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Commission on
State Mandates

VIA EMAIL & U.S. MAIL
csminfo@csm.ca.gov

Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: ***Claimant City of Glendora's Rebuttal to Department of Finance's July 22, 2016 Comments re Local Agency Employee Organizations: Impasse Procedures, Claim No. 15-TC-01***
Client-Matter: GL050/051

Dear Ms. Halsey,

The City of Glendora, claimant in the above-referenced matter, submits the following rebuttal to the Department of Finance's July 22, 2016 comments concerning the test claim. As explained below, the Department's comments reflect a fundamental misunderstanding of the changes that AB 646 made to the Meyers-Milias-Brown Act ("MMBA").

Background

The MMBA governs labor relations between local public agencies and employee organizations. (Gov. Code § 3500, et seq.) The MMBA defines the term "public agency" as encompassing every "town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not." (Gov. Code § 3501(c); *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630 & fn. 4.)

Prior to January 1, 2012, the MMBA ***did not*** require local public agencies to participate in factfinding procedures with a recognized employee organization. Although the MMBA specifically allowed local public agencies to adopt their own impasse procedures, it did not require the adoption of such procedures. (Gov. Code § 3507; *County of Contra Costa* (2014) PERB Order No. Ad-410-M, p.33.) It also did not dictate what provisions must be included in those procedures if the agency adopted impasse procedures. (Gov. Code § 3507; *City and County of San Francisco* (2006) PERB Dec. No. 1890-M, p. 8.)

Instead, the MMBA merely required that local public agencies "refrain from making unilateral changes in employees' wages and working conditions until the employer and employee

association have bargained to impasse." (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal. 4th 525, 537 [28 Cal. Rptr. 2d 617, 869 P.2d 1142]; superseded by statute on other grounds as recognized in *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077.) Once the parties reached a proper impasse, the local public agency was free to "implement its last, best, and final offer." (Gov. Code §§ 3505.4, 3507; *County of Sonoma* (2010) PERB Dec. No. 2100-M, p. 13; *City of Clovis* (2009) PERB Dec. No. 2074-M, p.5, fn.5.)

In October 2011, however, Governor Brown signed AB 646 into law. AB 646 changed the MMBA significantly by establishing new ***mandatory*** factfinding procedures, effective January 1, 2012. (Gov. Code §§ 3505.4, 3505.5, 3505.7.) Under these new procedures, a local public agency is no longer free to implement its last, best and final offer after the parties reach a proper impasse. Instead, it is now statutorily required to submit to factfinding whenever a recognized employee organization makes a timely request for factfinding following a proper declaration of impasse. (Gov. Code § 3505.4(a); 8 C.C.R. § 32802(a).)[1] As long as the recognized employee organization makes a request for factfinding within the 30-45 day time-period following the appointment of a mediator, or if mediation is not used, within 30 days of the written declaration of impasse by either party, a local public agency has no choice but to submit to factfinding. (Gov. Code § 3505.4.)

Since AB 646 went into effect, PERB has confirmed that "Factfinding ***imposes a new process*** on the parties in MMBA jurisdictions." (*County of Fresno* (2014) PERB Order No. Ad-414-M p. 15, emphasis added.)

Rebuttal to Department Comment 1

The Department contends that activities 2, 3, 5 and 6 are not reimbursable because they are not new requirements. Those specific activities were identified as follows:

Activity 2: Agency must select a person to serve as its member of the factfinding panel, and pay for the costs of the member.

Activity 3: If chairperson is not approved by other party, agency must select a different chairperson.

Activity 5: The agency shall review and respond to all requests and subpoenas made by the panel and furnish panel with all relevant documents as requested. (This includes both administrative time to review and approve materials as well as clerical time to process these requests. Travel time would also be reimbursable if required.)

[1] As set forth in Government Code section 3505.4, only the exclusive representative can request factfinding, and a local public agency has no right to demand factfinding.

Activity 6: The agency shall participate in all factfinding hearings.

The Department's claim that these activities are not reimbursable because they did not impose new requirements is wrong.

As demonstrated above, at no point prior to January 1, 2012 did the MMBA ever ***require*** local public agencies to engage in factfinding.[2] Prior to AB 646, if a public agency and a union reached an impasse in their negotiations, the MMBA allowed the parties to mutually agree to mediation, but did not require the parties to engage in factfinding or any other impasse procedure. (*San Diego Housing Commission v. Public Employment Relations Board* (2016) 246 Cal.App.4th, 1, 9 [200 Cal.Rptr.3d 629], citing *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25–26; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 614, fn. 4.)

Thus, contrary to what the Department claims (incorrectly), prior to AB 646, the MMBA did ***not*** require the City of Glendora to:

- Select a person to serve as its panel member on a factfinding panel;
- Engage in a selection process with any recognized employee organizations to select a chairperson for the factfinding panel;
- Review and produce documents in response to a factfinding panel's subpoena; or
- Submit to a factfinding hearing.

The City of Glendora was not required to engage in any of these activities because the MMBA did not require factfinding. (*County of Contra Costa* (2014) PERB Order No. 410-M, p.33.)

Accordingly, "but for" the imposition of factfinding by AB 646, local public agencies, including the City of Glendora, would not have incurred any costs associated with the now-mandated factfinding.

To the extent the Department is relying upon impasse procedures set forth in other labor relations statutes governing public sector collective bargaining in California, its reliance on those statutes is misplaced. As the Sixth District Court of Appeal recently explained, while "[s]everal California statutes applicable to different kinds of public employees contain mandatory

[2] The factfinding panel which presided over the factfinding hearing on the impasse between the City of Glendora and the Glendora Municipal Employees Association noted in the factfinding report the following: "Prior to 2012, the only impasse resolution under the Meyers-Milias-Brown Act (the State law governing cities, counties and special districts) was for voluntary mediation. However, in 2012 the State of California enacted AB 646 (now Government Code Sections 3505.4-3505.7) which establishes a fact finding process and lays out a set of 8 criteria to be used by the fact finding panel." (See "Factfinding Report & Recommendations, PERB Case.# LA-IM-179-M, August 24, 2015" at p. 2, attached hereto as Exhibit A.)

procedures for identifying and resolving a bargaining impasse, usually requiring mediation," the MMBA is not one of them. (*Santa Clara County Correctional Peace Officers' Association v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.) That same court, in a footnote, also noted the following:

> Former section 3505.4 was repealed and replaced amidst a number of amendments to the MMBA effective on January 1, 2012. Assembly Bill No. 646 (2011–2012 Reg. Sess.) repealed and replaced section 3505.4 and added sections 3505.5 and 3505.7. The nonexistence of mandatory impasse procedures in the MMBA is what prompted the author of Assembly Bill No. 646 to propose this new legislation. (Assem. Com. on Public Employees, Retirement and Social Security, Analysis of Assem. Bill No. 646 (2011–2012 Reg. Sess.) as amended Mar. 23, 2011, at <(http:// info.sen.ca.gov/pub/11– 12/bill/asm/ab_0601– 0650/ab_646_ cfa_20110503_104246_ asm_comm.html)> [as of June 26, 2012].) (*Santa Clara County Correctional, supra*, at 1034-1035, fn.5.)

Clearly, if the MMBA required factfinding prior to January 1, 2012, there would have been no need for the Legislature to repeal the prior section 3505.4, and replace it with a new section 3505.4, or add a new section 3505.5 or 3505.7.

Thus, because the MMBA did not require factfinding prior to January 1, 2012, the Department's comments against reimbursement lack merit, and the activities identified above are reimbursable.

Rebuttal to Department Comment 2

The Department contends that activities 1, 9, and 10 are discretionary and thus not reimbursable. Those specific activities were identified as follows:

Activity 1: The agency must notice impasse hearing if delay in factfinding request.

Activity 9: The agency must hold a public impasse hearing if it chooses to impose its last, best and final offer.

Activity 10: The agency shall meet and confer with union and submit/resubmit last, best offer.

The Department's claim that these activities are not reimbursable because the City of Glendora had the discretion to either perform or not perform these activities is incorrect.

As a result of the changes made by AB 646, the MMBA now states that a public agency "that is not required to proceed to interest arbitration may, ***after holding a public hearing***

regarding the impasse, implement its last, best, and final offer." (Gov. Code § 3505.7, emphasis added.) The Department's claim that the holding of a public hearing is optional is wrong.

As evidenced by the clear language of the statute itself, the public hearing does not concern the implementation of the local public agency's last, best and final offer, but concerns "***the impasse***" between the local public agency and the recognized employee organization in negotiations. (Gov. Code § 3505.7.) This public hearing regarding the impasse occurs only after the public agency has made the factfinding panel's "findings and recommendations publicly available" for at least 10 days. (Gov. Code §§ 3505.5(a), 3505.7.) Thus, the purpose of the public hearing regarding the impasse is for the public agency to receive and consider public comments regarding the impasse ***before*** it makes any decision regarding any subsequent implementation. (*County of Fresno* (2014) PERB Order No. Ad-414-M, p. 14, citing *Chaffee v. San Francisco Library Commission* (2004) 115 Cal.App.4th 461 [Brown Act is intended to facilitate public participation in all phases of local government decision-making].)

Since the public agency is required to hold this public hearing before it renders a decision on implementation, the notice and hearing requirements are not discretionary, but mandatory. The local public agency has no choice but to hold this public hearing so it can receive public comment ***before*** making any decision to implement its last, best and final offer. Prior to January 1, 2012, local public agencies were not required to hold a public hearing ***regarding the impasses*** reached with their employee organizations.

Thus, because the MMBA did not mandate public hearings regarding impasses in negotiations prior to January 1, 2012, the Department's comments against reimbursement lack merit, and the activities identified above are reimbursable.

Rebuttal to Department Comment 3

The Department contends that activities 4 and 8 are not reimbursable because they do not provide any new or increased programs or levels of service. Those specific activities were identified as follows.

Activity 4: PERB shall appoint a panel Chairperson and the agency shall pay for half of the panel chairperson's costs.

Activity 8: The agency shall pay for half of the costs of the factfinding.

The Department's contention that these activities do not provide any new programs or level of service is wrong.

Under the California Constitution, "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of such program or increased level of service." (Cal. Const. Art. XIII.B, § 6.) The Constitution, therefore, imposes

on the State an obligation to reimburse local agencies for the cost of most programs and services they are required to provide pursuant to State mandate provided that those local agencies were not under a preexisting duty to fund the activity. (*Kinlaw v. State of California* (1991) 54 Cal.3d 326, 328.)

A "program" is defined as that which carries out the "governmental function of providing services to the public, ***or*** laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189 [citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56], emphasis added.) A program is "new" if the local government had not previously been required to institute it. (*Ibid.*)

While AB 646 did not increase the level of services provided to the public, it did establish a new law which imposed unique requirements on local public agencies that do not apply generally to all residents or entities in California. (*Id.*) For instance, the MMBA mandates that the cost of the panel chairperson be equally divided between the local public agency and the recognized employee organization, regardless of whether PERB or the parties select the chairperson. (Gov. Code § 3505.5(b) and (c); *County of Contra Costa* (2014) PERB Order No. Ad-410-M, p.29.) In contrast, under both the Educational Employment Relations Act ("EERA") and the Higher Education Employment Relations Act ("HEERA'), the Board pays the cost of the chairperson selected. (*Id.*; Gov. Code §§ 3548.3(b); 3593(b).) The MMBA now also requires that the local public agency share in any mutually-incurred costs associated with the factfinding, as well as any individually-incurred costs associated with its panel member. (Gov. Code § 3505.5(d).) Prior to AB 646 going into effect, local public agencies, and in particular the City of Glendora, did not incur such costs.

Likewise, although the National Labor Relations Act ("NLRA") (which governs labor relations over certain private sector employers) requires private sector employers and their recognized employee organizations to bargain in good faith, it does not mandate that the parties participate in factfinding. (29 U.S.C. § 151, et seq.) Instead, if the parties are unable to reach an agreement despite good faith bargaining, the private sector employer may declare impasse and impose its last offer to the union. (*NLRB v. Unbelievable, Inc.,*. (9th Cir. 1995) 71 F.3d 1434, 1440; *Southwest Forest Indus., Inc. v. NLRB* (9th Cir. 1988) 841 F.2d 270, 27.)

That was the same process applicable to local public agencies, including the City of Glendora, under the MMBA prior to January 2012. But once the changes mandated by AB 646 went into effect, local public agencies had no choice but to submit to mandatory factfinding once impasse was declared and the recognized employee organization timely requested factfinding. (Gov. Code § 3505.4(a).) A local public agency is also now prohibited from imposing its last, best, and final offer until it first publishes the factfinding report for a minimum of 10 days, and then holds a public hearing regarding the impasse; procedures not previously required by the MMBA. (Gov. Code § 3505.7.)

Had the City of Glendora not been forced to comply with the factfinding mandates established by AB 646, it would not have been required to share the costs of the panel chairperson or any other mutually-incurred costs associated with the factfinding. It also could have avoided its individually-incurred costs since there would have been no need to participate in factfinding, no need to publish the factfinding panel's report, and no need to hold a public hearing regarding the impasse. But because AB 646, codified at Government Code sections 3505.4, 3505.5, and 3505.7, mandated that the City of Glendora submit to factfinding, the City had no choice but to incur such costs once the Glendora Municipal Employees Association made a timely request for factfinding.

Thus, the Department's comments against reimbursement lack merit, and the activities identified above are reimbursable.

Conclusion

As noted above, the Department's reasons for denying the City of Glendora's reimbursable activities lack merit and are based on a fundamental misunderstanding of how the MMBA dealt with impasses prior to January 1, 2012. The City of Glendora has demonstrated why these activities are reimbursable, and respectfully requests that the Commission on State Mandates approves its request.

If you have any questions regarding the above, please feel free to contact me or my colleague Melanie Chaney at (310) 981-2000. We can also be reached by email at aguzman@lcwlegal.com and mchaney@lcwlegal.com.

Very truly yours,

LIEBERT CASSIDY WHITMORE

Adrianna E. Guzman

AEG:lb

Enclosures:
Exhibit A – Factfinding Report
Exhibit B – Compendium of Cited Authority

DECLARATION

I, Adrianna Guzman, am an attorney with the law firm of Liebert Cassidy Whitmore, Claimant City of Glendora's designated representative in this matter. I declare under penalty of perjury that the statements made in this Rebuttal are true and complete to the best of my knowledge, information and belief and that this declaration was executed on September 15, 2016 at 6033 W. Century Blvd., Suite 500, Los Angeles, California.

Adrianna E. Guzman

CITY OF GLENDORA'S SUPPORTING DOCUMENTS

Exhibit A

City of Glendora and Glendora Municipal Employees Association
Fact-finding Report & Recommendations, PERB Case # LA-IM-179-M
August 24, 2015

This Fact-Finding involves an impasse over the terms of a successor agreement between the City of Glendora and the Glendora Municipal Employees Association. The Panel Members were Ralph Royds for the Association, and Bruce Barsook for the City. Tony Butka was jointly selected as the neutral Chair by a PERB Appointment letter dated June 25, 2015.

A hearing was held at the Glendora City Hall on Thursday, July 23, 2015, where all parties were represented by counsel and afforded an opportunity to introduce evidence, testimony, and argument as to their respective positions. A number of stipulations were agreed to by the parties at hearing.

Background Information

Glendora is located in the San Gabriel mountain foothills, and was historically known for Sunkist Growers as well as a number of private military academies. The City currently has in excess of 50,000 residents, and is renown for it's excellent educational system

Glendora has 8 departments, including a Police Department and Water Department, with approximately 250 employees. The City was hard-struck by first the economic meltdown of 2007/08, and then the elimination of all Community Redevelopment Agencies by the State of California in 2012. As with most California municipalities, it has been a long and difficult road back to economic stability.

The Current Dispute & Issues

The Glendora Municipal Employee's Association represents approximately 100 of the some 250 City employees, and is the largest of the City's four bargaining units.

The last agreement between the parties ran from July 1, 2013 through January 31, 2015. Negotiations for a successor agreement started in October of 2014 through May 2015. The City issued a Last, Best & Final offer on May 18, 2015. The Association membership rejected the offer, and the Association requested Factfinding from PERB by letter of May 29,2015.

At hearing, there was consensus that six (6) issues are in dispute for a successor agreement:

(1) Term
(2) Base Salary Increase
(3) Flexible Benefit Plan
(4) Retiree Medical Insurance Contributions
(5) "Timely" Evaluations
(6) Movement between Level 1 and Level 2 Classifications

Statutory Criteria

Prior to 2012, the only impasse resolution under the Meyers-Milias-Brown Act (the State law governing cities, counties, and special districts) was for voluntary mediation. However, in 2012 the State of California enacted **AB 646** (now Government Code Sections 3505.4 – 3505.7) which establishes a fact finding process and lays out a set of 8 criteria to be used by the fact finding panel. Those criteria are listed in Section 3505.4(d) and provde as follows:

"(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following Criteria:
(1) State and federal laws that are applicable to the employer.
(2) Local rules, regulations, or ordinances.
(3) Stipulations of the parties.
(4) The interests and welfare of the public and the financial ability of the public agency.
(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
(6) The consumer price index for goods and services, commonly known as the cost of living.
(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations."

Final Positions of the Parties -

Term - While there was agreement that both parties would like a three year term, it seems that the differences between the two sides on other issues, particularly salary,

are so great that unless substantial movement is made by one or both parties on these other issues, a multiyear agreement is unlikely. Given those circumstances, the parties may need to consider other alternatives to the three year term they both agree to.

Base Salary Increase - Money is generally the biggest sticking point, and this factfinding is no exception. Here it seems that we have a tale of two cities, which illustrates how far apart the parties really are in obtaining a multiyear agreement.

The Association's position is that these employees have gone without a raise for some six years, including staffing reductions & furloughs. Therefore, the argument goes, in better economic times they should be rewarded for their stick-to-it spirit and deserve a substantial pay increase. To help the Panel in their deliberations, the Association provided us with a set of nine (9) Proposed Findings, eight of which pertain to salary increases (No's 1-8).

The City's position is that although the economic environment has improved since the Great Recession, the City is not yet out of the woods; the City needs to continue to be financially prudent and live within its means. The City asserts that it needs to strive to maintain fiscal discipline through compliance with City Council policies, such as a balanced budget, mandatory reserves, GASBY requirement policies, and not paying for ongoing expenses out of 'one-time' money. The City also asserts that it also needs to anticipate increased retirement costs, and that undefined costs associated with mandates pose future financial challenges. Under these circuimstances, the City argues that, their Last, Best and Final offer is the best that can be done, particularly where, as here, the offer is the same one accepted by the City's other three bargaining units.

The relative positions of the parties on salaries highlights these stark differences; the City proposes 5.25% over three years, with 2% effective February 1st for 2015 while the Association proposes 5% per year for each of the three years.

These are not differences that lend themselves to mutually acceptable solutions, as we say in the trade.

Flexible Benefit Plan - The Association proposed a change of increasing the Flexible Benefit Plan to increase the monthly medical premium reimbursements by $50/month.

Although the City initially proposed increases over the life of the agreement which would not have been subject to a 'cash out' provision, it later changed its position, and instead put all of the proposed compensation costs into its salary offer. The City's position is now to retain current contract amounts.

Retiree Medical Insurance Contributions:- The City proposed a $50/month increase in retiree medical insurance contributions for 2015. While the Association rejected the proposal, there was no counterproposal.

Lack of Timely Evaluations - The Association proposed that any employee not receiving a timely performance evaluation would automatically become "Meets Standards". This is evidently linked to merit raises under the Agreement. The City rejected the Association proposal, simply saying that issues relating to timelieness should be reporter to HR for follow-up.

Level I to Level II Positions - Basically the Association is proposing that for positions in a class series, such as Librarian I and Librarian II, that the City designate the Level I position as an entry level position, and the Level II position as the journey level position, with automatic advancement after two years. The City rejected the proposal, claiming that it wants to retain discretion to determine service levels and classification requirements.

Analysis

Clearly, salaries are the "800 pound Gorilla" preventing an agreement between the parties. And underneath that disagreement are some fairly fundamental differences in analyzing the City's budgets. The Association argues that the issue isn't "ability to pay" but rather priorities. The Association implicitly asserts that adherence to the City's various financial principles, eg. (1) a balanced budget (2) setting a goal of a 1-2% budget surplus each year, (3) setting a goal of general fund reserve levels of 45% mandatory Reserve requirement , and (4) Five (5) year budget forecasting, makes it impossible for them to get significant salary increases.

While one can sympathize with employees' desire for a significant raise after many years of belt tightening, here's the problem; there is absolutely nothing in the Meyers-Milias-Brown Act which restricts the ability of elected officials to establish policies regarding financial prudence (balanced budgets, prudent reserves, etc.). Those decisions are political decisions expressly reserved to the elected officials of the City by state law and recognized by AB 646 as factors to consider by the fact finding panel in determining what recommendations to make. Section 3505.4(d)(2) and (4) provide that the panel shall consider "local rules" as well as the "interests and welfare of the public and the financial ability of the public agency." While it is understandable that the Association is unpersuaded by the City's position, their Last, Best & Final offer is consistent with the City's adopted financial policies.

However, there are two other considerations which should be included by any factfinding panel in a factfinding report and recommendations:

5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees

performing similar services in comparable public agencies, and

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

While the public agency is not obligated to base its pay proposals on these criteria, these criteria should be included in any factfinding report and recommendations, and it is arguably crucial marketplace information that any agency should be aware of.

This record is virtually devoid of objective information regarding either of these two criteria. And there is reason for their inclusion in the Act -- they are fundamental in the establishment and maintenance of a rational classification/compensation system.

In this particular case, they could provide valuable information as to how other agencies handle merit system increases, whether or not other agencies in fact have merit increases or simple step & column systems, and give a clue as to how significant or insignificant an issue the proposal about timely evaluations really is.

Further, in the benchmarking process it becomes clear as to what if any classifications are subject to "pairing", or automatic movement between levels.

Finally, in examining the total compensation practices of similar agencies, it will become quickly apparent as to how other cities handle retiree health & welfare, benefits including best practices on buybacks and related provisions, as well as overall benefit costs.

The Associations claims that Department Heads and the City Manager made out much better than bargaining unit employees in compensation during the last several years. In contrast, the City argued that the Association was offered and rejected multi-year deals similar to those given to other groups. However, we do not need to determine the accuracy of either party's claims because how the City treats other units/groups vs. bargaining unit employees is, as stated previously, a political decision of the elected Council. There is no direct comparison requirement in labor law that mandates everyone being treated equally.

While one can certainly sympathize with the perception of disparate treatment, and recognize the emotional effect that it has on employees, these feelings do not provide a path under the MMBA criteria to make a recommendation that the troops get the same deal as other bargaining units/groups.

RECOMMENDATIONS

Based on the probability that a multiyear agreement is not likely, and in the spirit that a factfinding process is after all designed to bring the parties closer together towards an agreement, the following is recommended:

1) Term - Approximately 18 months. The parties should consider adopting a contract term that more closely follows the budget cycle of July 1 – June 30th. While finances remain as tight as they are, this will allow the Association to receive the benefit of projected revenue increases sooner rather than later, and align Association negotiations with those of the units/groups it perceives to be treated more generously than it has been treated. It will also allow the City to plan for expenditures at the same time it creates a budget and negotiates with other units/groups.

2) Wages - 2.25% for 2015, which is similar to the increase given to the other bargaining units in the City (and who agreed to multi-year agreements to get this salary increase).

3) Flexible Benefit Plan - No change, the same as for other bargaining units in the City;

4) Retiree Medical Insurance Contribution - No Change

5) Timely Evaluation, should be monitored during the remainder of the MOU with the Association encouraged to bring any problems to HR as soon as they occur. If problems remain unresolved by the end of the MOU, this matter can be addressed as a part of successor negotiations

6) Level I and Level II - No change, as there is insufficient data as to current practices.

Submitted,

Tony Butka, Chair

Ralph Royds, Association Member

Bruce Barsook, City Member

Exhibit B

Compendium of Authorities In Support of City of Glendora's Rebuttal

Federal Cases: **TAB**

State Cases:

PERB Cases:

Federal Statute:

State Authorities:

Exhibit 1

***NLRB v. Unbelievable, Inc.,*. (9th Cir. 1995)**
71 F.3d 1434, 1440

one else who is present intends to sell drugs, is insufficient to establish membership in a conspiracy. *See United States v. Rork*, 981 F.2d 314, 316 (8th Cir.1992).

[6, 7] Viewed in the light most favorable to the verdict, the evidence shows that a conspiracy to distribute marijuana clearly existed; this Shoffner does not dispute. The evidence also shows that Shoffner knowingly became part of the conspiracy. "Once the existence of a conspiracy is established, even slight evidence connecting a defendant to the conspiracy may be sufficient to prove the defendant's involvement." *Agofsky*, 20 F.3d at 870 (internal quotations and citations omitted). Shoffner travelled from Kentucky to Missouri to help transport 250 of the 500 pounds of marijuana that Clark arranged to purchase (Clark needed a second vehicle to transport such a large amount of marijuana). Shoffner was present at the hotel meeting where the plan to transport the marijuana to Kentucky was discussed, Shoffner approved the quality of the sample marijuana offered to him, and Shoffner knowingly drove one of the vehicles in the caravan toward the marijuana warehouse in Illinois around 1:00 a.m. on March 11, 1993, to assist in transporting the 500 pounds of marijuana. Additionally, Shoffner's intent, motive, knowledge, and absence of mistake are established by his prior dealing in large quantities of marijuana. We cannot conclude that no reasonable jury could have found Shoffner guilty beyond a reasonable doubt of the crime of conspiracy to distribute marijuana. Accordingly, the district court did not err in denying Shoffner's motions for judgment of acquittal.

III. CONCLUSION.

The district court did not err by admitting the Rule 404(b) evidence of the appellant's prior conviction, and the district court did not err by denying Shoffner's motions for judgment of acquittal. Accordingly, we affirm the judgment of the district court.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

Beverage Dispensers' Union, Local 165, Hotel Employees & Restaurant Employees International Union, AFL–CIO, Petitioner–Intervenor,

v.

UNBELIEVABLE, INC., d/b/a Frontier Hotel & Casino, Respondent.

No. 93–70236.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted January 9, 1995.

Memorandum Filed Sept. 6, 1995.

Order and Opinion Filed Dec. 1, 1995.

Union filed unfair labor practice charges with National Labor Relations Board (NLRB) which filed complaint against employer. After administrative law judge (ALJ) found that employer engaged in unfair labor practices and issued cease and desist order, NLRB affirmed ALJ's decision. NLRB petitioned for enforcement of its order and union intervened with both parties seeking sanctions on appeal. The Court of Appeals, Tashima, District Judge, sitting by designation, held that: (1) employer engaged in unfair labor practices by eavesdropping on private conversations between employees and union representative; (2) employer's ejection of union representatives constituted unfair labor practice; (3) employer illegally issued new set of disciplinary rules and regulations without notifying union or providing it with opportunities to bargain over them; (4) employer terminated pension fund contributions without giving union prior notice or opportunity to bargain; (5) union did not waive its right to bargain over pension contributions; and (6) NLRB and union were entitled to attorney fees and double costs for frivolous appeal.

Ordered enforced with sanctions.

1. Administrative Law and Procedure ⚖791, 796

Labor Relations ⚖677.1, 680

Court of Appeals will uphold decisions of National Labor Relations Board (NLRB) if its findings of fact are supported by substantial evidence and if it correctly applied law.

2. Administrative Law and Procedure ⚖791

Labor Relations ⚖680

Substantial evidence test for reviewing decisions by National Labor Relations Board (NLRB) is essentially case-by-case analysis requiring review of whole record.

3. Statutes ⚖219(8)

Court of Appeals will defer to interpretation of National Labor Relations Board (NLRB) of NLRA if it is reasonably defensible. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

4. Labor Relations ⚖556

Substantial evidence supported decision by National Labor Relations Board (NLRB) that employer engaged in unfair labor practices by eavesdropping on private conversations between employees and union representative; employer's security chief eavesdropped on conversation between union representative and employee in employee breakroom, area union representatives were authorized to visit under collective bargaining agreement, and shortly thereafter expelled representative from employer's premises on basis of what he heard. National Labor Relations Act, § 8(a)(1), as amended, 29 U.S.C.A. § 158(a)(1).

5. Labor Relations ⚖557

Substantial evidence supported National Labor Relations Board (NLRB) finding that employer's ejection of union representative from employer's premises constituted unfair labor practice as it violated employees' contractually granted access to their bargaining representative; union representatives were operating within terms of collective bargaining agreement when they visited employer's premises and their expulsion constituted unilateral change of agreement. National Labor Relations Act, § 8(a)(1, 5), as amended, 29 U.S.C.A. § 158(a)(1, 5).

6. Labor Relations ⚖261

Contractual provision for union access is term and condition of employment that survives expiration of collective bargaining contract. National Labor Relations Act, § 8(a)(1, 5), as amended, 29 U.S.C.A. § 158(a)(1, 5).

7. Labor Relations ⚖178

Providing union representatives access to employer's premises constitutes mandatory subject of bargaining which requires notice to union and opportunity to bargain prior to any change. National Labor Relations Act, § 8(a)(1, 5), as amended, 29 U.S.C.A. § 158(a)(1, 5).

8. Labor Relations ⚖367

Employer's ejection of union representatives from employer's premises interfered with union-related communications in violation of NLRA. National Labor Relations Act, § 8(a)(1), as amended, 29 U.S.C.A. § 158(a)(1).

9. Labor Relations ⚖393

Findings by National Labor Relations Board (NLRB) that employer unilaterally promulgated new disciplinary rules were supported by substantial evidence; employer issued new set of 63 rules and regulations to employees without notifying union or providing it with opportunity to bargain over them and employer's argument that five new rules did not involve material changes were frivolous. National Labor Relations Act, § 8(a)(1, 5), as amended, 29 U.S.C.A. § 158(a)(1, 5).

10. Labor Relations ⚖264

Unilateral change in work rules constitutes breach of bargaining obligation, even after collective bargaining agreement has expired. National Labor Relations Act, § 8(a)(1, 5), as amended, 29 U.S.C.A. § 158(a)(1, 5).

11. Labor Relations ⚖393

Findings by National Labor Relations Board (NLRB) that employer illegally terminated pension fund contributions without giving union prior notice or opportunity to bargain was supported by substantial evidence; pension fund contribution issue was never

discussed during bargaining or during negotiations leading up to impasse on other issues, employee never indicated that it proposed changes in pension and employer was not free to unilaterally end payment of pension benefits. Labor Management Relations Act, 1947, § 302(c)(5), 29 U.S.C.A. § 186(c)(5).

12. Labor Relations ⇐393

Employer has duty to refrain from unilaterally changing terms of employment without first bargaining.

13. Labor Relations ⇐393

After impasse, employer may unilaterally impose changes in terms and conditions of employment, only if those changes were reasonably comprehended in employer's previous proposals to union.

14. Labor Relations ⇐393

Finding by National Labor Relations Board (NLRB) that employer did not establish clear and unmistakable waiver of right to bargain by union inaction regarding pension fund contribution issue was supported by substantial evidence; union indicated that it would discuss issue of pension but employer's representatives never responded.

15. Labor Relations ⇐671

Court of Appeals gives substantial deference to National Labor Relations Board (NLRB) when it defines scope of duty to bargain by defining part of process that collective bargaining must follow.

16. Labor Relations ⇐176

To establish waiver of right to bargain by union inaction, employer must first show that union had clear notice of employer's intent to institute change sufficiently in advance of actual implementation so as to allow reasonable opportunity to bargain about change and employer must show that union failed to make timely bargaining requests before change was implemented.

17. Labor Relations ⇐176

Waiver of right to bargain by union in action must be clear and unmistakable.

18. Federal Civil Procedure ⇐2840

Appeal of unfair labor practices action was frivolous, and, thus, National Labor Relations Board (NLRB) and union were entitled to attorney fees and double costs to be imposed against employer and its former legal counsel with both parties being jointly and severally liable. 28 U.S.C.A. § 1912; F.R.A.P.Rule 38, 28 U.S.C.A.

19. Federal Civil Procedure ⇐2839

Appeal is frivolous for purposes of determining attorney fees and double costs when results are obvious or arguments are wholly without merit. 28 U.S.C.A. § 1912; F.R.A.P.Rule 38, 28 U.S.C.A.

20. Federal Civil Procedure ⇐2840

Union-intervenor may recover attorney fees and double costs under rule allowing attorney fees and double costs for prevailing party where appeal is frivolous. 28 U.S.C.A. § 1912; F.R.A.P.Rule 38, 28 U.S.C.A.

21. Federal Civil Procedure ⇐2846

Employer's counsel, who was substituted as counsel after employee's reply brief was filed in appeal of unfair labor practices charge, was not liable for sanctions of attorney fees and double costs imposed on employer and his former counsel; although new counsel petitioned for leave to file supplemental brief, counsel attempted to improve original briefs and withdrew one of employer's frivolous arguments. 28 U.S.C.A. § 1912; F.R.A.P.Rule 38, 28 U.S.C.A.

Frederick C. Havard, National Labor Relations Board, Washington, DC, for the petitioner.

Barry S. Jellison, Michael T. Anderson, Davis, Cowell & Bowe, San Francisco, California, for intervenor Beverage Dispensers' Union, Local 165, Hotel & Restaurant Employees International Union, AFL-CIO.

James J. Meyers, Jr., Meyers, Merrill, Schultz & Wolds, San Francisco, California; Michael A. Taylor, Ogletree, Deakins, Nash, Smoak & Stewart, Washington, DC, for respondent Unbelievable, Inc.

Petition for Enforcement of an Order of the National Labor Relations Board.

Before: GOODWIN and SCHROEDER, Circuit Judges, and TASHIMA, District Judge.*

ORDER

The Memorandum disposition filed September 6, 1995, is amended as follows:

[Editor's Note: Amendments incorporated for purposes of publication].

The request for publication is granted and the Memorandum disposition, filed September 6, 1995, as amended, is redesignated as an authored Opinion by Judge Tashima.

OPINION

TASHIMA, District Judge:

The National Labor Relations Board ("Board") petitions for enforcement of its order finding that respondent Unbelievable, Inc. d/b/a Frontier Hotel & Casino ("Frontier") violated § 8(a)(1) and (a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1) and (5), by conducting surveillance on and ejecting Union representatives, unilaterally imposing new rules on employee conduct and unilaterally ceasing to pay pension fund contributions. We have jurisdiction under 29 U.S.C. § 160(e) and we grant the petition to enforce.

FACTUAL AND PROCEDURAL BACKGROUND

Frontier owns a hotel in Las Vegas, where the disputed events occurred. The hotel's previous owner entered into a collective bargaining agreement ("CBA") with the Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO (the "Union"). Frontier acquired the hotel in July, 1988, adopted the CBA, and honored it through its expiration in June, 1989, and thereafter. On February 26, 1990, bargaining between Frontier and the Union to reach a new CBA reached an impasse, when Frontier implemented its "Last, Best and Final Proposal" (the "Final Offer") to the Union.

After the CBA expired, Frontier engaged in certain activities which were alleged to have violated the NLRA, including eavesdropping and conducting private surveillance on employees, ejecting Union representatives, unilaterally issuing new rules and ceasing to pay pension fund contributions.

The Union filed charges with the Board on November 16, 1989, July 17, 1990, October 4, 1990, and October 23, 1990. The Regional Director of the Board subsequently filed complaints against Frontier, which were tried before an Administrative Law Judge (the "ALJ"). The ALJ found that Frontier had engaged in the alleged unfair labor practices and issued an order for Frontier to cease and desist from such activities. Frontier filed exceptions to that decision. A three-member panel of the Board affirmed the ALJ's decision in a Decision and Order issued on December 7, 1992. 309 NLRB No. 120. Pursuant to 29 U.S.C. § 160(e), the Board petitioned this court for enforcement of its order. The Union intervened on appeal on behalf of the Board. Both the Board and the Union also seek sanctions on appeal.

Frontier, represented by its counsel Joel I. Keiler ("Keiler"), filed both an opening and reply brief, challenging all of the Board's rulings. In addition, Frontier argued that the ALJ should have recused himself for bias against both Frontier and this court. Subsequently, Frontier obtained new counsel, Ogletree, Deakins, Nash, Smoak & Stewart, and Meyers, Merrill, Schultz & Wolds, who moved for leave to file a supplemental brief, and to strike references to the motion to disqualify the ALJ. A motions panel denied the request to file a supplemental brief, and referred the motion to strike to this panel for resolution.

For the reasons given below, we affirm the Board's order in all respects, deny Frontier's

* Hon. A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

motion to strike, and impose sanctions against Frontier and its former counsel, Keiler.

DISCUSSION

Standard of Review

[1–3] We will uphold decisions of the Board if its findings of fact are supported by substantial evidence and if it correctly applied the law. *NLRB v. General Truck Drivers, Local No. 315*, 20 F.3d 1017 (9th Cir.), *cert. denied*, — U.S. —, 115 S.Ct. 355, 130 L.Ed.2d 310 (1994); *NLRB v. O'Neill*, 965 F.2d 1522, 1526 (9th Cir.1992), *cert. denied*, — U.S. —, 113 S.Ct. 2995, 125 L.Ed.2d 689 (1993). " 'The substantial evidence test is essentially a case-by-case analysis requiring review of the whole record.' " *General Truck Drivers*, 20 F.3d at 1021 (quoting *Turcios v. INS*, 821 F.2d 1396, 1398 (9th Cir.1987)). We will defer to the Board's interpretation of the NLRA if it is reasonably defensible. *General Truck Drivers*, 20 F.3d at 1017.

Surveillance and Ejection of Union Representatives

The first issue raised is whether Frontier's ejection of Union representatives was lawful.

[4] The Board accepted the ALJ's finding that Frontier engaged in unfair labor practices by eavesdropping on private conversations between employees and Union representative Roxanna Tynan ("Tynan") in violation of § 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). Our review of the record finds substantial factual support for these findings. On October 20, 1989, Frontier security chief Michael Kluge ("Kluge") eavesdropped on a conversation between Tynan and an employee in the employee break room, an area Union representatives were authorized to visit under the CBA. Kluge shortly thereafter expelled Tynan from the hotel premises on the basis of what he heard of the conversation.

We do not accept Frontier's paradoxically self-incriminating argument that the issue of surveillance is barred by the NLRA's six-month statute of limitations, § 10(b), 29 U.S.C. § 160(b), because it had engaged in surveillance of Tynan as early as February, 1989, more than six months prior to the filing of the charge of unlawful surveillance on November 16, 1989. Although the surveillance began more than six months before the charge was filed, the record is clear that the surveillance continued up to October 20, 1989, less than a month before filing of the charge. Frontier's statute of limitations argument is frivolous.

[5] The Board also upheld the ALJ's finding that Frontier's ejection of Union representatives constituted an unfair labor practice by violating the employees' contractually granted access to their bargaining representatives, in violation of § 8(a)(1) and (a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) and (a)(1). We agree.

[6, 7] Article 4 of the expired CBA provided access to Union representative "to see that this Agreement is being enforced." A contractual provision for Union access, such as Article 4, is a term and condition of employment that survives the expiration of the contract. *See, Facet Enters., Inc. v. NLRB*, 907 F.2d 963, 983 (10th Cir.1990); *NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 403–404 (5th Cir.1984). Providing Union representatives access to the employer's premises constitutes a mandatory subject of bargaining which requires notice to the Union and an opportunity to bargain prior to any change. *Facet Enters.*, 907 F.2d at 983. The findings that the Union representatives were operating within the terms of the CBA when they visited the hotel are supported by substantial evidence. Thus, their expulsion constituted a unilateral change of the CBA.

Extensive testimony supports the ALJ's finding that Frontier expelled Union representatives on either the flimsiest of grounds or no grounds at all. Among the evidence on which the ALJ relied was the ejection of Union representative Tynan, discussed above, after Frontier unlawfully eavesdropped on her conversation with an employee. On November 22, 1989, Frontier's personnel director ejected Union representative Michelle Viela, on the sole ground that Frontier was "just taking a hard stand." On

October 22, 1990, Union representative Hattie Canty ("Canty") was ejected for "harassing" two non-union employees. Frontier based its decision to expel Canty on reports from the employees that she had asked them if they were happy with certain benefits. We agree with the ALJ that these reports were unremarkable, and not a proper basis for ejection of Union representatives.

[8] In addition to the contractual violation, the ALJ found that the ejection of representatives interfered with union-related communications in violation of § 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). *See Harvey's Wagon Wheel, Inc.*, 236 N.L.R.B. 1670, 1978 WL 7669 (1978). This constitutes an additional, independent rationale for the Board's findings and renders all of Frontier's arguments futile. We conclude that in regard to surveillance and ejection of Union representatives, the Board's decision was supported by substantial evidence, and that it correctly applied the law.

Promulgation of New Rules

[9, 10] On July 1, 1990, the Hotel issued a new set of 63 rules and regulations to employees without notifying the Union or providing it with an opportunity to bargain over them. The Board agreed with the ALJ that Frontier unilaterally promulgated new disciplinary rules in violation of § 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1). A unilateral change in work rules constitutes a breach of the bargaining obligation, even after the CBA has expired. *See, Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 408 (9th Cir.1978); *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 14 (9th Cir.1969).

In its briefs, Frontier took issue with the ALJ's findings, arguing in particular that five of the new rules did not involve "a material, a substantial, and a significant" change. *Peerless Food Products*, 236 N.L.R.B. 161, 1978 WL 7691 (1978). At oral argument, Frontier's new counsel conceded significant differences in three of the new rules, and argued only that new rules 40 and 42 did not represent substantial changes. We find no merit in Frontier's argument as to these two rules.

New rule 40 requires employees suspected of being under the influence of drugs or alcohol to undergo a medical examination or be terminated immediately. The old rules said nothing about a medical examination. They merely prohibited employees from reporting to work under the influence of liquor, narcotics or drugs. We find it incredible that Frontier would argue that the added requirement that employees subject themselves to medical examination on threat of termination is only an insubstantial change in the rules. The argument is frivolous.

In its opening brief, Frontier argues that new Rule 42 is merely a restatement of contract article 6.01(b). Frontier's argument is inaccurate and appears purposely designed to mislead the court. New Rule 42 prohibits the unauthorized posting, distributing or circulating or any written materials in the working area. Contract article 6.01(b) pertains to drug and alcohol abuse. The two provisions have nothing to do with one another.

Frontier's arguments are meritless. The Board's finding that Frontier unilaterally promulgated new disciplinary rules in violation of § 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1), is supported by substantial evidence and is affirmed.

Pension Contributions

Under Article 27 of the expired CBA, Frontier was required to make contributions to an employee pension fund. During negotiations over a new agreement, Article 27 was never an issue. Frontier's Final Offer presented on February 5, 1990, by its then attorney Kevin Efroymson ("Efroymson"), explicitly provided that there shall be "no change" from Article 27. A subsequent implementation letter sent by Efroymson following impasse contained no references to changes in Article 27.

On May 10, 1990, Keiler sent a letter to the Union notifying it that the pension plan was being discontinued as of June 2. On May 24, 1990, the Union responded in a letter explaining that it had not been advised that Keiler represented Frontier, and that the Union would respond to his letter if it received such notification. Keiler did not respond to that letter. Frontier terminated

pension contributions in June. The Board and the ALJ found that Frontier violated § 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1), by unilaterally discontinuing its contributions to the pension fund.

[11, 12] Frontier argues incorrectly that it had to stop payments to the pension trust once the CBA expired and negotiations stopped upon impasse, pursuant to § 302 of the Labor–Management Relations Act, 29 U.S.C. § 186(c)(5), which requires a written agreement with the employer, before the employer can make any contribution to an employee trust fund. An employer has a duty to refrain from unilaterally changing the terms of employment without first bargaining. *Carter v. CMTA–Molders & Allied Health & Welfare Trust*, 736 F.2d 1310, 1313 (9th Cir.1984). Frontier's continuing contributions to the pension fund after the CBA expired were not only legal, they were required.

Moglia v. Geoghegan, 403 F.2d 110 (2d Cir.1968), *cert. denied*, 394 U.S. 919, 89 S.Ct. 1193, 22 L.Ed.2d 453 (1969), upon which Frontier relies, does not compel us to hold otherwise. In *Moglia*, the court held that contributions to the pension trust were illegal because no CBA had ever been signed. *Id.* at 116. However, this circuit has consistently refused to apply *Moglia* in cases such as the instant one, where a CBA was signed but has expired.[1] *See, e.g., Carter*, 736 F.2d at 1313; *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 n. 2 (9th Cir.1981). In the case at bench, a prior CBA had been honored by Frontier and, though the CBA expired, the parties never engaged in bargaining regarding pension benefits.

[13] We agree with the Board's finding that Frontier terminated pension fund contributions without giving the Union prior notice or an opportunity to bargain. Frontier argues that it did not have to give notice to the Union, however, because impasse had been reached. After an impasse, an employer may unilaterally impose changes in terms and conditions of employment, only if those changes were reasonably comprehended in the employer's previous proposals to the union. *Southwest Forest Indus., Inc. v. NLRB*, 841 F.2d 270, 273 (9th Cir.1988); *Peerless Roofing*, 641 F.2d at 735. However, no impasse was reached over Article 27, because it was never raised as an issue during bargaining. During the negotiations leading up to the February 1990 impasse, Frontier never indicated that it proposed changes in the Pensions Article.

Frontier presented no evidence whatsoever that changes in the Pension Plan were reasonably comprehended in its proposals before impasse. To the contrary, substantial evidence supports the finding that changes to the Pension Plan were not reasonably comprehended in Frontier's previous proposals—indeed, were not comprehended at all. Frontier's Final Offer explicitly provided that there shall be no change from Article 27 of the CBA. The subsequent implementation letter sent by Efroymson after impasse contained no reference to changes in Article 27. Efroymson himself testified that if an article was not being changed, it was not included in the implementation letter. Thus, Frontier's decision to end pension fund contributions could not have been contemplated from its previous proposals, and Frontier was not free unilaterally to end the payment of pension benefits. *Id.*

[14, 15] As a last resort, Frontier argues that the Union waived its right to bargain over the proposed change through inaction. We give "substantial deference" to the Board when it "defines the scope of the duty to bargain by defining part of the process that collective bargaining must follow." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir.1983), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984).

[16, 17] To establish waiver of the right to bargain by union inaction, the employer must first show that the union had "clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable

1. At least one decision of this court has distinguished *Moglia* as a private dispute that did not involve collective bargaining issues or national labor policy. *Peerless Roofing Co., Ltd. v. NLRB*, 641 F.2d 734, 736 n. 2 (9th Cir.1981).

opportunity to bargain about the change." *American Distrib. Co. v. NLRB,* 715 F.2d 446, 450 (9th Cir.1983) (citations omitted), *cert. denied,* 466 U.S. 958, 104 S.Ct. 2170, 80 L.Ed.2d 553 (1984). In addition, the employer must show that "the union failed to make a timely bargaining request before the change was implemented." *Id.* (citations omitted). The waiver of a protected right must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983). Here, Frontier bore the burden of proving that the Union clearly and unmistakably waived its right to bargain over the proposed pension plan change. Frontier cannot argue credibly that it has met this burden.

Frontier's entire argument rests on unsupported testimony by Keiler that Frontier had informed the Union prior to his May 10 letter that he was representing Frontier. Under Frontier's theory, because the Union must have known Keiler was representing Frontier, the Union's May 24 letter requesting confirmation of his status as Frontier's counsel was merely an obstructionist tactic. Frontier argues that because the Union did not request bargaining right then, it forever waived its right to bargain on the pension issue.

However, as the Board noted, Keiler testified that he was not present when Frontier's owners allegedly told the Union of Keiler's representation and he did not know how it happened. The ALJ and the Board rejected Keiler's unsupported testimony, and we find no reason to question their decision. In its May 24 letter the Union said it would respond to Keiler's letter if it received confirmation that he represented Frontier. Thus, the Union indicated a willingness to discuss the issue of the pension. Keiler never responded to this request.

On these facts, it is incredible for Frontier to argue that it established a clear and unmistakable waiver by the Union. The Board's findings are supported by substantial evidence and are affirmed.

Motion to Strike References to Bias of ALJ

In its opening and reply briefs, filed by Keiler, Frontier argued that the ALJ should have recused himself for bias against Frontier and the Ninth Circuit. Subsequently, Frontier's new counsel requested leave of the Court to withdraw the motion to disqualify the ALJ and to strike all references to that motion.

We deny Frontier's motion to strike. While we find absolutely no substance to Frontier's claims of bias on the part of the ALJ, we agree with the Board and the Union that Frontier's motion to strike is a last ditch effort to sanitize the record. Frontier's motion to strike underlines the frivolous nature of its original allegations of bias, which, as discussed below, form one of the bases for sanctions against Frontier and Keiler.

Rule 38 Sanctions

[18–20] Both the Board and the Union request sanctions against Frontier in the form of attorneys' fees and double costs. Where this court determines that an appeal is frivolous, it may, in its discretion, award the prevailing party damages for delay and double costs. Fed.R.App.P. 38; 28 U.S.C. § 1912. An appeal is frivolous when the results are obvious or the arguments are wholly without merit. *NLRB v. Catalina Yachts,* 679 F.2d 180, 182 (9th Cir.1982) (citations omitted). A union-intervenor may recover attorneys' fees and double costs under Rule 38. *See, NLRB v. Limestone Apparel Corp.,* 705 F.2d 799, 800 (6th Cir.1982).

This entire appeal was frivolous. As discussed above, substantial evidence existed on the record to support the Board's holding that Frontier engaged in the charged unfair labor practices. Indeed, the evidence is overwhelming. Further, the legal arguments advanced and the legal authority cited are largely inapposite.

[21] Accordingly, we conclude that both the Board and the Union are entitled to attorneys' fees and double costs. Frontier and its original counsel on appeal, Keiler, are jointly and severally liable. *First Investors Corp. v. American Capital Fin. Servs., Inc.,* 823 F.2d 307, 310 (9th Cir.1987). We decline to impose sanctions of Frontier's new counsel, who were substituted as counsel after Frontier's reply brief was filed. Although

Frontier's new counsel petitioned for leave to file a supplemental brief, we do not find that their request was frivolous. Indeed, they attempted to improve the original briefs filed by Keiler by withdrawing one of Frontier's frivolous arguments—its efforts to disqualify the ALJ. *See, Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1417 (9th Cir.1990), *cert. denied*, 498 U.S. 1109, 111 S.Ct. 1019, 112 L.Ed.2d 1100 (1991).

The amount of the award for attorneys' fees and double costs incurred on appeal shall be established by a supplemental order upon submissions by the Board, the Union and Frontier, in accordance with Fed. R.App.P. 39(d) and Ninth Circuit Rule 39–1.

The Board's petition to enforce its order is granted. The Board and the Union are granted 28 days from the date of the filing of this memorandum in which to file with the clerk their statements of costs and attorney fees in this court. Frontier and Keiler are granted 14 days in which to file any objection. Thereafter this panel will enter a judgment for attorneys' fees and double costs.

ORDER ENFORCED WITH SANCTIONS.

UNITED STATES of America, Plaintiff–Appellee,

v.

Anthony BARONE, Defendant–Appellant.

No. 93–10415.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 12, 1994.

Decided Nov. 3, 1994.

As Amended Dec. 18, 1995.

Defendant was convicted of conspiracy and uttering forged securities in the United States District Court for the District of Nevada, Lloyd D. George, Chief Judge, and defendant appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that fact that victims operated in interstate commerce was insufficient to establish that nonexistent, shell companies upon whose accounts forged securities were drawn were "organizations" which affected interstate commerce, within meaning of statute of conviction.

Reversed.

See Also: Opinion, 39 F.3d 981, superseded.

1. Criminal Law ⇐1139

Jurisdiction is legal question which is ordinarily reviewed de novo.

2. Forgery ⇐16

Nonexistent shell companies on whose accounts checks were drawn in course of scheme to utter forged securities were not "organizations" whose activities affected interstate commerce within meaning of statute making it federal offense to utter, with intent to deceive, forged security of organization, as only effect on interstate commerce resulted from passage of forged securities to victim which operated in interstate commerce; intent of statute was to tie interstate jurisdictional element to interstate effect of organization's operations, not its offense conduct. 18 U.S.C.A. § 513(a).

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐16

Entities can only constitute "organizations," for purpose of statute making it federal offense to utter, with intent to deceive, forged security of organization, if their activities, apart from uttering of forged securities, affect interstate commerce. 18 U.S.C.A. § 513(a).

4. Forgery ⇐16

Defendants' alleged acts of travelling interstate and purchasing goods that had crossed state lines as part of scheme to utter forged securities were not sufficient to establish that nonexistent shell companies, on

Exhibit 2

Southwest Forest Indus., Inc. v. NLRB (9t Cir. 1988)
841 F.2d 270

841 F.2d 270
United States Court of Appeals,
Ninth Circuit.

SOUTHWEST FOREST INDUSTRIES, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

Nos. 86-7137, 86-7177.
|
Argued and Submitted July 6, 1987.
|
Decided March 1, 1988.

The National Labor Relations Board found that employer had committed unfair labor practices by unilaterally implementing changes in terms and conditions of employment, and employer petitioned for review. Board cross-applied for enforcement of its order. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) employer's three-day notice of its intent to unilaterally implement changes not proposed during bargaining after reaching impasse was unfair labor practice, and (2) proper remedy was restoration of status quo, where there was evidence that, if union had been given sufficient notice of plan changes, it would have exercised its right to negotiate.

Employer's petition for review denied; Board's cross application for enforcement granted.

Attorneys and Law Firms

***271** John H. Stephens, Cox, Castle & Nicholson, Los Angeles, Cal., for petitioner.

Howard E. Perlstein, NLRB, Washington, D.C., for respondent.

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Before BROWNING, Chief Judge, FLETCHER and POOLE, Circuit Judges.

Opinion

FLETCHER, Circuit Judge:

Southwest Forest Industries Inc. (Southwest) petitions for review of an unfair labor practice order issued by the National Labor Relations Board (the Board). The Board cross-applies for enforcement of its order. The Board found that Southwest had violated sections 8(a)(1) and (5) of the National Labor Relations Act (the Act), 29 U.S.C. §§ 158(a)(1) and (5), in unilaterally ***272** implementing changes in terms and conditions of employment. The Board ordered the reinstatement of the *status quo ante* until the parties bargained in good faith to impasse. We enforce the Board's order.

BACKGROUND

Graphic Communications Union District Council # 1, Local 388 (the Union) and Southwest mutually agreed to extend their collective bargaining agreement beyond its June 15, 1983 termination date, subject to cancellation on 30 days notice by either party. On August 22, 1983, the Union notified Southwest that it would terminate the collective bargaining agreement effective September 23.[1] After unsuccessful negotiations in August and September, all employees went out on strike on September 23.

On November 23, Southwest contacted the federal mediator and asked him to arrange a meeting with the Union. The mediator contacted the Union but was advised that the Union would not agree to meet unless Southwest dropped its proposals on union security and health care. The Board's General Counsel concedes that as of November 23 the parties were at an impasse. On November 28, Southwest delivered a letter to the Union, notifying it of Southwest's intent to hire permanent replacements, proposing a wage reduction in some job classifications, and suggesting that it would also make unspecified changes in job conditions. The Union did not contact Southwest in response to this letter. Most striking employees, however, reported for work on November 30.

On December 2, Southwest delivered an "Interim Policy Manual" (IPM) to the Union without an explanatory cover letter. Most of Southwest's employees received a copy of the IPM on December 5, the same date on which Southwest implemented the IPM. The employment conditions described in the IPM differed significantly from those under the expired collective bargaining agreement and from Southwest's previous proposals to the Union.[2] The Union did not request a delay in the implementation of the IPM or request bargaining over the changes set forth in the IPM. Rather, on December 6, the Union filed unfair labor practices charges with the Board

based on Southwest's failure to negotiate prior to implementing the changes.

On February 3, 1984, the Regional Office of the NLRB informed Southwest that it would file a complaint against it. At a meeting on February 4, 1984, Southwest asked the Union to state its position with respect to the changes reflected in the IPM. The Union refused to do so because it had not seen the unfair labor practice complaint. At a meeting on March 15, 1984, the Union offered to negotiate a settlement of the unfair labor practice complaint, but refused to negotiate the changes contained in the IPM. Southwest has made several subsequent offers to negotiate, but the Union has not responded.

An Administrative Law Judge (ALJ) heard the charge on October 2, 1984. The ALJ found that Southwest violated sections 8(a)(1) and (5) of the Act in its unilateral implementation of changes in terms and conditions of employment without first affording ***273** the Union an opportunity to bargain. The ALJ did not order a *status quo ante* remedy because he concluded that "irrespective of any opportunity to bargain, the Union would not have resumed bargaining." Both parties filed exceptions to the ALJ's decision. The Board affirmed the ALJ's finding that Southwest had violated sections 8(a)(1) and (5) of the Act, but modified the ALJ's order by requiring a restoration of the *status quo* from December 1983 until such time as the parties bargain in good faith to a new agreement or impasse. Southwest filed a timely petition for review, and the Board timely cross-petitioned for enforcement of its order.

STANDARD OF REVIEW

On review in this court, the National Labor Relations Board's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole. *NLRB v. Auto Fast Freight, Inc.,* 793 F.2d 1126, 1128 (9th Cir.1986); 29 U.S.C. § 160(e). "The Board's [remedial] order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *Fibreboard Paper Prods. Corp. v. NLRB,* 379 U.S. 203, 216, 85 S.Ct. 398, 406, 13 L.Ed.2d 233 (1964) (quoting *Virginia Elec. & Power Co. v. NLRB,* 319 U.S. 533, 540, 63 S.Ct. 1214, 1218-19, 87 L.Ed. 1568 (1943)).

DISCUSSION

I. *Refusal to Bargain Violation*

[1] [2] [3] Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Until the parties bargain to an impasse, an employer's unilateral change in the terms and conditions of employment constitutes a refusal to bargain. *NLRB v. Katz,* 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962); *Auto Fast Freight,* 793 F.2d at 1129. An employer must maintain the *status quo* after the expiration of the collective bargaining agreement until a new agreement is reached or until the parties bargain in good faith to impasse. *NLRB v. Carilli,* 648 F.2d 1206, 1214 (9th Cir.1981). Where, as in this case, an impasse is reached, "the employer may unilaterally impose changes in the terms of employment *if* the changes were reasonably comprehended in the terms of its contract offers to the union." *Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund,* 827 F.2d 491, 496 (9th Cir.1987) (emphasis added). Unilateral changes not comprehended in pre-impasse proposals constitute a refusal to bargain in violation of sections 8(a)(5) and (1) of the Act. *Id.; Peerless Roofing Co. v. NLRB,* 641 F.2d 734, 735 (9th Cir.1981).

[4] It is undisputed that the changes made by Southwest were not on the bargaining table prior to impasse. Southwest contends, however, that the Union failed to respond to any of its bargaining overtures after receiving notice of the changes and that this failure resulted in a waiver of the Union's statutory right to bargain prior to implementation. The Union cannot be found to have waived its bargaining rights unless the notice it received provided adequate time to consider and respond to Southwest's proposals. *See M.A. Harrison Mfg. Co.,* 253 NLRB 675, 676 (1980), *enf'd,* 682 F.2d 580 (6th Cir.1982) (three day interval between announcement and institution of unilateral change inadequate opportunity to bargain); *City Hospital of E. Liverpool, Ohio,* 234 NLRB 58, 59 (1978) (three weeks notice sufficient).

[5] Substantial evidence in the record before the Board supports the Board's finding that Southwest did not afford the Union a meaningful opportunity to bargain about the changes before instituting them. The only change that Southwest's previous proposal-contained in its letter of November 28, 1983-set forth specifically was Southwest's intent to revise the existing wage rates for unskilled employees. Southwest first announced the numerous changes at issue here in the IPM that it

delivered on December 2 and implemented ***274** on December 5. The IPM was 18 pages long and did not readily reveal what proposals, if any, differed from Southwest's previous offer.

In light of the many changes proposed in the IPM, three days notice was insufficient notice to permit Southwest unilaterally to implement the changes. The Board could reasonably conclude that the Union did not have adequate notice of the changes Southwest wished to implement to formulate a response. Because Southwest did not provide the Union with the opportunity to bargain, *see Auto Fast Freight,* 793 F.2d at 1131, the Union's failure to act did not constitute a waiver of its right to bargain under the Act. *See Stone Boat Yard v. NLRB,* 715 F.2d 441, 444 (9th Cir.1983), *cert. denied,* 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984). Accordingly, we affirm the Board's finding that Southwest's implementation of unilateral changes in the terms of employment violated sections 8(a)(5) and (1) of the Act.

II. *Status Quo Ante Remedy*

When an employer violates section 8(a)(5) in unilaterally altering conditions of employment, the Board typically orders a restoration of the *status quo ante* running from the date of the violation until such time in the future as the parties negotiate in good faith to a new agreement or an impasse. *NLRB v. Cauthorne,* 691 F.2d 1023, 1025 (D.C. Cir.1982). Here, however, the ALJ determined that a make-whole remedy was not appropriate based on his finding that, even absent Southwest's unfair labor practice, the Union would not have resumed bargaining. The Board rejected the ALJ's finding as "purely speculative" and ordered the *status quo* restored.

[6] We find no basis for disagreement with the Board. It is by no means certain that, had the Union been given sufficient notice of Southwest's planned changes, it would have sat passively by rather than exercising its right to negotiate. The fact that an impasse had been reached in November 1983 over the issues of union security and health care does not support the conclusion that the Union would have refused to discuss other proposed changes, particularly when its refusal could permit unilateral implementation. *See Auto Fast Freight,* 793 F.2d at 1129. Furthermore, the record shows that, on February 10, 1984, the Union indicated its willingness to reopen negotiations following resolution of the unfair labor practice dispute. We conclude that substantial evidence supports the Board's finding that the question of whether the Union was willing to reopen negotiations is amenable only to speculation.

Southwest contends that the Board's remedial order is at odds with Circuit Court precedent. The first case Southwest cites is *Rayner v. NLRB,* 665 F.2d 970 (9th Cir.1982). In *Rayner,* the employer, which had never adhered to the terms of its collective bargaining agreement, notified the Union more than three months prior to the agreement's expiration that it was willing to negotiate a new contract. 665 F.2d at 973. The Union rejected the offer to negotiate. *Id.* This court refused to enforce the portion of the Board's remedy that held the employer to the terms of the expired contract past its expiration date. This was because the employer had given timely notice that the contract would terminate and that the agreement would be modified. *Id.* at 977. *Rayner* stands for the proposition that a union may waive its right to bargain if it fails to respond to good faith bargaining overtures, provided the opportunity for response is adequate. Certainly three months notice is sufficient. What distinguishes this case from *Rayner* is the fact that Southwest did *not* provide the Union with timely notice or the opportunity to negotiate the post-expiration modifications. *Reynor,* thus, is inapposite here.

Second, Southwest relies on *NLRB v. Cauthorne,* 691 F.2d 1023 (D.C. Cir.1982). The *Cauthorne* court held that if, *following* an employer's illegal unilateral action, the parties bargain to impasse, restoration of the *status quo* may not be ordered beyond the date impasse is reached. 691 F.2d at 1026. The court distinguished the facts in *Cauthorne* from the "usual case" in which "no substantial bargaining has occurred between the parties after the employer's unilateral change," and in which "consequently the typical make-whole order ***275** runs from the date of the unilateral change until the employer and union negotiate a new agreement or reach an impasse." *Id.* at 1025. *Cauthorne* only serves to support the Board's order here, for this is the "usual case." Southwest and the Union engaged in no substantial bargaining following the unilateral changes and thus could not have reached an impasse. The remedy ordered by the Board is the one *Cauthorne* approves under these circumstances.

The Board's power to restore the *status quo ante* as a means to ensure meaningful bargaining is well recognized. *See Fibreboard Paper Prods. Corp.,* 379 U.S. at 217, 85 S.Ct. at 406. Indeed, to deny the Union a make-whole remedy would permit Southwest "to retain the fruits of unlawful action" and render the guarantees embodied in the National Labor Relations Act "meaningless." *NLRB v. Warehousemen's Union Local 17,* 451 F.2d 1240, 1243 (9th Cir.1971). In sum we find that the Board's order is supported by substantial evidence and serves to effectuate the policies of the Act.

Accordingly, the Southwest's petition for review is DENIED, and the Board's cross-application for enforcement is GRANTED.

All Citations

841 F.2d 270, 127 L.R.R.M. (BNA) 2913, 56 USLW 2555, 108 Lab.Cas. P 10,358

Footnotes

1 All dates refer to the calendar year 1983, unless otherwise noted.

2 The IPM differed from Southwest's previous proposal in the following respects:
(a) The IPM made no provisions for the position of working foreman.
(b) The IPM made no provision for the position of pallet hard forklift operator and pallet yard helper.
(c) The IPM provided for a reduced hourly wage rate for employees in the bundler position.
(d) The IPM provided for reduced hourly wage rates for employees in unskilled classifications.
(e) The IPM contained a new management's rights policy.
(f) The IPM reduced the number of paid holidays.
(g) The IPM provided for a new industrial injury policy.
(h) The IPM did not provide for union bulletin boards, union representatives, shop committees, grievance committees and joint conciliation committees.
(i) The IPM changed the method for computing overtime for employees.
(j) the IPM changed the vacation policies.

End of Document

Exhibit 3

***Bagley v. City of Manhattan Beach* (1976)**
18 Cal.3d 22

18 Cal.3d 22, 553 P.2d 1140, 132 Cal.Rptr. 668, 93 L.R.R.M. (BNA) 2435, 79 Lab.Cas. P 53,874

BARRY BAGLEY et al., Plaintiffs and Appellants,
v.
CITY OF MANHATTAN BEACH et al., Defendants and Respondents.

L.A. No. 30523.
Supreme Court of California
September 16, 1976.

SUMMARY

A city council of a general law city refused to place on the ballot an initiative measure which provided the unresolved disputes between the city and the recognized firemen's employee organization should be submitted to arbitration, and that the arbitrator's award should be final and binding. In a mandate action, the trial court refused to compel the council to place the measure on the ballot, concluding the proposed measure was invalid. (Superior Court of Los Angeles County, No. C76275, Campbell M. Lucas, Judge.)

The Supreme Court affirmed, holding that the Legislature had placed the power to determine salaries in a general law city in the city council (Gov. Code, § 36506), which precluded delegation of that power to an arbitrator. The court further held since the city possessed no power under state law to provide for arbitration of wage rates, such power could not be created by local initiative.

In Bank. (Opinion by Clark, J., with Wright, C. J., McComb, Sullivan and Richardson, JJ., concurring. Separate dissenting opinion by Mosk, J., with Tobriner, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

([1a], [1b])
Municipalities § 74--Officers, Agents, and Employees--Compensation--Arbitration.
Under the clear language of Gov. Code, § 36506, requiring compensation of all appointive officers and employees to be fixed by the city council of a general law city by ordinance or resolution, a general law city had no power to permit fixing of compensation by administrative order or by arbitrator's award. Accordingly, the city properly refused to place on the ballot an initiative measure which would have provided that unresolved disputes between the city and the firemen's employee organization should be submitted to arbitration, and his award should be final and binding; since the city possessed no power under state law to provide for arbitration of wage rates, such power could not be created by local initiative.

[See **Cal.Jur.2d,** Municipal Corporations, § 337; **Am.Jur.2d,** Municipal Corporations, Counties, and Other Political Subdivisions, § 258.]

([2])
Statutes § 3--Performance of Public Duty.
When the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization.

([3])
Initiative and Referendum § 15--Local Elections--Initiative--Adoption of Ordinances.
A city ordinance proposed by initiative must constitute such legislation as the legislative body of such city has the power to enact under the law granting, defining and limiting the powers of such body.

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Attorney (Pismo Beach), as Amici Curiae on behalf of Defendants and Respondents.

CLARK, J.

After the City Council of the City of Manhattan Beach refused to place an initiative measure on the ballot, petitioners sought a writ of mandate to compel the council to do so. The trial court denied relief, and petitioners appeal.

The proposed initiative measure provides that unresolved disputes between the city and the recognized firemen's employee organization shall be submitted to arbitration and that the arbitrator's award shall be final and binding. The arbitration requirement applies not only to unresolved disputes pertaining to the interpretation or application of contracts but also to all disputes as to wages, hours, and terms of employment.

Denying the writ, the superior court concluded the proposed measure is invalid because (1) the Legislature placed the power to determine salaries in a general law city in the city council, precluding delegation to an arbitrator and (2) there are no safeguards in the proposed initiative to prevent abuse of the arbitrator's power. ([1a]) We affirm the judgment on the first ground, finding it unnecessary to reach the second.

Government Code section 36506, dealing with general law cities, provides: "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees."

The language in the statute is clear. It requires compensation be fixed by the city council by ordinance or resolution; the language does not permit fixing of compensation by administrative order or by arbitrator's award.

([2]) When the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization. (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 923-924 [120 Cal.Rptr. 707, 534 P.2d 403]; ***25** *California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, 144 [89 Cal.Rptr. 620, 474 P.2d 436].)

Although standards might be established governing the fixing of compensation and the city council might delegate functions relating to the application of those standards, the ultimate act of applying the standards and of fixing compensation is legislative in character, invoking the discretion of the council. (*City and County of San Francisco v. Cooper, supra*, 13 Cal.3d 898, 919-921; *Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 634, 637 [12 Cal.Rptr. 671, 361 P.2d 247]; *City and County of S.F. v. Boyd* (1943) 22 Cal.2d 685, 689-690 [140 P.2d 666]; *Alameda County Employees' Assn. v. County of Alameda* (1973) 30 Cal.App.3d 518, 532 [106 Cal.Rptr. 441]; *Collins v. City & Co. of S. F.* (1952) 112 Cal.App.2d 719, 730-731 [247 P.2d 362]; *Spencer v. City of Alhambra* (1941) 44 Cal.App.2d 75, 77 [111 P.2d 910].) As such, and because the language of the statute is not merely clear, but redundant (cf. *Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832, 838 [313 P.2d 545]), the city council may not delegate its power and duty to fix compensation.

Examination of the history of other legislation relating to general law city employees confirms that we should apply the plain language of Government Code section 36506 literally. The Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510), which applies to local government employees and deals with public employee organizations and labor relations, seeks to provide "a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Gov. Code, § 3500.) Although there is provision for a written memorandum of understanding by employee organizations and *representatives* of a negotiating public agency, the act expressly provides that the memorandum "shall not be binding" but shall be presented to the governing body of the agency or its statutory representative for determination, thus reflecting the legislative decision that the ultimate determinations are to be made by the governing body itself or its statutory representative and not by others. (Gov. Code, § 3505.1; see *City and County of San Francisco v. Cooper, supra*, 13 Cal.3d 898, 926-928 [under the Winton Act involving school labor relations, written memorandum of understanding is not binding, the school board retaining ultimate authority].)

Moreover, the Meyers-Milias-Brown Act provides for negotiation and *permits the local agency and the employee organization to agree to mediation but not to fact-finding or binding arbitration.* (***26** Gov. Code, §§ 3505, 3505.2; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 614, fn. 4 [116 Cal.Rptr. 507, 526 P.2d 971]; *Alameda County Employees' Assn. v. Alameda County, supra*, 30 Cal.App.3d 518, 533-534.) Similarly, Labor Code sections 1960-1963 permit firefighters to form unions and to present grievances but do not authorize arbitration.

Probably no issue in recent years has been presented to the Legislature more frequently than proposed arbitration of public employee salaries, including firemen's. (Assem. Bill Nos. 1781, 1724, 119, 86 (1975-1976 Reg. Sess.); Sen. Bill Nos. 1310, 1294, 275, 4 (1975-1976 Reg. Sess.); Assem. Bill Nos. 3666, 1243, 33 (1973-1974 Reg. Sess.); Sen. Bill No. 32 (1973-1974 Reg. Sess.); Sen. Bill Nos. 1440, 1424 (1972 Reg. Sess.); Sen. Bill No. 333 (1971 Reg. Sess.); Assem. Bill No. 98 (1970 Reg. Sess.); Sen. Bill Nos. 1294, 1293 (1970 Reg. Sess.); Assem. Bill No. 1400 (1969 Reg. Sess.); Assem. Bill No. 1935 (1967 Reg. Sess.); Assem. Bill Nos. 3084, 2500 (1963 Reg. Sess.).) But no such bill has become law.

Petitioner's reliance on *Kugler v. Yocum* (1968) 69 Cal.2d 371 [71 Cal.Rptr. 687, 445 P.2d 303], is misplaced. The case involved the sufficiency of standards necessary to a valid delegation of legislative power in the absence of statutes demonstrating an intent that the power be exercised by a specific legislative body. Here legislative intent limiting delegability is clear.

The language of Government Code section 36506, the provisions of the Meyers-Milias-Brown Act, and the Legislature's repeated refusal to enact any law permitting general law cities to fix salaries by arbitration compel the conclusion that the Legislature intends the city council of a general law city to fix compensation, precluding the fixing of compensation by arbitrator.

([3]) It has long been settled that a city ordinance proposed by initiative "must constitute such legislation as the legislative body of such ... city has the power to enact under the law granting, defining and limiting the powers of such body. [Citations.]" (*Hurst* v. *City of Burlingame* (1929) 207 Cal. 134, 140 [277 P. 308].) ([1b]) The city ***27** possessing no power under existing state statute to provide for arbitration of wage rates, such power cannot be created by local initiative.[1]

The judgment is affirmed.

Wright, C. J., McComb, J., Sullivan, J., and Richardson, J., concurred.

MOSK, J.

I dissent.

Under the principles enunciated by this court in *Kugler* v. *Yocum* (1968) 69 Cal.2d 371 [71 Cal.Rptr. 687, 445 P.2d 303], the proposed initiative should not be banned, as an improper delegation of power, from consideration by the electorate.

In divining a legislative intent to preclude the local use of arbitration for resolution of labor disputes, the majority appear to employ two theories. First, they seem to conclude that whenever a discretionary power is granted to one body, any infringement on that authority, of whatever extent or effect, is per se an improper delegation of power. (*Ante*, p. 24.) Second, in the majority view, the Legislature has expressly voiced hostility to any arbitration ordinance. The former conclusion is incorrect under relevant case law, the latter as a matter of statutory interpretation.

As for the first rationale, the majority position is contradicted by *Kugler v. Yocum, supra*, in which we upheld a proposed ordinance decreeing that the salaries of Alhambra firefighters shall be no less than the average wage of firefighters employed by the City of Los Angeles and those working for Los Angeles County. The majority vainly attempt to distinguish *Kugler* because it involved a chartered city and thus was decided "in the absence of statutes demonstrating an intent that the power be exercised by a specific legislative body." (*Ante*, p. 26.)

On the contrary, at the time of the proposed ordinance in *Kugler*, the Alhambra City Charter provided, in a manner similar to Government Code section 36506, on which the majority rely, that "The [city] council ... shall have power to organize the fire division and ... establish the number of its members and the amount of their salaries ...." (*Kugler, supra*, 69 Cal.2d at p. 374, fn. 1.) As a charter provision has all the force of state law within a chartered city (*Bruce v. Civil Service Board* (1935) 6 Cal.App.2d 633, 636 [45 P.2d 419]), pursuant to the majority's reasoning ***28** we could have held simply that the terms of the Alhambra Charter precluded the proposed ordinance. Instead, we proceeded to scrutinize the ordinance in order to ascertain whether it contained safeguards sufficient to insure that the fundamental policy decisions regarding wages would be made by the city council, not by extraneous forces. (*Kugler, supra*, 69 Cal.2d 371, 376.) We declared, "Doctrinaire legal concepts should not be invoked to impede the reasonable exercise of legislative power properly designed to frustrate abuse. Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation,' and then only to preserve the representative

character of the process of reaching legislative decision." (*Id.* at p. 384.)

Yet the majority imperiously label a legislative enactment an unlawful delegation without ascertaining the extent of the delegation or the availability of standards and safeguards to prevent its abuse. This result cannot be justified on the simplistic ground that the Legislature granted the city council power to fix wages. In *Kugler* and in every California case confronting the issue of unlawful delegation, a power has been granted by statute or the Constitution to one body and then delegated some aspect to another entity. Yet unless the delegation removes *all* authority from the group originally directed to exercise that power (see *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 923-924 [120 Cal.Rptr. 707, 534 P.2d 403]), courts have analyzed the delegation to determine whether fundamental policy-making power has been maintained by the legislative body originally designated to exercise it. (See, e.g., *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 816 [114 Cal.Rptr. 577, 523 P.2d 617]; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 369 [55 Cal.Rptr. 23, 420 P.2d 735]; *Gaylord v. City of Pasadena* (1917) 175 Cal. 433, 437 [166 P. 348].)

In the present case, Government Code section 36506 states only that, "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees." The proposed initiative would not divest the council of that designated power; indeed, the arbitrator's award could be implemented only by a council ordinance. Of course, the initiative would, in many instances, inhibit the council from unilaterally pronouncing decisions regarding wages, as would, for example, any collective bargaining with the firefighters. Because of this potential infringement, we should analyzed the initiative in the manner undertaken ***29** by *Kugler*. But it is heroic and unprecedented to conclude that grants of power to one body absolutely preclude any appropriate referral of aspects of that power to another entity. (See *Eastlake* v. *Forest City Enterprises, Inc.* (1976) 426 U.S. 668 [49 L.Ed.2d 132, 96 S.Ct. 2358].)

As for the other point relied upon by the majority - the Legislature expressly intended to prohibit local arbitration ordinances - little persuasive support is offered. Government Code section 36506, as we have seen, does not, by its terms, prohibit arbitration or other reasonable means to resolve labor disputes. The majority can find no legislative history to suggest that the section was intended to be anything other than it facially appears to be: a general grant of power to a local government.

The majority also rely on the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.). It is true that the act does not compel local governments to submit to arbitration, but the majority misreads the statute to conclude that the act prohibits municipalities from arbitrating. The act establishes certain minimum procedures that must be undertaken by public employers and employees. They must meet and confer with each other and bargain in good faith. (Gov. Code, § 3505.) If they reach an agreement, they must prepare a memorandum of agreement (§ 3505.1). The Legislature's directive that the agreement shall not be binding reflects a reluctance to impose arbitration on unwilling municipalities, not a repudiation of local arbitration ordinances voluntarily adopted.

This is made clear in other provisions of the act. Section 3500 provides: "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 nor is it intended that this chapter be binding upon those public agencies which provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter." The act thus allows local governments to maintain their own procedures, consistent with the purposes of the act. (*Ball v. City Council* (1967) 252 Cal.App.2d 136, 143 [60 Cal.Rptr. 139]; Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 725.) As the act is designed to provide reasonable dispute-solving mechanisms, section 3500 seems to permit such procedures as arbitration. ***30**

Also significant are sections 3505 and 3507. The former provides that the bargaining process "should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance ...." Section 3507 allows a public agency to adopt "additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment." Taken together, these provisions indicate that the Meyers-Milias-Brown Act expresses no marked hostility, but benign neutrality toward local use of arbitration procedures.

Also lending dubious credence to the majority conclusion is the reference to defeat of various public employment bills in the Legislature. (*Ante*, p. 26.) As we observed recently in *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 418 [128 Cal.Rptr. 183, 546

P.2d 687], "At best, 'Legislative silence is a Delphic divination.'" In these circumstances, even the Oracle of Delphi would have difficulty in finding legislative hostility to local use of arbitration. Of the 22 bills cited by the majority, 14 would have required as a matter of state law public employers and employees to submit to arbitration of wage disputes. Obviously, the defeat of a bill to establish state-imposed arbitration requirements does not signify legislative opposition to voluntary local decisions to adopt arbitration. Six of the bills would have imposed mandatory mediation and fact-finding, while at the same time providing for arbitration of disputes revolving around interpretations of existing agreements, an area entirely different from arbitration of wage disputes. One of the remaining two measures cryptically stated, without further explanation, "Upon failure to reach agreement, the difference may be referred to voluntary arbitration." (Assem. Bill No. 3084 (1963) Reg. Sess.).) Only 1 of the 22 bills was at all relevant to our problem. That measure purported to amend the Meyers-Milias-Brown Act to provide that any arbitration procedures adopted by local agencies would be governed by the Code of Civil Procedure sections regarding arbitration. (Assem. Bill No. 3666 (1973-1974 Reg. Sess.).) The bill, thus, did not propose allowing local governments to use arbitration, but assumed that the power already existed.

In short, from the standpoint of case law and legislative history, the majority have erred in concluding that the Legislature expressly intended to prevent adoption of arbitration to resolve labor disputes.

But the initiative must still be examined to determine whether it constitutes an improper delegation of power. As stated, the keys to this ***31** determination are whether the legislative body retains the fundamental policy-making decision and whether there are sufficient safeguards in the initiative to prevent abuse of authority. (*Kugler v. Yocum* (1968) *supra*, 69 Cal.2d 371, 381-382.)

Our analysis in *Kugler* aids us in ascertaining when a delegation of power amounts to an abdication of the legislative policy-making role in labor matters. In approving in that case the proposed ordinance pegging wages of Alhambra firefighters to their counterparts in Los Angeles, we stated, "Once the legislative body has determined the issue of policy, i.e., that the Alhambra wages for firemen should be on a parity with Los Angeles, that body has resolved the 'fundamental issue'; the subsequent filling in of the facts in application and execution of the policy does not constitute legislative delegation ... the implementation of the policy by reference to Los Angeles is not the delegation of it." (*Id.* at p. 377.)

Similarly, the initiative in question here does not strip policy-making powers from the legislative body of Manhattan Beach. The proposed ordinance makes a fundamental policy determination, i.e., that impasses in labor disputes involving firefighters shall be resolved not by the present adversary method, with its potential for disruption of essential services, but by a mutual reasoned appeal to an impartial arbitrator. Also, it sets forth detailed procedures concerning the selection of the arbitrator and guidelines governing his decisions. Referring disputes to an arbitrator so selected and directed, like the pegging of wages to those prevalent in Los Angeles in *Kugler*, is not delegating but implementing policy-making.

Further, the proposed ordinance contains safeguards sufficient to prevent abuse of the grant of authority; indeed it appears to be less susceptible to abuse than the proposal approved by this court in *Kugler*.

First, the present initiative, unlike the ordinance in *Kugler*, contemplates reference to an agency beyond the control of the city council only when all else fails. In most circumstances, the firefighters and the city council will continue to reach agreements based on normal collective bargaining. Only when an impasse is reached will there be resort to arbitration. While it may be suggested that the availability of a compulsory arbitration alternative will discourage serious compromising by disputants, it is equally likely that the potential of an adverse binding arbitration award will encourage each side to be conciliatory. In Michigan, where compulsory arbitration is available to resolve police ***32** and firefighter labor disputes, during a 15-month period 224 disputes were settled by the parties and only 105 went to arbitration; of the latter, 17 were settled before final determination by the arbitrator. (McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector* (1972) 72 Colum.L.Rev. 1192, 1210 (hereinafter cited as McAvoy).)

Another safeguard inherent in the present initiative is the potentiality of court review of an arbitrator's decision. Under Code of Civil Procedure section 1286.2, a court must vacate an arbitration award if, inter alia, the arbitrator exceeds his powers or his award is tainted with corruption, fraud, misconduct, or procedural irregularities. While courts will not usually examine the merits of an arbitration decision (*Santa Clara-San Benito etc. Elec. Contractors' Assn. v. Local Union No. 332* (1974) 40 Cal.App.3d 431, 437 [114 Cal.Rptr. 909]), the prospect of judicial review on the grounds listed in section 1286.2

should deter any untoward tendency of an arbitrator to rule capriciously. Indeed, the Oregon Supreme Court has held that the existence of an appeals procedure in itself may constitute an adequate safeguard against administrative abuse. (*Warren v. Marion County* (1960) 222 Ore. 307 [353 P.2d 257, 261-262], cited with approval in *Kugler* at pp. 381-382 of 69 Cal.2d.)

Most significantly, the present initiative purports to afford protection to the municipal fisc. In this regard, the city and amici claim, in a strictly policy argument, that the imposition of arbitration will inevitably lead to exorbitant labor settlements and skyrocketing taxes. Implicit in their contention is a marked antipathy to arbitrators as being biased and irresponsible, particularly in matters affecting city treasuries. No authority in support of such apprehension is offered. On the contrary, this court has recognized arbitration to be a time-honored, respected method of settling labor disputes. In *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 622 [116 Cal.Rptr. 507, 526 P.2d 971], a case involving a charter amendment providing for arbitration of disputes between firefighters and a city, we declared that "state policy in California 'favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization.'"

Again, a comparison with *Kugler* is appropriate. There we approved the proposed ordinance even though it linked firefighter salaries in Alhambra, population 64,500, with those paid in Los Angeles, where ***33** 2,743,500 people lived at the time. (69 Cal.2d at p. 385, Burke, J., dissenting.) While Los Angeles may have had greater tax resources to pay salary increases than Alhambra and a tradition of providing some of the highest salaries in the state, we reasoned that the proposed parity plan contained safeguards because "Los Angeles is no more anxious to pay its firemen exorbitant compensation than is Alhambra." (69 Cal.2d 371, 382.)

The arbitration provisions in the present case contain a number of financial safeguards. In contrast to the *Kugler* initiative, the ordinance here in question sets no floor for salaries. Although the arbitrator will not be directly responsible to the electorate, the city will share an equal role with the employees in selecting him. While the salary level in *Kugler* was to be determined solely by one index - the wages paid by Los Angeles - the Manhattan Beach arbitrator must weigh a number of factors. The initiative requires the arbitrator not only to consider the cost of living and existing salaries and benefits in other communities, but also "the interest and welfare of the public; [and] the availability and sources of funds to defray the cost of any changes in wages, hours and conditions of employment." As one commentator has suggested, in reference to a provision in a Nebraska statute similar to the quoted clauses, "Such a formulation avoids the possibility of an award that would necessitate increased taxes, employee lay-offs or reduced municipal services." (McAvoy, at p. 1200.)

For the foregoing reasons I conclude that the proposed initiative is not an unconstitutional delegation of power. The people of the city should not be denied the right to determine by democratic vote how their city government is to resolve labor disputes.

I would reverse the judgment.

Tobriner, J., concurred. ***34**

Footnotes

1 Although *Fire Fighters Union v. City of Vallejo, supra*, 12 Cal.3d 608, approved arbitration procedures adopted by initiative, Vallejo is a chartered city - not a general law city subject to Government Code section 36506.

End of Document

Exhibit 4

Chaffee v. San Francisco Library Commission (2004)
115 Cal.App.4th 461

115 Cal.App.4th 461
Court of Appeal, First District, Division 2, California.

James CHAFFEE, Plaintiff and Appellant,
v.
SAN FRANCISCO LIBRARY COMMISSION et al.,
Defendants and Respondents.

No. A102550.
|
Jan. 29, 2004.

Synopsis
Background: An individual filed a complaint seeking injunctive and declaratory relief against a city library commission and its commissioners, alleging a violation of state and local public meeting statutes. The Superior Court, City and County of San Francisco, No. 408077, David A. Garcia, J., granted summary judgment for the commission and commissioners, and the individual appealed.

[Holding:] The Court of Appeal, Ruvolo, J., held that: library commission was not required by state or local public meeting statutes, in continuing a regularly scheduled public meeting for a second session to consider a single agenda, to provide a general public comment period at each session of the continued public meeting.

Affirmed.

Attorneys and Law Firms

**337 *464 Robert J. Moskowitz, for Appellant.

Dennis J. Herrera, City Attorney, Wayne K. Snodgrass, Rafal Ofierski, K. Scott Dickey, Deputy City Attorneys, for Respondents.

RUVOLO, J.

I.

INTRODUCTION

Appellant James Chaffee appeals from a judgment granting respondents' motion for summary judgment. We disagree with appellant that the Ralph M. Brown Act (Gov.Code, § 54950 et seq.)[1] (the Brown Act) and the San Francisco Sunshine Ordinance **338 of 1999 (S.F.Admin.Code, ch. 67) (the Sunshine Ordinance) require that a general public comment[2] period be provided at *each* session of a continued public meeting held to consider a single published agenda. Accordingly, we affirm.

II.

FACTS AND PROCEDURAL HISTORY

On May 16, 2002, the San Francisco Library Commission (Library Commission) held its regularly scheduled meeting.[3] Commissioners Bautista, Chin, Higueras, and Steiman were present. The agenda for the May 16th meeting was posted on May 12, 2002, and included the following items: (1) Approval of the April 18, 2002 Minutes (Action); (2) Bond Program Manager's Report (Discussion); (3) Art Enrichment Program (Action); (4) Design Excellence Program (Discussion); (5) Site Acquisition: Portola Branch (Action); (6) Library 2002/2003 Budget Update (Action); (7) Public Comment (Discussion); and (8) Adjournment (Action). The agenda also noted that public comment would be taken before or during the Library Commission's consideration of each agenda item. During the May 16th session, *465 President Higueras announced that due to the potential loss of quorum by 5:30 p.m. that day, he would reorder the taking up of agenda items.[4] The commission announced the three agenda items to be considered that day (agenda items (1), (3), and (5)), and proceeded to hear public comment on each item. President Higueras then announced that, as the commission was losing its quorum, the remaining business of the meeting would be continued to Tuesday, May 21, 2002. The meeting was adjourned at 5:27 p.m.

On May 17, 2002, the Library Commission issued the notice and the agenda for the continued portion of the May 16th meeting, and posted both at the door of the main library's Koret Auditorium, where the second

session of the continued meeting would be held. The agenda for the continued May 16th meeting only listed the remaining items not heard at the first and in the new order as announced by President Higueras on May 16th: (1) Bond Program Manager's Report (Discussion); (2) Design Excellence Program (Discussion); (3) Library 2002/ 2003 Budget Update (Action); (4) Public Comment (Discussion); and (5) Adjournment (Action). Also on May 17, 2002, appellant filed a complaint seeking injunctive and declaratory relief against the commission and commissioners Higueras, Steiman, Chin, and Bautista alleging that the parties violated the Brown Act and the Sunshine Ordinance. Appellant sought a permanent injunction requiring the Library Commission and its members to provide for public comment at all meetings, and declaratory relief stating that the Brown Act and the Sunshine Ordinance require general public comment at all regular meetings. Appellant also filed an ex parte application for a temporary restraining order on May 20, 2002, which the trial court denied.

At the continued meeting on Tuesday, May 21, 2002, the same commissioners present at the May 16th meeting heard the **339 remaining agenda items. At this session public comment was allowed on each remaining agenda item, and a general public comment period was also held at the conclusion of meeting, but before adjournment.

Appellant filed a motion for preliminary injunction on July 26, 2002, which the trial court denied. Thereafter, respondents filed a summary judgment motion, which was granted. This timely appeal followed.

III.

DISCUSSION

[1] Appellant argues that the Brown Act and the Sunshine Ordinance require that members of the public be given an opportunity to comment generally on *466 matters within the jurisdiction of a legislative body at *each session* of that body's public meetings, in addition to being allowed comment on specific agenda items. Hence, appellant claims respondents violated both statutes when the Library Commission adjourned and continued its May 16, 2002 meeting without giving him an opportunity to make general public comment. This is so, he argues, notwithstanding that he was allowed to make comments on every agenda item taken up at the May 16th meeting, in addition to being allowed to comment on the remaining agenda items, and to make general public comments, at the continued May 21st meeting session.

[2] On appeal from a grant of summary judgment, we exercise our independent judgment in determining whether there are triable issues of material fact and whether the moving party is entitled to judgment as a matter of law. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334–335, 100 Cal.Rptr.2d 352, 8 P.3d 1089.) Summary judgment is properly granted if there is no question of fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 107 Cal.Rptr.2d 841, 24 P.3d 493 (*Aguilar*).) In moving for summary judgment, a defendant may show that one or more elements of the cause of action cannot be established by the plaintiff or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (*o*)(2); *Aguilar, supra,* 25 Cal.4th at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493.) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (*Ibid.*) The plaintiff may not rely upon the mere allegations or denials of his pleadings to show that a triable issue of material fact exists but instead, must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto. (*Ibid.*)

The moving party must support the motion with evidence including affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken. (Code Civ. Proc., § 437c, subd. (b); *Aguilar, supra,* 25 Cal.4th at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493.) Similarly, any adverse party may oppose the motion and " 'where appropriate,' " may present evidence including affidavits, declarations, admissions to interrogatories, depositions, and matters of which judicial notice must or may be taken. (*Ibid.*) In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra,* 25 Cal.4th at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493), and view such evidence and inferences in the light most favorable to **340 the opposing party. (*Aguilar, supra,* at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

*467 Appellant makes no reference in his brief to any material disputed issue of fact in this case.[5] Therefore, our independent review of the summary judgment turns solely on an interpretation of the law. More specifically, we are called upon to interpret sections 54950 et seq. and San Francisco Administrative Code chapter 67 as applied to

the May 16th and May 21st Library Commission meetings, and determine whether general public comment is required at both the original and the continued session of those assemblies.

Section 54954.3, subdivision (a) provides in pertinent part, "[e]very agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public ... that is within the subject matter jurisdiction of the legislative body...." Similarly, San Francisco Administrative Code section 67.15, subdivision (a) provides, "[e]very agenda for regular meetings shall provide an opportunity for members of the public to directly address a policy body on items of interest to the public that are within policy body's subject matter jurisdiction...."

Appellant urges us to interpret these laws to mean that there must be general public comment allowed at every *session* when a public body meets, in addition to allowing comment on specific agenda items. Appellant argues that because a continued meeting is a separate and regular meeting under sections 54952.2, subdivision (a), and 54955, and respondents failed to provide for a general public comment period at both "meetings," respondents violated both the Brown Act and the Sunshine Ordinance.[6] We disagree.

[3] [4] In determining the meaning of a statute, we are guided by settled principles of statutory interpretation. "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the ***468** purpose of the law. [Citations.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 898, 276 Cal.Rptr. 918, 802 P.2d 420 (*Pieters*).) To determine this intent, we begin by examining the words of the statute. (*Ibid.*) We must follow the construction that "comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." ****341** (*People v. Jenkins* (1995) 10 Cal.4th 234, 246, 40 Cal.Rptr.2d 903, 893 P.2d 1224.) Further, we must read every statute, " 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' " (*Pieters, supra,* 52 Cal.3d at p. 899, 276 Cal.Rptr. 918, 802 P.2d 420, quoting *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 814, 114 Cal.Rptr. 577, 523 P.2d 617.)

Here, the words of both public meeting statutes are clear: "[e]very *agenda* for regular meetings shall provide an opportunity for members of the public to directly address a legislative body on any item of interest to the public ... that is within the subject matter jurisdiction of the legislative body ...." (§ 54954.3, subd. (a), italics added; see S.F. Admin. Code, § 67.15, subd. (a).) The Library Commission provided for general public comment during the second day of its two-day meeting held to consider a single agenda. Thus, the commission fully complied with the plain meaning requirements of both section 54954.3 and San Francisco Administrative Code section 67.15.

If we were to accept appellant's interpretation of the statute requiring general public comment at every session or "meeting" of a public body, and not for every "agenda," we would render the Legislature's use of the word "agenda" mere surplusage. (See *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330, 87 Cal.Rptr.2d 423, 981 P.2d 52 ["[S]ignificance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage"].)

[5] In addition, construing section 54954.3 and San Francisco Administrative Code section 67.15 to require a single general public comment period where a public body meets in multiple sessions to consider its agenda is fully consonant with the plain meaning of the applicable open government statutes and avoids absurd results. The Brown Act's statement of intent provides: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining ***469** informed so that they may retain control over the instruments they have created." (§ 54950.) The Brown Act is intended to ensure the public's right to attend public agency meetings to facilitate public participation in all phases of local government decisionmaking, and to curb misuse of the democratic process by secret legislation of public bodies. (*International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 293, 81 Cal.Rptr.2d 456.)

When the Brown Act and the Sunshine Ordinance are read in their entirety, we conclude that the lawmaking bodies clearly contemplated circumstances in which continuances and multiple sessions of meetings to consider a published agenda would be required, and thus

they mandated that a single general public comment period be provided *per agenda,* in addition to public comment on each agenda item as it is taken up by the body. For example, section 54955.1 allows for any hearing by a legislative body of a local agency to be continued in the manner set forth in section 54955. Section 54955 provides that less than a quorum may adjourn from time ****342** to time and a copy of the order or notice of adjournment shall be conspicuously posted on or near the door of the place where the meeting was held within 24 hours after the time of the adjournment. In addition, section 54954.2, subdivision (b)(3) mandates that action on continued agenda items must occur within five calendar days of the meeting at which the continuance is called. Similarly, San Francisco Administrative Code section 67.15, subdivision (e) states that continuances shall be announced at beginning of meeting, or soon thereafter, while section 67.7, subdivision (e)(2) prevents policy bodies from taking action on items not appearing on posted agenda if less than two-thirds of members are present.

The Library Commission fully adhered to the language of these enactments and the Legislature's intent embedded in the statutes by hearing public comment on every agenda item taken up at the May 16th meeting. When the commission then lost its quorum, and in accordance with sections 54955, 54955.1, and 54954.2, subdivision (b)(3) and San Francisco Administrative Code sections 67.15, subdivision (e), and 67.7, subdivision (e)(2), the meeting on the May 16th agenda was continued for a period not to exceed the prescribed five-day limit with notice of the continued hearing time and date posted on the door of the meeting place within 24 hours. Further, the commission provided public comment on every remaining agenda item at the session held on May 21st, including providing for general public comment. Thus, the Library Commission did all that was required under both the plain meaning of pertinent provisions of the Brown Act and the Sunshine Ordinance, and in accordance with the Legislature's purpose in facilitating and providing for public participation in legislative decisionmaking.

***470** Therefore, we conclude that respondents were entitled to judgment as a matter of law.

IV.

DISPOSITION

The judgment is affirmed.

We concur: HAERLE, Acting P.J., and LAMBDEN, J.

All Citations

115 Cal.App.4th 461, 9 Cal.Rptr.3d 336, 04 Cal. Daily Op. Serv. 889, 2004 Daily Journal D.A.R. 1125

Footnotes

1 Unless otherwise indicated, further statutory references are to the Government Code.

2 For simplicity, we will refer to the type of additional public comment at issue in this appeal as "general public comment."

3 Respondents' request for judicial notice of meeting minutes, which was taken under submission pursuant to this court's order dated October 1, 2003, is hereby granted.

4 President Higueras reordered the taking of agenda items as follows: (2) was changed to (4), (3) to (2), (4) to (5), (5) to (3), followed by items (6) through (8) in the original posted order.

5 Although appellant disputes whether the Library Commission's choice of the order with which to proceed with agenda items at the May 16th meeting was not really the "most pressing" in appellant's statement of disputed facts, we find that this "disputed" fact is not material to the cause of action for relief because neither the Brown Act nor the Sunshine Ordinance requires that agenda items be put in any specific order. (See § 54950 et seq.; see also S.F. Admin. Code, ch. 67.) Further, appellant's only other "disputed" fact relevant to this appeal is that "[t]he adjournment of defendant library commission on May 16, 2002 was not unexpected or due to any emergency or situation beyond the commission's control." Again, this point is not material because there is no requirement in either the Brown Act or the Sunshine Ordinance necessitating such conditions for adjournment and continuance. (See § 54950 et seq.; see also

S.F. Admin. Code, ch. 67.)

6 Although appellant contends that "the actions of defendants violated the law by refusing to allow public comment that is mandated by both ... the 'Brown Act' ... and ... the 'Sunshine Ordinance,' " appellant fails to provide us with any argument relating to *how* respondents have violated the Sunshine Ordinance. Nevertheless, because of the textual similarity of the two public meeting statutes, we will also address any potential Sunshine Ordinance violations.

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Exhibit 5

Claremont Police Officers Assn. v. City of Claremont (2006)
39 Cal.4th 623

[84] Defendant contends that the trial court did not independently reweigh the evidence in mitigation and aggravation or determine in its own judgment that the evidence presented at trial supported death. He infers that the court could not have done so, because in ruling on the motion the judge, who is required by section 190.4, subdivision (e) to "state on the record the reasons for his findings," did so by reading into the record a typescript some 14 pages in length, which had been prepared by the prosecutor. The judge's use of the prosecutor's language does not support the inference that defendant draws. Before stating his assessment of the evidence, the judge outlined his legal duty to review the evidence and to make an independent determination that it was appropriate to impose the death penalty. Accordingly, we reject defendant's contention that the judge was either unaware of, or did not fulfill, his obligation to conduct a review of the evidence presented at trial and to make an independent determination of the propriety of the jury's verdict of death.

Defendant complains that the trial court erred by relying on an irrelevant fact when it stated that defendant lacked "any good reason" to kill victims Bettancourt, a drug customer, and Morris, who was "friendly and non-threatening." Because the circumstances of the crime (§ 190.3, subd. (a)) are an appropriate statutory factor, defendant's claim fails.

[85] In ruling on a motion to modify, " '[t]he trial judge's function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether in the judge's independent judgment, *the weight of the evidence supports the jury verdict.* [Citations.]' " (*People v. Guerra* (2006) 37 Cal.4th 1067, 1161, 40 Cal.Rptr.3d 118, 129 P.3d 321.)

Defendant also argues that by attributing defendant's lack of a prior felony conviction to his young age—18 at the time of the murders—the trial court effectively denied defendant the benefit of both those mitigating factors. (§ 190.3, factors (c) & (i).) Although the court noted that defendant had no prior felony convictions as an adult, it also pointed out that defendant had only been an adult for six months, but in that period defendant had committed three murders. Accordingly, the court found defendant's youth a factor that was "only minimally mitigating." Thus, the court independently reweighed factors (c) and (i), but found they added little to the mitigation side of the scale.

VI. Disposition

The judgment is affirmed. Defendant's request for a stay of execution is denied.

GEORGE, C.J., BAXTER, WERDEGAR, CHIN, MORENO, and CORRIGAN, JJ., concur.

39 Cal.4th 623

47 Cal.Rptr.3d 69

CLAREMONT POLICE OFFICERS ASSOCIATION, Plaintiff and Appellant,

v.

CITY OF CLAREMONT et al., Defendants and Respondents.

No. S120546.

Supreme Court of California.

Aug. 14, 2006.

Background: Police officers association sought a writ of mandate challenging city's policy requiring officers to record race and ethnicity of persons subject to vehicle stop but not arrested or cited. The Superior Court, Los Angeles County, No. KS007219, Conrad Richard Aragon, J., denied the petition. Association appealed. The Court of Appeal reversed, and the Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holding: The Supreme Court, Chin, J., held that city was not required, under

Meyers–Milias–Brown Act (MMBA), to meet and confer with association concerning implementation of racial profiling policy.

Judgment of the Court of Appeal reversed, and matter remanded.

Moreno, J., filed a concurring opinion in which Kennard, J., joined.

Opinion, 5 Cal.Rptr.3d 326, superseded.

1. Labor and Employment ⚿1115

Even if the public employer and the public employee organization meet and confer on specified issues of employment, as required by the Meyers–Milias–Brown Act (MMBA), they are not required to reach an agreement because the employer has the ultimate power to refuse to agree on any particular issue. West's Ann.Cal.Gov.Code §§ 3504, 3505.

2. Labor and Employment ⚿1115, 1482(2)

"Good faith" under Meyers–Milias–Brown Act (MMBA) provision requiring public employer and public employee organization to meet and confer on specified issues of employment, requires a genuine desire to reach agreement. West's Ann.Cal.Gov.Code §§ 3504, 3505.

See publication Words and Phrases for other judicial constructions and definitions.

3. Labor and Employment ⚿1128

Notwithstanding broad language in Meyers–Milias–Brown Act (MMBA) provision defining "scope of representation" for public employee organizations, to require an employer to bargain, its action or policy must have a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees. West's Ann.Cal. Gov.Code § 3504.

4. Labor and Employment ⚿1115

Even if a public employer's action or policy has a significant and adverse effect on the employees' bargaining unit's wages, hours, and working conditions, the employer may be excepted from bargaining requirements of the Meyers–Milias–Brown Act (MMBA) under the Act's exclusion for "merits, necessity, or organization" of any service or activity provided by law. West's Ann.Cal. Gov.Code § 3504.

5. Labor and Employment ⚿1115, 1124

If a public employer's action is taken pursuant to a fundamental managerial or policy decision, it is within the "scope of representation" under the bargaining requirements of the Meyers–Milias–Brown Act (MMBA) only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question. West's Ann. Cal.Gov.Code §§ 3504, 3505.

6. Labor and Employment ⚿1115

To determine whether a public employer's action requires it to meet and confer with employee organization under Meyers–Milias–Brown Act (MMBA), courts apply three-part inquiry: first, it asks whether management action has significant and adverse effect on wages, hours, or working conditions of bargaining-unit employees, and if not, there is no duty to meet and confer, second, it asks whether significant and adverse effect arises from implementation of fundamental managerial or policy decision, and if not, meet-and-confer requirement applies, and third, if both factors are present, courts apply balancing test under which action is within scope of representation only if employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question. West's Ann.Cal.Gov.Code §§ 3504, 3505.

7. Labor and Employment ⚿1124

City was not required, under Meyers–Milias–Brown Act (MMBA), to meet and confer with police officers association concerning implementation of city's racial profiling study requiring officers to record race and ethnicity of persons subject to vehicle stop but not arrested or cited; implementation of study did not have a significant and adverse effect on the officers' working conditions as study required only slightly more information than arrest or citation report, requiring only about

two minutes. West's Ann.Cal.Gov.Code §§ 3504, 3505.

See 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 577; Cal. Jur. 3d, Public Officers and Employees, §§ 233, 234.

Lackie & Dammeier, Dieter C. Dammeier and Michael A. Morguess, Upland, for Plaintiff and Appellant.

Rains, Lucia & Wilkinson and Alison Berry Wilkinson, Pleasant Hill, for Peace Officers Research Association of California's Legal Defense Fund as Amicus Curiae on behalf of Plaintiff and Appellant.

Liebert Cassidy Whitmore, Richard M. Kreisler, Los Angeles, Mark H. Meyerhoff; Best Best & Krieger, Jeffrey V. Dunn, Sonia R. Carvalho, Irvine and Sandra M. Schwarzmann for Defendants and Respondents.

Alan L. Schlosser, Mark Schlosberg, San Francisco; and Peter Eliasberg, Los Angeles, for American Civil Liberties Union Foundation of Northern California and American Civil Liberties Union Foundation of Southern California as Amici Curiae on behalf of Defendants and Respondents.

Jeffrey Kightlinger, Henry Barbosa, Henry Torres, Jr.; Atkinson, Andelson, Loya, Ruud & Romo, James F. Baca, Warren S. Kinsler, Nate Kowalski and Joshua E. Morrison, Cerritos, for Metropolitan Water District of Southern California as Amicus Curiae on behalf of Defendants and Respondents.

Meyers, Nave, Riback, Silver & Wilson, Andrea J. Saltzman and Arthur A. Hartinger, Oakland, for League of California Cities as Amicus Curiae on behalf of Defendants and Respondents.

CHIN, J.

In this case, we consider a provision of the Meyers–Milias–Brown Act (MMBA) (Gov. Code,[1] § 3500 et seq.), which governs labor-management relations at the local government level. Section 3505 mutually obligates a public employer and an employee organization to meet and confer in good faith about a matter within the "scope of representation" concerning, among other things, "wages, hours, and other terms and conditions of employment" (§ 3504). A fundamental managerial or policy decision, however, is outside the scope of representation (§ 3504), and is excepted from section 3505's meet-and-confer requirement.

For reasons that follow, we conclude that there is a distinction between an employer's fundamental managerial or policy decision and the implementation of that decision. To determine whether an employer's action implementing a fundamental decision is subject to the meet-and-confer requirement (§ 3505), we employ the test found in our decision in *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 660, 224 Cal.Rptr. 688, 715 P.2d 648 (*Building Material*).

Applying that test to the case at hand, we reverse the judgment of the Court of Appeal.

I. Factual and Procedural Background

Plaintiff Claremont Police Officers Association (Association) is an employee organization representing public employees of defendant City of Claremont (City), including police officers and recruits, police agents, communication officers, record clerks, jailors and parking enforcement officers. In May 2000, the City's police department (Department) implemented a tracking program to determine if police officers were engaging in racial profiling. The Association, as the "[r]ecognized employee organization," [2] did not request to meet and confer with the City beforehand. Under the program, if an officer stopped a vehicle or person without issuing a citation or making an arrest, the officer was required to radio the Department with information about the stop, including the person's race. The program lasted one year.

1. All further statutory references are to the Government Code unless otherwise indicated.

2. A "[r]ecognized employee organization" is "an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency." (§ 3501, subd. (b).)

After the City's police commission concluded that the data collected in the pilot tracking program was insufficient to determine whether officers engaged in racial profiling, the commission appointed a subcommittee and advisory panel to prepare a further study. In February 2002, the police commission adopted the subcommittee's recommendation that the Department implement a "Vehicle Stop Data Collection Study" (Study), which is at issue in this case. This Study required officers on all vehicle stops to complete a preprinted scantron form called a "Vehicle Stop Data Form" (Form). The Form included questions regarding the "driver's perceived race/ethnicity," and the "officers' prior knowledge of driver's race/ethnicity." On average, the Form takes two minutes to complete, and an officer may complete between four and six Forms for each 12–hour shift. Each Form is traceable to the individual officer making the stop. The Study was to last 15 months, commencing July 1, 2002.

In April 2002, the Association requested that the City meet and confer regarding the Study because it asserted "the implementation of policy and procedures in regards to this area falls under California Government Code section 3504." On April 11, 2002, the City gave written notice disagreeing that the Study fell within the scope of representation under section 3504. On June 27, 2002, the Department informed officers it would implement the Study effective July 1, 2002. On July 11, 2002, the Association filed a petition for writ of mandate to compel the City and the Department not to implement the Study until they meet and confer in good faith under the MMBA.

On August 22, 2002, the superior court denied the petition. In its detailed statement of findings and conclusions, the court concluded, among other things, that the Study did not substantially affect the terms and conditions of the Association members' employment, and that "given the de minimis impact upon workload, and the predominantly policy directed objectives of the Study, . . . the Study falls primarily within management prerogatives under § 3504, and is not a matter within the scope of representation requiring compliance with the meet and confer provisions of the MMBA."

The Court of Appeal reversed. While it concluded the City's decision to take measures to combat the practice of racial profiling and the public perception that it occurs is "a fundamental policy decision that directly affects the police department's mission to protect and to serve the public," the Court of Appeal held that "the decision precisely *how to implement* that fundamental policy, however, involves several variables affecting law enforcement officers and is not itself a fundamental policy decision." [3] The Court of Appeal explained that "the vehicle stop policy significantly affects officers' working conditions, particularly their job security and freedom from disciplinary action, their prospects for promotion, and the officers' relations with the public. Racial profiling is illegal. [Fn. omitted.] An officer could be accused of racial profiling and subjected to disciplinary action, denial of promotion, or other adverse action based in part on the information collected under the new policy. For this reason, the manner that the information is collected and the accuracy of the data and data analysis are matters of great concern to the association's members."

We granted review.

II. Discussion

A. Background of the MMBA

[1, 2] The MMBA applies to local government employees in California. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 614, fn. 4, 116 Cal.Rptr. 507, 526 P.2d 971 (*Fire Fighters Union*).) [4] "The MMBA

3. Although the Court of Appeal appeared at times to construe the City's fundamental decision as the decision to undertake measures against the practice of racial profiling, on the one hand, and the implementation of that decision as the adoption of the Study, on the other, neither of the parties adopts such a broad construction; nor do we. (See *post*, 47 Cal.Rptr.3d at pp. 75–76, 139 P.3d at pp. 537–538.)

4. The MMBA has its roots in the 1961 enactment of the George Brown Act, which originally appeared as sections 3500 through 3509. (See Stats.1961, ch.1964, pp. 4141–4143.) "The legislative revisions of 1968 and 1971 reserved those

has two stated purposes: (1) to promote full communication between public employers and employees, and (2) to improve personnel management and employer-employee relations. (§ 3500.) To effect these goals the act gives local government employees the right to organize collectively and to be represented by employee organizations (§ 3502), and obligates employers to bargain with employee representatives about matters that fall within the 'scope of representation.' (§§ 3504.5, 3505.)" (*Building Material, supra,* 41 Cal.3d at p. 657, 224 Cal.Rptr. 688, 715 P.2d 648.) The duty to meet and confer in good faith is limited to matters within the "scope of representation": the public employer and recognized employee organization have a "mutual obligation personally to meet and confer promptly upon request by either party ... and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year." (§ 3505.) Even if the parties meet and confer, they are not required to reach an agreement because the employer has "the ultimate power to refuse to agree on any particular issue. [Citation.]" (*Building Material, supra,* 41 Cal.3d at p. 665, 224 Cal.Rptr. 688, 715 P.2d 648.) However, good faith under section 3505 "requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25, 129 Cal.Rptr. 126.)

1. "Scope of representation"

Section 3504 defines "scope of representation" 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." (Italics added.) The definition of "scope of representation" and its exception are "arguably vague" and "overlapping." (*Building Material, supra,* 41 Cal.3d at p. 658, 224 Cal.Rptr. 688, 715 P.2d 648; *Fire Fighters Union, supra,* 12 Cal.3d at p. 615, 116 Cal.Rptr. 507, 526 P.2d 971.) "'[W]ages, hours and working conditions,' which, broadly read could encompass practically any conceivable bargaining proposal; and 'merits, necessity or organization of any service' which, expansively interpreted, could swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city's discretion." (*Fire Fighters Union, supra,* 12 Cal.3d at p. 615, 116 Cal.Rptr. 507, 526 P.2d 971.)

[3] Courts have interpreted "wages, hours, and other terms and conditions of employment," which phrase is not statutorily defined, to include the transfer of bargaining-unit work to nonunit employees (*Building Material, supra,* 41 Cal.3d at p. 659, 224 Cal.Rptr. 688, 715 P.2d 648; *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 119, 119 Cal.Rptr. 182); mandatory drug testing of employees (*Holliday v. City of Modesto* (1991) 229 Cal.App.3d 528, 530, 280 Cal.Rptr. 206 (*Holliday*)); work shift changes (*Independent Union of Pub. Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 487, 195 Cal.Rptr. 206); and the adoption of a disciplinary rule prohibiting use of city facilities for personal use (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 165 Cal.Rptr. 908). Notwithstanding section 3504's broad language, to require an employer to bargain, its action or policy must have "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees." (*Building Material, supra,* 41 Cal.3d at pp. 659–660, 224 Cal.Rptr. 688, 715 P.2d 648.)

2. "Merits, necessity or organization"

[4] Even if an employer's action or policy has a significant and adverse effect on the bargaining unit's wages, hours, and working conditions, the employer may be excepted from bargaining requirements under the "merits, necessity, or organization" language

sections for the Meyers–Milias–Brown Act, and reenacted the George Brown Act, now limited to the relationship between the state government and state employees, as Government Code sections 3525–3536." (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 335, fn. 5, 124 Cal.Rptr. 513, 540 P.2d 609.)

of section 3504. (*Building Material, supra,* 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648.) This exclusionary language, which was added in 1968, was intended to "forestall any expansion of the language of 'wages, hours and working conditions' to include more general managerial policy decisions." (*Fire Fighters Union, supra,* 12 Cal.3d at p. 616, 116 Cal.Rptr. 507, 526 P.2d 971; Stats.1968, ch. 1390, § 4, p. 2727.) "Federal and California decisions both recognize the right of employers to make unconstrained decisions when fundamental management or policy choices are involved." (*Building Material, supra,* 41 Cal.3d at p. 663, 224 Cal.Rptr. 688, 715 P.2d 648; *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 937, 143 Cal.Rptr. 255 (*Berkeley Police Assn.*) ["To require public officials to meet and confer with their employees regarding fundamental policy decisions such as those here presented, would place an intolerable burden upon fair and efficient administration of state and local government"]; see also *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, 678–679, 101 S.Ct. 2573, 69 L.Ed.2d 318 (*First National Maintenance*).)

Such fundamental managerial or policy decisions include changing the policy regarding a police officer's use of deadly force (*San Jose Peace Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, 947, 144 Cal.Rptr. 638 (*San Jose Peace Officer's Assn.*)), permitting a member of the citizen's police review commission to attend police department hearings regarding citizen complaints and sending a department member to review commission meetings (*Berkeley Police Assn., supra,* 76 Cal.App.3d 931, 143 Cal.Rptr. 255), and, in the context of private labor relations, closing a plant for economic reasons (*N.L.R.B. v. Royal Plating & Polishing Co.* (3d Cir.1965) 350 F.2d 191, 196 (*Royal Plating*)).

B. Distinction Between an Employer's Fundamental Decision and the Implementation and Effects of That Decision

Both parties agree that the City's decision to take measures against racial profiling, specifically its decision to implement the Study as a necessary first step, is a fundamental managerial or policy decision. Racial profiling, which has been defined as "the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped" (Pen.Code, § 13519.4, subd. (e)), is expressly prohibited by statute (*id.,* subd. (f)), and by the Department's policy.[5] The Legislature has made clear that the practice of racial profiling "presents a great danger to the fundamental principles of a democratic society. It is abhorrent and cannot be tolerated." (Pen.Code, § 13519.4, subd. (d)(1).) The City's decision to implement the Study was made in hopes to "improve relations between the police and the community and establish the Claremont Police Department as an open and progressive agency committed to being at the forefront of the best professional practices in law enforcement." (See *Building Material, supra,* 41 Cal.3d at p. 664, 224 Cal.Rptr. 688, 715 P.2d 648 [matters relating to "the betterment of police-community relations ... are of obvious importance, and directly affect the quality and nature of public services"]; *Berkeley Police Assn., supra,* 76 Cal.App.3d at p. 937, 143 Cal.Rptr. 255 [same]; see also *San Jose Peace Officer's Assn., supra,* 78 Cal.App.3d at p. 946, 144 Cal.Rptr. 638 ["the use of force policy is as closely akin to a managerial decision as any decision can be in running a police department"].) Thus, the Association concedes that the City "may have the right to unilaterally decide to implement a racial profiling study."

However, the Association maintains that the Study's implementation and effects involve many factors that are distinct from the City's fundamental decision to adopt the Study. These factors include, on the one hand, determining the methodology used in collecting the data, and on the other, determining the effects or use of the Study's data, i.e., whether the data would be used only for

5. The Department's policy provides: "Officers shall stop persons on the basis of all available information, not solely on the basis of race or ethnicity." (Dept. Rules & Regs., § 1.030.3.05.)

study purposes, whether results based on the analyzed data or results regarding individual officers would be made public, whether and under what circumstances the results could be used against officers (including imposing discipline or denying promotions), and what the implications are for officers' privacy and the potential for self-incrimination. The Association concludes that meeting and conferring on the Study's implementation and effects will not directly interfere with the City's right to exercise its managerial prerogative. The Association contends that although *Building Material* is distinguishable, it "completely recognizes this 'dichotomy.' "

The City, however, counters that the Court of Appeal misinterpreted section 3504 and calls this dichotomy "unprecedented." It maintains that a public employer's fundamental decision and the implementation of that decision "are integral to the nature of the public agency and are thus, *equally excluded* from the bargaining process under Section 3504." The City's amicus curiae, League of California Cities (League), argues that drawing an implementation distinction is both "artificial and unworkable" because "[i]t is pointless to adopt a policy if it cannot be implemented." According to the League, the Association's contention begs the question "how the City could implement the Study and collect the data if it were not known *how* the data would be collected and *how* it would be used." Another amicus curiae, Metropolitan Water District of Southern California, adds that "the policy and its implementation cannot be severed and analyzed separately. Rather, the former is interwoven with the latter, such that a decision to compel negotiation of the implementation would inevitably compel negotiation of the policy decision itself."

At the outset, we agree with the Association that there is a long-standing distinction under the National Labor Relations Act (NLRA) between an employer's unilateral management decision and the *effects* of that decision (29 U.S.C. § 158(d)), the latter of which are subject to mandatory bargaining. (*First National Maintenance, supra,* 452 U.S. at pp. 681–682, 101 S.Ct. 2573; *id.* at p. 677, fn. 15, 101 S.Ct. 2573; *Kirkwood Fabricators, Inc. v. N.L.R.B.* (8th Cir.1988) 862 F.2d 1303, 1306 ["Requiring effects bargaining maintains an appropriate balance between an employer's right to close its business and an employee's need for some protection from arbitrary action"].) In other words, although "an employer has the right unilaterally to decide that a layoff is necessary, he must bargain about such matters as the timing of the layoffs and the number and identity of employees affected. [Citation.]" (*Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 64, 151 Cal.Rptr. 547, 588 P.2d 249 [discussing cases under the NLRA]); see also 1 Chin et al., Cal Practice Guide: Employment Litigation (The Rutter Group 2005) ¶¶ 6:80–6:84, p. 6–11 [discussing effects bargaining under NLRA].) For example, matters deemed subject to effects bargaining include severance pay, vacation pay, seniority, and pensions. (*N.L.R.B. v. Transmarine Navigation Corporation* (9th Cir.1967) 380 F.2d 933, 939; *Royal Plating, supra,* 350 F.2d at p. 196 [union must have "opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision"].)

We agree with the City, however, that the issue before us is whether it was compelled to meet and confer with the Association before it required officers on their vehicle stops to fill out the Forms as part of the Study. Based on the limited record before us, there is no evidence regarding what effects would result from implementing the Study; for instance, whether the data collected and later analyzed will result in discipline if an officer is found to have engaged in racial profiling,[6]

6. Regarding any discipline that may result from an officer's failure to properly fill out the Form, the superior court found that "officers are already subject to discipline for not completing required reports." For purposes of the issue here, we conclude this type of discipline is distinguishable from any possible discipline which may be imposed if an officer is found to have engaged in racial profiling. (See *Berkeley Police Assn., supra,* 76 Cal.App.3d at p. 938, 143 Cal. Rptr. 255 [no change in working conditions where officers "were working under these rules and conditions even prior to the challenged practices"].)

or whether the City will publicize the Study's raw data. It is also not clear from the record what exact methodology the City has adopted to analyze the collected data to determine any racial profiling. Nor can we say that racial profiling studies have been so historically associated with employee discipline that their implementation invariably raises disciplinary issues. (Cf. *Holliday, supra,* 229 Cal.App.3d at p. 540, 280 Cal.Rptr. 206 [various details of implementing mandatory drug-testing policy subject to meet-and-confer requirement].) Thus, we do not decide the issue whether the City was required to meet and confer with the Association over any effects resulting from the City's decision to implement the Study. (See *Fibreboard Corp. v. NLRB* (1964) 379 U.S. 203, 223, 85 S.Ct. 398, 13 L.Ed.2d 233 (*Fibreboard*) (conc. opn. of Stewart, J.) [an "extremely indirect and uncertain" impact on job security may alone suffice to conclude such decisions do not concern conditions of employment].)

We disagree with the City's amici curiae that drawing a distinction between an employer's fundamental managerial or policy decision and the implementation of that decision, as a general matter, would be impossible or impractical. The reality is that "practically every managerial decision has some impact on wages, hours, or other conditions of employment." (*Westinghouse Electric Corporation v. N.L.R.B.* (4th Cir.1967) 387 F.2d 542, 548.) Indeed, section 3504 of the MMBA codifies the unavoidable overlap between an employer's policymaking discretion and an employer's action impacting employees' wages, hours, and working conditions. (See *ante,* 47 Cal.Rptr.3d at p. 74, 139 P.3d at p. 536; *Building Material, supra,* 41 Cal.3d at p. 657, 224 Cal.Rptr. 688, 715 P.2d 648; *Fire Fighters Union, supra,* 12 Cal.3d at p. 615, 116 Cal.Rptr. 507, 526 P.2d 971.) As we shall explain in greater detail below, while drawing a distinction may sometimes be difficult, the alternative—which would risk sheltering any and all actions that flow from an employer's fundamental decision from the duty to meet and confer—is contrary to established case law. (*Building Material, supra,* 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648; see also *First National Maintenance, supra,* 452 U.S. at p. 686, 101 S.Ct. 2573.) Although *Building Material* did not specifically decide the issue, our decision, as the City acknowledges, expressly contemplates that the implementation of an employer's fundamental decision ("action ... taken pursuant to a fundamental managerial or policy decision"), is a separate consideration for purposes of section 3505's meet-and-confer requirement. (*Building Material, supra,* 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648.)

Instead, we turn our focus to the City's implementation of the Study, requiring officers to fill out the Forms in order to collect data on possible racial profiling.

C. The Applicable Test

Emphasizing that the Court of Appeal erroneously created an "automatic presumption that a meet and confer is required if implementation of a fundamental decision significantly affects the terms and conditions of employment," the City urges that our decision in *Building Material, supra,* 41 Cal.3d 651, 224 Cal.Rptr. 688, 715 P.2d 648, requires us to perform a balancing test that also considers the employer's need for unencumbered decisionmaking. If the balance weighs in favor of the employer, there is no need to bargain even if the employer's action has a significant and adverse impact on the employees' working conditions. The Association counters that *Building Material's* balancing test would apply only to the fundamental decision itself and not to its implementation or its effects.

In *Building Material, supra,* 41 Cal.3d 651, 224 Cal.Rptr. 688, 715 P.2d 648, the City and County of San Francisco unilaterally eliminated two bargaining unit positions and reorganized and reclassified duties of hospital truck drivers who were members of the Building Material and Construction Teamsters' Union, Local 216 (Union). The city transferred certain work duties to new positions that were not in the Union's bargaining unit. (*Building Material, supra,* 41 Cal.3d at p. 655, 224 Cal.Rptr. 688, 715 P.2d 648.) The Union requested to meet and confer with city agencies regarding the city's action;

however, the request was denied on grounds that this matter was not within the meet-and-confer obligations under the MMBA. (*Building Material, supra,* 41 Cal.3d at p. 656, 224 Cal.Rptr. 688, 715 P.2d 648.)

After reviewing the background and purposes of the MMBA (*Building Material, supra,* 41 Cal.3d at pp. 657–660, 224 Cal.Rptr. 688, 715 P.2d 648), we concluded that the city was required to meet and confer (§ 3505) with the Union because the city's transfer of duties to a non-bargaining unit had a significant and adverse effect on the bargaining unit's wages, hours, and working conditions. (*Building Material, supra,* 41 Cal.3d at pp. 663–664, 224 Cal.Rptr. 688, 715 P.2d 648.) We rejected the city's assertion that its action was exempted as a fundamental policy decision because it concerned the effective operation of local government. (*Id.* at p. 664, 224 Cal.Rptr. 688, 715 P.2d 648.) The "decision to reorganize certain work duties was hardly 'fundamental.' It had little, if any, effect on public services. Rather, it primarily impacted the wages, hours, and working conditions of the employees in question and thus was a proper subject for mandatory collective bargaining. Indeed, defendants' claim to the contrary is in conflict with the statutory framework of the MMBA: any issue involving wages, for example, would affect the cost of government services, but such matters are specifically included in the scope of representation as defined in section 3504." (*Ibid.*)

[5] Going on to explain that an employer's fundamental decision may have a significant and adverse effect on the bargaining unit's wages, hours, or working conditions (*Building Material, supra,* 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648), we considered whether "an action . . . taken pursuant to a fundamental managerial or policy decision" may be within the scope of representation (§ 3504), and thus subject to a duty to meet and confer. (*Building Material, supra,* 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648.) As relevant here, such an action would encompass an employer's steps to implement the details of the fundamental decision. Under that circumstance, a balancing test would apply: "If an action is taken pursuant to a fundamental managerial or policy decision, it is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." (*Building Material, supra,* 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648, citing *First National Maintenance, supra,* 452 U.S. at p. 686, 101 S.Ct. 2573; see *Berkeley Police Assn., supra,* 76 Cal.App.3d at p. 937, 143 Cal.Rptr. 255; see also *San Francisco Fire Fighters Local 798 v. Board of Supervisors* (1992) 3 Cal.App.4th 1482, 1494, 5 Cal.Rptr.2d 176 (*San Francisco Fire Fighters*).)

The high court applied a similar balancing test in *First National Maintenance, supra,* 452 U.S. 666, 101 S.Ct. 2573. While recognizing an employer's "freedom to manage its affairs unrelated to employment," the high court balanced the competing interests to determine whether mandatory bargaining was required when a fundamental management decision directly impacted employment. (*First National Maintenance, supra,* 452 U.S. at p. 677, 101 S.Ct. 2573.) The high court concluded: "[I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." (*Id.* at p. 679, 101 S.Ct. 2573; see also *id.* at p. 686, 101 S.Ct. 2573.) In discussing the issues subject to collective bargaining (*id.* at p. 676, 101 S.Ct. 2573), the high court explained that employers' management decisions may range from having "only an indirect and attenuated impact on the employment relationship," to being "almost exclusively 'an aspect of the relationship' between employer and employee," to having "a direct impact on employment" though the decision is " 'not in [itself] primarily about conditions of employment. . . .' " (*Id.* at pp. 676–677, 101 S.Ct. 2573, brackets in *First National Maintenance;* see also *Fibreboard, supra,* 379 U.S. at p. 223, 85 S.Ct. 398 (conc. opn. of Stewart, J.).)

The balancing test under *Building Material*, which has been described as a "fluid standard" (*San Francisco Fire Fighters, supra*, 3 Cal.App.4th at p. 1494, 5 Cal.Rptr.2d 176), properly considers the competing interests while furthering the MMBA's neutral purpose to "promote communication between public employers and employees and to improve personnel management. (§ 3500.)" (*Building Material, supra*, 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648; see also *First National Maintenance, supra*, 452 U.S. at pp. 680–681, 101 S.Ct. 2573 [NLRA "is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved"].) We conclude it applies to determine whether management must meet and confer with a recognized employee organization (§ 3505) when the implementation of a fundamental managerial or policy decision significantly and adversely affects a bargaining unit's wages, hours, or working conditions.

In view of the vast range of management decisions and to give guidance on whether a particular matter is subject to a duty to meet and confer (§ 3505) under *Building Material, supra*, 41 Cal.3d at page 660, 224 Cal. Rptr. 688, 715 P.2d 648, we find instructive the high court's observation that "[t]he concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. [Citations.] This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process." (*First National Maintenance, supra*, 452 U.S. at p. 678, 101 S.Ct. 2573, fn. omitted.) To that end, when balancing competing interests a court may also consider whether "the transactional cost of the bargaining process outweighs its value. [Citations.]" (*Social Services Union v. Board of Supervisors* (1978) 82 Cal.App.3d 498, 505, 147 Cal.Rptr. 126 (*Social Services Union*) [discussing NLRA].) We believe this "transactional cost" factor is not only consistent with the *Building Material* balancing test, but its application also helps to ensure that a duty to meet and confer is invoked only when it will serve its purpose.

[6] In summary, we apply a three-part inquiry. First, we ask whether the management action has "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees." (*Building Material, supra*, 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648.) If not, there is no duty to meet and confer. (See § 3504; see also *ante*, 47 Cal.Rptr.3d at pp. 74–75, 139 P.3d at pp. 536–537.) Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then, as in *Building Material*, the meet-and-confer requirement applies. (*Building Material, supra*, 41 Cal.3d at p. 664, 224 Cal.Rptr. 688, 715 P.2d 648.) Third, if both factors are present—if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on the wages, hours, or working conditions of the employees—we apply a balancing test. The action "is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." (*Building Material, supra*, 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648.) In balancing the interests to determine whether parties must meet and confer over a certain matter (§ 3505), a court may also consider whether the "transactional cost of the bargaining process outweighs its value." (*Social Services Union, supra*, 82 Cal.App.3d at p. 505, 147 Cal.Rptr. 126.)

Next, we apply the foregoing standard to the facts of this case to determine whether the City was required to meet and confer (§ 3505) with the Association before implementing the Study.

D. Application to the Present Case

[7] Applying the test under *Building Material*, we conclude that the implementation of the Study did not have a significant and adverse effect on the officers' working conditions. (*Building Material, supra*, 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d

648.) The record reflects that "[i]n those cases resulting in citation or arrest, the Study requires slightly more information to be collected by the officer than required in completing the citation or arrest report." Based on "undisputed evidence," the superior court determined that officers may complete a Form in about two minutes and may complete between four and six such Forms in a 12–hour shift. The superior court concluded that the impact on the officers' working conditions was de minimis. We agree and conclude the City was not required to meet and confer (§ 3505) with the Association before implementing the Study. Because there was no significant and adverse effect, we need not balance the City's need for unencumbered decisionmaking—in this case, its policymaking prerogative to eliminate the practice and perception of racial profiling and to determine the best means for doing so—against the benefit to employer-employee relations from bargaining about the subject. (*Building Material, supra,* 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648; see also *First National Maintenance, supra,* 452 U.S. at p. 686, 101 S.Ct. 2573.)

In conclusion, we emphasize the narrowness of our holding. In determining that the City was not required to meet and confer with the Association before implementing the Study, we do not decide whether such a duty would exist should issues regarding officer discipline, privacy rights, and other potential effects (see *ante,* 47 Cal.Rptr.3d at pp. 76–77, 139 P.3d at pp. 538–539), arise after the City implements the Study. Based on the record, that question is not before us.

III. Disposition

We reverse the judgment of the Court of Appeal and remand for further proceedings consistent with our opinion.

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, WERDEGAR, MORENO, and CORRIGAN, JJ.

Concurring Opinion by MORENO, J.

I agree with the majority's narrow holding that the City of Claremont (City) need not meet and confer regarding its decision to conduct a racial profiling study and to adopt a particular data collection method in implementing the study, and that we need not consider other issues raised by the Claremont Police Officers Association (Association). As the majority states: "Based on the limited record before us, there is no evidence regarding what effects would result from implementing the Study; for instance, whether the data collected and later analyzed will result in discipline if an officer is found to have engaged in racial profiling, or whether the City will publicize the Study's raw data. It is also not clear from the record what exact methodology the City has adopted to analyze the collected data to determine any racial profiling. Nor can we say that racial profiling studies have been so historically associated with employee discipline that their implementation invariably raises disciplinary issues. (Cf. *Holliday* [*v. City of Modesto* (1991)] 229 Cal.App.3d [528,] 540 [280 Cal. Rptr. 206] [various details of implementing mandatory drug-testing policy subject to meet-and-confer requirement].) Thus, we do not decide the issue whether the City was required to meet and confer with the Association over any effects resulting from the City's decision to implement the Study." (Maj. opn., *ante,* 47 Cal.Rptr.3d at pp. 76–77, 139 P.3d at pp. 538–539, fn. omitted.) Instead, the majority opinion addresses only "the City's implementation of the Study, requiring officers to fill out the Forms in order to collect data on possible racial profiling." (*Id.* at p. 77, 139 P.3d at p. 539.)

That having been said, it is no doubt true that the study results may potentially be used to discipline police officers or may have other adverse employment consequences for them, because racial profiling is a serious form of police misconduct. In my view, the use of the study as an additional basis for discipline would give rise to a duty on the City's part to meet and confer with the Association. The City's adoption of a new basis for disciplining police officers goes to the heart of officers' employment security, and is therefore one of the critical "terms and conditions of employment" at the core of Government Code section 3504. (See *Fire*

Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 618, 116 Cal.Rptr. 507, 526 P.2d 971.) Although the City plainly has the authority and responsibility to discipline officers who persistently engage in racial profiling, its unfettered right to do so does not outweigh the Association's interest in ensuring, through negotiations with the City, that any such discipline follows due process and that the study results have been accurately and fairly analyzed.

I CONCUR: KENNARD, J.

Exhibit 6

***Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005)**
35 Cal.4th 107

35 Cal.4th 1072
29 Cal.Rptr.3d 234

COACHELLA VALLEY MOSQUITO AND VECTOR CONTROL DISTRICT, Plaintiff and Appellant,

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD, Defendant and Respondent;

California School Employees Association et al., Real Parties in Interest.

No. S122060.

Supreme Court of California.

June 9, 2005.

Background: A mosquito and vector control district petitioned for a writ of prohibition or mandate directing the Public Employment Relations Board (PERB) to dismiss a complaint the PERB issued on behalf of the California School Employees Association (CSEA) and against the district for unfair practices in violation of the Myers-Milias-Brown Act (MMBA). The Superior Court, Riverside County, No. INC26814, Charles Everett Stafford, Jr., J., denied the petition, and the district appealed. The Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Kennard, J., held that:

(1) district was excused from exhausting administrative remedies;

(2) six-month limitations period applied to MMBA unfair practices charges filed with PERB; and

(3) shortened limitations period applied retroactively provided parties were given reasonable time in which to file.

Judgment of the Court of Appeal affirmed.

Opinion, 7 Cal.Rptr.3d 444, superseded.

1. Administrative Law and Procedure ⚖229

In general, a party must exhaust administrative remedies before resorting to the courts.

2. Administrative Law and Procedure ⚖229

Under exhaustion of administrative remedies rule, an administrative remedy is "exhausted" only upon termination of all available, nonduplicative administrative review procedures.

See publication Words and Phrases for other judicial constructions and definitions.

3. Administrative Law and Procedure ⚖229

The exhaustion of administrative remedies doctrine is principally grounded on concerns favoring administrative autonomy, i.e., courts should not interfere with an agency determination until the agency has reached a final decision, and judicial efficiency, i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary.

4. Administrative Law and Procedure ⚖229

The exhaustion of administrative remedies requirement applies to defenses as well as to claims for affirmative relief.

5. Administrative Law and Procedure ⚖229

One exception to the exhaustion of administrative remedies doctrine is where exhaustion would be futile; this exception requires that the party invoking the exception can positively state that the agency has declared what its ruling will be on a particular case.

6. Labor and Employment ⚖1861

Futility exception to exhaustion of administrative remedies doctrine did not excuse failure of mosquito and vector control district to exhaust its administrative remedies before seeking judicial remedies, on both jurisdictional and limitations grounds, concerning unfair practices complaint that California Public Employment Relations Board (PERB) filed under Meyers–Milias–Brown Act (MMBA), even though PERB had declared in other cases that three-year limitation period applied to MMPA unfair practices charges,

rather than six months as district contended; for exception to apply, district was required to show PERB's ruling on entire case, not only on limitations defense. West's Ann.Cal. Gov.Code § 3500 et seq.

7. Administrative Law and Procedure ⚭229

To apply the futility exception to the exhaustion of administrative remedies, it is not sufficient that a party can show what the agency's ruling would be on a particular issue or defense; rather, the party must show what the agency's ruling would be on a particular case.

8. Labor and Employment ⚭1861

Mosquito and vector control district was excused from exhausting its administrative remedies with California Public Employment Relations Board (PERB) by claiming that PERB lacked authority, by virtue of alleged limitations period, to rule on complaint of unfair practices under Myers-Milias-Brown Act (MMBA) by California School Employees Association (CSEA) limitations period.

9. Administrative Law and Procedure ⚭229

Under an exception to the exhaustion of administrative remedies doctrine, exhaustion may be excused when a party claims that the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties.

10. Administrative Law and Procedure ⚭229

In deciding whether to entertain a claim that an administrative agency lacks jurisdiction before the agency proceedings have run their course, and therefore party is excused from exhausting administrative remedies, a court considers three factors: the injury or burden that exhaustion will impose, the strength of the legal argument that the agency lacks jurisdiction, and the extent to which administrative expertise may aid in resolving the jurisdictional issue.

11. Labor and Employment ⚭1115, 1488

The duty to bargain under the Myers-Milias-Brown Act (MMBA), which governs collective bargaining and employer-employee relations for most California local public entities, requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse. West's Ann.Cal.Gov. Code § 3505.

12. Labor and Employment ⚭1920

Six-month limitations period, rather than three-year period generally applied to court actions to enforce state labor laws, applies to Myers-Milias-Brown Act (MMBA) unfair practices charges filed with Public Employment Relations Board (PERB); although limitations period is not expressed in legislative act transferring jurisdiction of enforcement of MMBA claims to PERB, six-month period is in harmony with other public employment relations statutory schemes. West's Ann. Cal.Gov.Code § 3509; West's Ann.Cal.C.C.P. § 338(a).

See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 456B; Cal. Jur. 3d, Public Officers and Employees, § 225 et seq.

13. Statutes ⚭181(1), 184

When engaged in statutory construction, the court's goal is to ascertain the intent of the enacting legislative body so that the court may adopt the construction that best effectuates the purpose of the law.

14. Statutes ⚭220

The presumption of legislative acquiescence in prior judicial decisions is not conclusive in determining legislative intent.

15. Administrative Law and Procedure ⚭311

The statutes of limitations set forth in the Code of Civil Procedure do not apply to administrative proceedings.

16. Statutes ⚭223.1

Courts do not construe statutes in isolation; rather, they construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided.

17. Labor and Employment ⚭1432

Legislation transferring jurisdiction of enforcement of Myers-Milias-Brown Act

(MMBA) unfair practices charges from courts to Public Employment Relations Board (PERB) as of July 1, 2001, thereby shortening limitations period from three years to six months applies retroactively to MMBA unfair practice charges based on conduct that occurred before July 1, 2001, provided that parties are given a reasonable time in which to file such charges with the PERB; thus, for MMBA unfair practices occurring before July 1, 2001, charge filed with PERB is timely if brought within three years of occurrence of unfair practice, or within six months of July 1, 2001, whichever was sooner.

18. Limitation of Actions ⚖6(1)

Legislation that shortens a limitations period is considered procedural and is applied retroactively to preexisting causes of action, so long as parties are given a reasonable time in which to sue.

19. Limitation of Actions ⚖6(1)

When necessary to provide a reasonable time to sue, a shortened limitations period may be applied prospectively so that it commences on the effective date of the statute, rather than on the date the cause of action accrued.

Lisa Garvin Copeland, Palm Desert, for Plaintiff and Appellant.

Jack L. White, City Attorney (Anaheim), and Carol J. Flynn, Assistant City Attorney for the Cities of Anaheim, Carlsbad, Indian Wells, Monterey, Redlands, San Buenaventura, San Luis Obispo, San Pablo, Santa Paula, Walnut Creek, the California Association of Sanitation Agencies, the Orange County Vector Control District and the Sunline Transit Agency as Amici Curiae on behalf of Plaintiff and Appellant.

Ben Allamano for Mosquito and Vector Control Association of California as Amicus Curiae on behalf of Plaintiff and Appellant.

Robert Thompson, Sacramento, and Kristin L. Rosi for Defendant and Respondent.

Rothner, Segall & Greenstone, Glenn Rothner, Emma Leheny and Jean Shin, Pasadena, for American Federation for State, County and Municipal Employees Union, AFL–CIO as Amicus Curiae on behalf of Defendant and Respondent.

Michael R. Clancy, Madalyn J. Frazzini and Sonja J. Woodward, San Jose, for Real Party in Interest and Respondent California School Employees Association.

No appearances for Real Parties in Interest and Respondents Ramon C. Gonzalez, Mike Martinez, Jeffrey Garcia and Virginia Sanchez.

KENNARD, J.

The Meyers–Milias–Brown Act (Gov.Code, §§ 3500–3511; hereafter the MMBA) governs collective bargaining and employer-employee relations for most California local public entities, including cities, counties, and special districts. Before July 1, 2001, an employee association claiming a violation of the MMBA could bring an action in superior court. (See *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 541–542, 28 Cal.Rptr.2d 617, 869 P.2d 1142.) Effective July 1, 2001, however, the Legislature vested the California Public Employment Relations Board (PERB) with exclusive jurisdiction over alleged violations of the MMBA.[1] (Gov.Code, § 3509, added by Stats.2000, ch. 901, § 8.) In making this fundamental change, the Legislature did not specify a limitations period for making an MMBA unfair practice charge to the PERB. Under every other public employment law subject to the PERB's jurisdiction, however, the Legislature has expressly designated six months as the limitations period for making an unfair practice charge. (See Gov.Code, §§ 3514.5, subd. (a), 3541.5, subd. (a), 3563.2, subd. (a), 71639.1, subd. (c), 71825, subd. (c); Pub. Util.Code, § 99561.2, subd. (a).)

The main issue here is whether the limitations period for making an MMBA unfair practice charge to the PERB is three years, which the PERB insists was the generally

1. Exempt from the PERB's jurisdiction under the MMBA are peace officers, management employees, the City of Los Angeles, and the County of Los Angeles. (Gov.Code, §§ 3509, subds.(d)-(e), 3511.)

accepted limitations period for an MMBA cause of action filed in superior court (see *Giffin v. United Transportation Union* (1987) 190 Cal.App.3d 1359, 1365, 236 Cal. Rptr. 6 [holding that three years is the statute of limitations for an alleged violation of state labor law, without mentioning the MMBA]), or six months, which is the limitations period for all other unfair practice charges subject to the PERB's jurisdiction. We conclude the limitations period is six months.

This case presents two additional issues. One issue, which we address first, is whether this action is barred by the doctrine requiring exhaustion of administrative remedies. On this issue, we conclude that the failure to exhaust administrative remedies is excused because this action challenges the PERB's jurisdiction and raises issues of law with broad public importance. The other issue concerns retroactive application of the shortened limitations period. On this issue, we conclude that the shortened limitations period applies retroactively, but also that when an unfair practice charge is based on conduct before the effective date of the shortened limitations period, the charge is timely if filed within three years of the alleged unfair practice or before January 1, 2002, whichever occurs sooner.

Because the Court of Appeal's judgment is consistent with these conclusions, we affirm.

I. Facts and Procedural Background

On July 6, 2001, the California School Employees Association (CSEA) filed an MMBA unfair practice charge with the PERB against the Coachella Valley Mosquito and Vector Control District (District), a special district (see Health & Saf.Code, § 2000 et seq. [formerly § 2200 et seq.]) subject to the MMBA. The CSEA amended the charge on August 29, 2001. In the amended charge, the CSEA, as the exclusive employee representative of a bargaining unit of the District's employees, alleged that the District had discriminated against several CSEA-represented employees for their participation in negotiations for a memorandum of understanding, interfered with the rights of additional unit members by threatening disciplinary action if they engaged in activity protected under the MMBA, and unilaterally changed the means by which employees' annual performance evaluations were prepared and administered. On October 23, 2001, the PERB issued a complaint against the District on these allegations, alleging that the District had committed specified unfair practices on various dates between December 1999 and July 2001.

On November 13, 2001, the District filed an answer to the complaint and a motion to dismiss it. In the motion, the District argued that the PERB lacked jurisdiction over alleged MMBA violations occurring before July 1, 2001, and that six months was the limitations period for an MMBA unfair practice charge. On December 5, 2001, the PERB's board agent denied the motion to dismiss.

The District objected to the board agent's ruling and requested a ruling by the PERB itself. Under a PERB regulation, however, the PERB does not review a board agent's interim ruling unless the agent joins in the party's request for review. (Cal.Code Regs., tit. 8, § 32200.) On January 3, 2002, the board agent refused to join in the District's request.

On January 9, 2002, the District petitioned the superior court for writs of mandate and prohibition, naming the CSEA and certain District employees as real parties in interest and arguing that the PERB lacked jurisdiction to issue the complaint.[2] After the PERB filed preliminary opposition, the superior court issued an order to show cause. Both the CSEA and the PERB then filed formal opposition in which they argued, among other things, that the District's action was barred because the administrative proceedings had not concluded and therefore the District had not exhausted its administrative remedies. The superior court held a brief hearing, after which it denied the petition, concluding that the District was not required

2. Final decisions of the PERB are now reviewable by a writ petition filed directly in the Court of Appeal, rather than in the superior court. (Gov. Code, § 3509.5, subd. (b), added by Stats.2002, ch. 1137, § 3.)

to exhaust its administrative remedies before challenging the PERB's jurisdiction, that the PERB had jurisdiction over alleged MMBA violations occurring before July 1, 2001, that the limitations period for alleging these violations was three years, and that the PERB therefore had jurisdiction over each unfair practice alleged in the complaint.

The District appealed from the superior court's judgment denying the petition. In May 2002, while the appeal was pending, the District and the CSEA executed a settlement agreement covering the merits of the unfair practices charge, the CSEA withdrew the charge, and the PERB complaint was dismissed. Although the settlement had rendered it moot, the appeal nonetheless proceeded, and all parties joined in urging the Court of Appeal to issue a decision on the merits. The court granted requests for judicial notice of various legislative history documents. On December 9, 2003, the court issued its decision.

The Court of Appeal held: (1) Because the appeal presented issues of broad public interest that were likely to recur, the court could properly resolve those issues even though the case had become moot;[3] (2) the District's action was not barred by the rule requiring exhaustion of administrative remedies because exhaustion would have been futile; (3) the PERB had jurisdiction to issue a complaint based on unfair practices occurring before July 1, 2001;[4] (4) the limitations period for an MMBA unfair practice charge filed with the PERB is six months; and (5) to prevent unfair retroactive application of the shortened limitations period, charges based on unfair practices occurring before July 1, 2001, were timely if filed with the PERB within three years of their occurrence or before January 1, 2002, whichever occurred first. Applying these holdings to the facts, the Court of Appeal concluded that the CSEA's unfair practice charge was timely filed as to all of the alleged unfair practices, and therefore it affirmed the trial court's judgment.

This court granted the PERB's petition for review.

II. Exhaustion of Administrative Remedies

[1, 2] In general, a party must exhaust administrative remedies before resorting to the courts. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292, 109 P.2d 942; see *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1148, 43 Cal.Rptr.2d 693, 899 P.2d 79.) Under this rule, an administrative remedy is exhausted only upon "termination of all available, nonduplicative administrative review procedures." (*California Correctional Peace Officers Assn. v. State Personnel Bd., supra*, at p. 1151, 43 Cal.Rptr.2d 693, 899 P.2d 79; see also *Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 933, 16 Cal.Rptr.3d 849, 94 P.3d 1055 [exhaustion requires agency decision of " 'entire controversy' "]; *People v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 124, 3 Cal.Rptr.3d 429 [administrative process must " ' "run its course" ' "]; *Bleeck v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 432, 95 Cal.Rptr. 860 [exhaustion requires "a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings"].)

[3, 4] "The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary)."

3. We agree with the Court of Appeal that this case poses issues of broad public interest that are likely to recur, and we conclude that the Court of Appeal did not abuse its discretion in deciding to resolve those issues even though this case has become moot. (See *Cadence Design Systems, Inc. v. Avant! Corp.* (2002) 29 Cal.4th 215, 218, fn. 2, 127 Cal.Rptr.2d 169, 57 P.3d 647; *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 172, 126 Cal.Rptr.2d 727, 56 P.3d 1029; *People v. Cheek* (2001) 25 Cal.4th 894, 897–898, 108 Cal.Rptr.2d 181, 24 P.3d 1204; *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 829, fn. 4, 50 Cal.Rptr.2d 101, 911 P.2d 1.)

4. No party has challenged this holding.

(*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391, 6 Cal.Rptr.2d 487, 826 P.2d 730; accord, *Jonathan Neil & Assoc., Inc. v. Jones, supra,* 33 Cal.4th at p. 932, 16 Cal.Rptr.3d 849, 94 P.3d 1055; see also *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501, 87 Cal.Rptr.2d 702, 981 P.2d 543.) The exhaustion requirement applies to defenses as well as to claims for affirmative relief (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57, 109 Cal.Rptr.2d 14, 26 P.3d 343; see *Top Hat Liquors v. Department of Alcoholic Beverage Control* (1974) 13 Cal.3d 107, 110, 118 Cal. Rptr. 10, 529 P.2d 42), and we have described exhaustion of administrative remedies as "a jurisdictional prerequisite to resort to the courts" (*Abelleira v. District Court of Appeal, supra,* 17 Cal.2d at p. 293, 109 P.2d 942; accord, *Styne v. Stevens, supra,* at p. 56, 109 Cal.Rptr.2d 14, 26 P.3d 343; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70, 99 Cal.Rptr.2d 316, 5 P.3d 874).

[5] The doctrine requiring exhaustion of administrative remedies is subject to exceptions. (*Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1827, 17 Cal.Rptr.2d 323.) Under one of these exceptions, "[f]ailure to exhaust administrative remedies is excused if it is clear that exhaustion would be futile." (*Jonathan Neil & Assoc., Inc. v. Jones, supra,* 33 Cal.4th at p. 936, 16 Cal.Rptr.3d 849, 94 P.3d 1055; see also *Honig v. Doe* (1988) 484 U.S. 305, 327, 108 S.Ct. 592, 98 L.Ed.2d 686.) "The futility exception requires that the party invoking the exception 'can positively state that the [agency] has declared what its ruling will be on a particular case.' " (*Jonathan Neil & Assoc., Inc. v. Jones, supra,* at p. 936, 16 Cal.Rptr.3d 849, 94 P.3d 1055; see also *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89, 61 Cal.Rptr.2d 134, 931 P.2d 312; *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal. App.4th 677, 691, 67 Cal.Rptr.2d 323.)

[6] Here, the Court of Appeal concluded that the futility exception excused the District's failure to exhaust its administrative remedies because the PERB had held, in other cases, that all MMBA unfair practice charges filed with the PERB on and after July 1, 2001, are subject to the three-year limitations period in Code of Civil Procedure section 338. Therefore, the PERB had declared what its ruling would be on the limitations issue, even though it had not reviewed the board agent's ruling in this particular matter.

[7] That analysis is flawed. For the futility exception to apply, it is not sufficient that a party can show what the agency's ruling would be on a particular *issue or defense.* Rather, the party must show what the agency's ruling would be " 'on a particular *case.*' " (*Jonathan Neil & Assoc., Inc. v. Jones, supra,* 33 Cal.4th at p. 936, 16 Cal. Rptr.3d 849, 94 P.3d 1055, italics added.) This follows from the exhaustion doctrine itself, which "precludes review of an intermediate or interlocutory action of an administrative agency." (*Alta Loma School Dist. v. San Bernardino County Com. on School Dist. Reorganization* (1981) 124 Cal.App.3d 542, 554, 177 Cal.Rptr. 506; see also *McHugh v. County of Santa Cruz* (1973) 33 Cal.App.3d 533, 538–539, 109 Cal.Rptr. 149 [exhaustion doctrine "requires that a party must not only initially raise the issue in the administrative forum, but he must proceed through the entire proceeding to a final decision on the merits of the entire controversy"].)

Here, it is not sufficient that we know what the PERB's final ruling would have been on the District's limitations defense. For the futility exception to apply, the District must show how the PERB would have ruled on the CSEA's unfair practices charge. Had the administrative proceeding run its course, the District might have prevailed on some procedural ground other than expiration of the limitations period, or it might have prevailed on the merits. Thus, the District did not show that further administrative proceedings would have been futile because the outcome of those proceedings was known in advance.

[8, 9] Although we do not agree with the Court of Appeal's reasoning, we agree with its conclusion that the District was excused from exhausting its administrative remedies with the PERB. Under another exception, exhaustion of administrative remedies may

be excused when a party claims that "the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties." (*Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515, 521, 205 Cal.Rptr. 6; see also *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787, 798, 322 P.2d 449; *City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337, 360, 13 Cal.Rptr.3d 107; *Buckley v. California Coastal Com.* (1998) 68 Cal.App.4th 178, 191, 80 Cal.Rptr.2d 562; *People ex rel. Dept. of Conservation v. Triplett* (1996) 48 Cal.App.4th 233, 258, 55 Cal.Rptr.2d 610.)

Here, the limitations issue implicates the PERB's administrative authority or jurisdiction because the District contends that the applicable limitations period for MMBA unfair practice charges is found in Government Code section 3541.5, subdivision (a), which states that the PERB "shall not ... [¶] ... [i]ssue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." Under this provision, expiration of the six-month limitation period deprives the PERB of authority to issue a complaint.

[10] In deciding whether to entertain a claim that an agency lacks jurisdiction before the agency proceedings have run their course, a court considers three factors: the injury or burden that exhaustion will impose, the strength of the legal argument that the agency lacks jurisdiction, and the extent to which administrative expertise may aid in resolving the jurisdictional issue. (*Public Employment Relations Bd. v. Superior Court, supra,* 13 Cal.App.4th at p. 1830, 17 Cal.Rptr.2d 323.)

Here, in regard to the first factor, the District did not show that it would suffer any unusual or irreparable injury if it were required to litigate the CSEA's unfair practices charge to completion before obtaining a judicial resolution of the jurisdictional limitations issues. (See *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1269, 258 Cal.Rptr. 66 [administrative remedy not inadequate "merely because additional time and effort would be consumed by its being pursued through the ordinary course of the law"].) But the District is not the only party affected by this issue, and there is a significant public interest in obtaining a definitive resolution of this fundamental legal question. (See *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 170–171, 6 Cal.Rptr.2d 714 [exhaustion excused because of urgent need of judicial determination]; see also *Lindeleaf v. Agricultural Labor Relations Bd.* (1986) 41 Cal.3d 861, 871, 226 Cal.Rptr. 119, 718 P.2d 106 [exhaustion excused when case raises "important questions of public policy"]; *Action Apartment Assn. v. Santa Monica Rent Control Bd.* (2001) 94 Cal.App.4th 587, 615, 114 Cal.Rptr.2d 412 [same].) So the first factor weighs in favor of judicial intervention.

In regard to the second factor, as explained more fully in the next part of this opinion, the District makes a strong and ultimately persuasive argument that the proper limitations period is six months and not, as the PERB has ruled, three years. Thus, the second factor also weighs in favor of excusing exhaustion. Finally, in regard to the third factor, judicial intervention at this stage will not deny us the benefit of the PERB's administrative expertise; the issues are purely legal and of a kind within the expertise of courts, and we have received the benefit of the PERB's views on the issues through its briefs in this court. Accordingly, we conclude that all three factors favor judicial intervention. Thus, the administrative jurisdiction exception to the exhaustion doctrine applies, and the District's failure to exhaust administrative remedies is excused.

III. Statute of Limitations

To determine the limitations period for an unfair practice charge to the PERB alleging an MMBA violation, we begin by reviewing the history of the MMBA and of the PERB.

A. The MMBA

In 1961, the Legislature enacted the George Brown Act (Stats.1961, ch.1964, pp. 4141–4143), which for the first time recognized the rights of state and local public employees to organize and to have their rep-

resentatives meet and confer with their public agency employers over wages and working conditions. In 1968, the Legislature went a step further by enacting the MMBA (Stats.1968, ch. 1390, pp. 2725–2729), which "authorized labor and management representatives not only to confer but to enter into written agreements for presentation to the governing body of a municipal government or other local agency." (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 331, 124 Cal.Rptr. 513, 540 P.2d 609, fn. omitted; see also *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780–781, 35 Cal.Rptr.2d 814, 884 P.2d 645.) Although the MMBA covered most employees of local public entities, it did not include school districts' employees. (Stats.1968, ch. 1390, § 2, p. 2726; see *Glendale City Employees' Assn., Inc. v. City of Glendale, supra,* at p. 331, fn. 1, 124 Cal.Rptr. 513, 540 P.2d 609.) State employees were excluded from the MMBA in 1971. (Stats.1971, ch. 254, § 2, p. 402.)

[11] The MMBA imposes on local public entities a duty to meet and confer in good faith with representatives of recognized employee organizations, in order to reach binding agreements governing wages, hours, and working conditions of the agencies' employees. (Gov.Code, § 3505.) "The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse...." (*Santa Clara County Counsel Attys. Assn. v. Woodside, supra,* 7 Cal.4th at p. 537, 28 Cal.Rptr.2d 617, 869 P.2d 1142.)

This court has observed that the MMBA was "[a] product of political compromise," that its provisions "are confusing, and, at times, contradictory," and that it "furnishes only a 'sketchy and frequently vague framework of employer-employee relations for California's local governmental agencies.'" (*International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 197, 193 Cal.Rptr. 518, 666 P.2d 960.) In *Glendale City Employees' Assn., Inc. v. City of Glendale, supra,* 15 Cal.3d 328, 124 Cal.Rptr. 513, 540 P.2d 609, this court resolved one of the MMBA's ambiguities by holding that a written agreement (commonly termed a memorandum of understanding) entered into under the MMBA becomes binding and enforceable when the public agency employer ratifies it. (At p. 332.) Answering another important question, we held that counties with civil service systems are not exempt from the MMBA's meet-and-confer requirement. (*Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 62–65, 151 Cal.Rptr. 547, 588 P.2d 249.)

When the Legislature enacted the MMBA in 1968, it had not yet created the PERB, and it did not include in the MMBA any provisions expressly authorizing either administrative or judicial proceedings to enforce its provisions. Resolving the resulting uncertainty regarding methods of enforcement, this court in 1994 concluded that MMBA-created rights and duties were enforceable by a traditional mandate action under Code of Civil Procedure section 1085. (*Santa Clara County Counsel Attys. Assn. v. Woodside, supra,* 7 Cal.4th at p. 539, 28 Cal.Rptr.2d 617, 869 P.2d 1142.)

Although no published appellate decision ever expressly determined what statute of limitations applied to a mandate action to enforce MMBA-created rights and duties, a Court of Appeal held that the three-year statute of limitations in subdivision (a) of Code of Civil Procedure section 338 (hereafter section 338(a)) applied to an action to enforce a "state labor law." (*Giffin v. United Transportation Union, supra,* 190 Cal.App.3d at p. 1364, 236 Cal.Rptr. 6.) The parties here appear to agree that, before the Legislature vested the PERB with exclusive jurisdiction over MMBA unfair practice charges, the three-year period specified in section 338(a) applied to a traditional mandate action brought in superior court alleging an unfair practice under the MMBA.

B. The PERB

The history of the PERB begins in 1975, when the Legislature adopted the Educational Employment Relations Act (Gov.Code, §§ 3540–3549.3; hereafter the EERA), which governs employer-employee relations for

public schools (kindergarten through high school) and community colleges. (Stats.1975, ch. 961, § 2, pp. 2247–2263.) As part of this new statutory scheme, the Legislature created the Educational Employment Relations Board (EERB), "an expert, quasi-judicial administrative agency modeled after the National Labor Relations Board, to enforce the act." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 177, 172 Cal.Rptr. 487, 624 P.2d 1215.) The Legislature vested the EERB with authority to adjudicate unfair labor practice charges under the EERA. (See Stats.1975, ch. 961, § 2, pp. 2249–2252.)

The Legislature structured the EERA with the intention that it would eventually be expanded to incorporate other public employees. Thus, the EERA contains a declaration of purpose that includes this paragraph: "It is the further intention of the Legislature that any legislation enacted by the Legislature governing employer-employee relations of other public employees shall be incorporated into this chapter to the extent possible. The Legislature also finds and declares that it is an advantageous and desirable state policy to expand the jurisdiction of the board created pursuant to this chapter to cover other public employers and their employees, in the event that this legislation is enacted, and if this policy is carried out, the name of the Educational Employment Relations Board shall be changed to the 'Public Employment Relations Board.'" (Gov.Code, § 3540.)[5]

Two years later, in 1977, the Legislature enacted the State Employer–Employee Relations Act (Gov.Code, §§ 3512–3524) to govern relations between the state government and certain of its employees. (Stats.1977, ch. 1159, § 4, pp. 3751–3760.) It was later renamed, and its official name is now the Ralph C. Dills Act (hereafter the Dills Act). (Stats. 1986, ch. 103, § 1, p. 237.) Despite the declaration of purpose two years earlier in the EERA, the Legislature did not incorporate the Dills Act into the EERA, instead enacting it as a separate chapter in the Government Code preceding the EERA. The Legislature did, however, expand the jurisdiction of the EERB to include adjudication of unfair practice charges under the Dills Act, and as a result the EERB was renamed the PERB. (See Gov.Code, §§ 3513, subd. (h), 3514.5, as added by Stats.1977, ch. 1159, §§ 6–7, pp. 3761–3763.)

Since 1977, the PERB's jurisdiction has continued to expand as the Legislature has enacted new employment relations laws covering additional categories of public agencies and their employees. In 1978, the Legislature enacted the Higher Education Employer–Employee Relations Act (Gov.Code, §§ 3560–3599; hereafter the HEERA) to govern labor relations within the University of California, the California State University, and Hastings College of the Law. (Stats.1978, ch. 744, § 3, pp. 2312–2333.) In 2000, the Legislature not only brought the MMBA within the PERB's jurisdiction (Stats.2000, ch. 901, § 8), it also enacted the Trial Court Employment Protection and Governance Act (Gov.Code, §§ 71600–71675; hereafter the TCEPGA) to govern labor relations and other employment matters within the state's trial courts. (Stats.2000, ch. 1010, § 14.) In 2002, the Legislature enacted the Trial Court Interpreter Employment and Labor Relations Act (Gov.Code, §§ 71800–71829; hereafter the TCIERA) to govern labor relations and employment matters for trial court interpreters. (Stats.2002, ch. 1047, § 2.) In 2003, the Legislature enacted the Los Angeles County Metropolitan Transit Authority Transit Employer–Employee Relations Act (Pub. Util.Code, §§ 99560–99570.4; hereafter the TERA) to govern labor relations for a public transit district. (Stats.2003, ch. 833, § 1.)

In enacting the HEERA, the TCEPGA, the TCIERA, and the TERA, the Legislature followed the pattern set by the Dills Act. It did not incorporate the new laws' substantive provisions into the EERA; instead, it enacted the HEERA, the TCEPGA, and the TCIERA as separate chapters within the Government Code and the TERA as a chapter within the Public Utilities Code. But the Legislature expanded the PERB's jurisdiction to cover unfair labor practices alleged under each of these labor relations laws.

5. The chapter referred to in the quoted portion of the statute is chapter 10.7 of division 4 of title 1 of the Government Code. It includes Government Code sections 3540 to 3549.3.

(Gov.Code, §§ 3563, 71639.1, 71825; Pub. Util.Code, § 99561.)

In each of these six public employment relations laws—the Dills Act, the EERA, the HEERA, the TCEPGA, the TCIERA, and the TERA—the Legislature has expressly and separately specified a six-month limitations period for filing unfair practice charges with the PERB.[6] (Gov.Code, §§ 3514.5, subd. (a), 3541.5, subd. (a), 3563.2, subd. (a), 71639.1, subd. (c), 71825, subd. (c); Pub. Util. Code, § 99561.2, subd. (a).) Thus, the EERA provides: "Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not ... [¶] ... [i]ssue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." (Gov.Code, § 3541.5, subd. (a).)[7] The other provisions express the six-month limitations period in identical words.[8]

C. Analysis

[12, 13] As the parties recognize, determining what limitations period applies to an MMBA unfair practice charge requires construction of the relevant statutes. When engaged in statutory construction, our goal is "to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715, 3 Cal. Rptr.3d 623, 74 P.3d 726.)

The Court of Appeal here concluded that the six-month limitations period in Government Code section 3541.5, a provision of the EERA, applies also to unfair practice charges filed with the PERB under the MMBA. The PERB argues, instead, that because the Legislature did not specify a limitations period when it vested the PERB with jurisdiction over MMBA unfair practice charges, it must have intended to continue the existing three-year statute of limitations that had applied to actions filed in superior court. The PERB invokes the rule of statutory construction that when the Legislature amends a statute without altering parts of the statute that have previously been judicially construed, the Legislature is deemed to have been aware of and to have acquiesced in the previous judicial construction. (See *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, 2 Cal.Rptr.3d 699, 73 P.3d 554; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007, 55 Cal.Rptr.2d 760, 920 P.2d 705.)

[14] But "[t]he presumption of legislative acquiescence in prior judicial decisions is not

6. Six months is also the limitations period for an unfair practice charge to the Agricultural Labor Relations Board. (Lab.Code, § 1160.2.)

7. This language tracks the wording of the National Labor Relations Act. (See 29 U.S.C. § 160(b) ["no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made"].)

8. Although the six public employment relations laws all contain the same six-month limitations period, they differ in regard to tolling provisions. The HEERA and the TERA do not contain express tolling provisions. (Gov.Code, § 3563.2, subd. (a); Pub. Util.Code, § 99561.2, subd. (a).) But the four other laws contain variously worded provisions for tolling the six-month limitations period while a party exhausts other remedies. Both the Dills Act and the EERA provide that "[t]he board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery." (Gov.Code, §§ 3514.5, subd. (a), 3541.5, subd. (a).) The TCEPGA provides that "if the rules and regulations adopted by a trial court require exhaustion of a remedy prior to filing an unfair practice charge or the charging party chooses to exhaust a trial court's remedy prior to filing an unfair practice charge, the six-month limitation set forth in this subsection shall be tolled during such reasonable amount of time it takes the charging party to exhaust the remedy, but nothing herein shall require a charging party to exhaust a remedy when that remedy would be futile." (Gov.Code, § 71639.1, subd. (c).) The TCIERA similarly provides that "if the rules and regulations adopted by a regional court interpreter employment relations committee require exhaustion of a remedy prior to filing an unfair practice charge or the charging party chooses to exhaust a regional court interpreter employment relations committee's remedy prior to filing an unfair practice charge, the six-month limitation set forth in this subsection shall be tolled during such reasonable amount of time it takes the charging party to exhaust the remedy, but nothing herein shall require a charging party to exhaust a remedy when that remedy would be futile." (Gov.Code, § 71825, subd. (c).)

conclusive in determining legislative intent" (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1156, 278 Cal.Rptr. 614, 805 P.2d 873), and there are several reasons not to apply the presumption here. First, as noted above, no published decision had ever expressly held that an action alleging an MMBA unfair practice was subject to the three-year statute of limitations in section 338(a). Although the Court of Appeal in *Giffin v. United Transportation Union, supra*, 190 Cal.App.3d 1359, 236 Cal.Rptr. 6, had held that three years was the statute of limitations for an alleged violation of a state labor law, its opinion did not mention the MMBA, much less construe it. The case did not concern an employer's unfair labor practice, but an alleged breach of the duty of fair representation. The employing public agency was the Southern California Rapid Transit District, which was governed by its own specific labor relations law (Pub.Util.Code, §§ 30750–30756), and thus not subject to the MMBA. Therefore, this decision supports, at best, only a weak inference that the Legislature understood there was an existing three-year limitations period for an action alleging an MMBA unfair practice.[9]

Moreover, other MMBA actions filed in superior court were subject to other statutes of limitation. In *Anderson v. Los Angeles County Employee Relations Com.* (1991) 229 Cal.App.3d 817, 280 Cal.Rptr. 415, for example, a county employee asserted that an employee organization had violated the MMBA by denying him reinstatement after it had expelled him from membership. (*Id.* at pp. 819–822, 280 Cal.Rptr. 415.) The employee first complained to the Los Angeles County Employee Relations Commission; when it ruled against him, he petitioned the superior court for a writ of administrative mandate. (*Id.* at pp. 822–823, 280 Cal.Rptr. 415.) The statute of limitations for filing an administrative mandate petition is 90 days, not three years. (Code Civ. Proc., § 1094.6, subd. (b).) Therefore, the PERB is incorrect in asserting that *all* MMBA violation cases filed in superior court were subject to a three-year statute of limitations.

[15] Second, the statutes of limitations set forth in the Code of Civil Procedure, including the three-year period in section 338(a), do not apply to administrative proceedings. (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 47–48, 115 Cal.Rptr.2d 151; *Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal.App.4th 1357, 1361–1362, 72 Cal.Rptr.2d 180; *Little Company of Mary Hospital v. Belshé* (1997) 53 Cal.App.4th 325, 329, 61 Cal.Rptr.2d 626; *Bernd v. Eu* (1979) 100 Cal.App.3d 511, 515, 161 Cal.Rptr. 58.) The PERB concedes this point and does not argue that section 338(a) applies to MMBA unfair practice charges filed with the PERB. Instead, the PERB argues that the Legislature's silence should be construed as indicating its intent that the three-year limitations period should continue, *even though its statutory basis would no longer exist.*

We view this suggested inference as implausible and unsupported. As we have remarked, "[i]n the area of statutory construction, an examination of what the Legislature has done (as opposed to what it has left undone) is generally the more fruitful inquiry." (*Harris v. Capital Growth Investors XIV, supra*, 52 Cal.3d at p. 1156, 278 Cal.Rptr. 614, 805 P.2d 873.) Here, what the Legislature did was to remove from the courts their initial jurisdiction over MMBA unfair practice charges. Assuming the Legislature was aware that a three-year limitations period had applied to traditional mandate actions filed in superior court to enforce the MMBA, we assume also that the Legislature was aware that section 338(a)'s three-year period was forum specific—that is, it applied only to judicial proceedings. By changing the forum—vesting an administrative agency (the PERB) rather than the courts with initial jurisdiction over MMBA

9. The PERB directs our attention to *Key v. Housing Authority of the City of Oakland* (N.D.Cal. Mar. 8, 1994, No. C 93-1880 BAC) 1994 WL 90182, a federal district court order dismissing a complaint on the ground it was filed beyond the applicable limitation date. The order does not mention the MMBA, and it was not reported in the Federal Supplement. Therefore, it is unlikely that members of the Legislature were aware of it or had it in mind when they voted in 2000 to bring the MMBA within the PERB's jurisdiction.

charges—the Legislature abrogated the three-year statute of limitations under section 338(a), and we assume that this abrogation was intentional and not inadvertent.

[16] Finally, and perhaps most importantly, we do not construe statutes in isolation; rather, we construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided. (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 222, 17 Cal. Rptr.3d 842, 96 P.3d 141; *Mejia v. Reed* (2003) 31 Cal.4th 657, 663, 3 Cal.Rptr.3d 390, 74 P.3d 166.) The MMBA, which we construe here, is part of a larger system of law for the regulation of public employment relations under the initial jurisdiction of the PERB. The PERB suggests no way in which MMBA unfair practice charges differ from unfair practice charges under the other six public employment relations laws within the PERB's jurisdiction—the Dills Act, the EERA, the HEERA, the TCEPGA, the TCIERA, and the TERA—so as to justify a limitations period that is *six times longer* than the six months allowed under each of these other laws. The PERB suggests no rational ground upon which the Legislature could have decided to treat MMBA unfair practices charges so differently in regard to the limitations period. We find it reasonable to infer that the Legislature intended no such anomaly, and that it intended, rather, a coherent and harmonious system of public employment relations laws in which all unfair practice charges filed with the PERB are subject to the same six-month limitations period.

The PERB relies also on the rule of statutory construction that when the Legislature uses a critical word or phrase in one statute, the omission of that word or phrase in another statute dealing with the same general subject generally shows a different legislative intent. (See *In re Young* (2004) 32 Cal.4th 900, 907, 12 Cal.Rptr.3d 48, 87 P.3d 797.) Thus, the PERB argues that because the Legislature included an express six-month limitation period in every other public employment relations law under the PERB's jurisdiction, the omission of an express six-month limitation period in the MMBA is compelling evidence of a different legislative intent. We would agree if there were any plausible ground for the Legislature to draw such a distinction, or, in other words, if this line of reasoning did not lead to an inexplicable anomaly. The rule that the PERB cites is merely one of several guides to statutory construction; it applies generally but not universally, and we do not find it helpful or controlling here.

The PERB argues that nothing in the language of the MMBA supports an inference that the Legislature intended a six-month limitations period for an MMBA unfair practice charge. But Government Code section 3509, which vests the PERB with jurisdiction over MMBA matters, states in subdivision (b) that "[a] complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 *shall be processed as an unfair practice charge by the board.*" (Italics added.) This language is appropriately read as referring to and incorporating an existing body of law concerning the manner in which the PERB processes unfair practice charges, including the limitations period for unfair practices charged under the three other then-existing public employment relations laws—the EERA, the Dills Act, and the HEERA. The Legislature's later adoption of a six-month limitations period for the TCEPGA, the TCIERA, and the TERA is further evidence that the Legislature regards six months as an appropriate limit for bringing an unfair practice charge under each of the various schemes governing employer-employee relations in state and local government, all of which are now under the PERB's jurisdiction.

The PERB argues that Government Code section 3509, subdivision (b), which requires the PERB to "apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter," should be construed as requiring the PERB to continue applying the three-year statute of limitations previously applied to judicial proceedings to enforce the MMBA. (See also Gov. Code, § 3510, subd. (a) ["The provisions of this chapter shall be interpreted and applied by the board in a manner consistent with and

in accordance with judicial interpretations of this chapter."].) This provision is most reasonably construed as incorporating existing judicial interpretations of substantive provisions of the MMBA, including what constitutes an unfair labor practice, but not as incorporating judicial decisions prescribing the procedures that were deemed suitable to *judicial* enforcement proceedings. In any event, there was no existing judicial precedent on the appropriate limitations period for an MMBA unfair practice charge to the PERB.

We have reviewed the documents judicially noticed by the Court of Appeal relating to Senate Bill 739 (1999–2000 Reg. Sess.), the legislation that vested the PERB with jurisdiction over MMBA unfair practice charges. (See *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 922, fn. 4, 12 Cal.Rptr.3d 262, 88 P.3d 1 [documents that the Court of Appeal has judicially noticed become part of the record on appeal]; *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 502, fn. 22, 66 Cal.Rptr.2d 304, 940 P.2d 891; *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274, fn. 7, 41 Cal.Rptr.2d 220, 895 P.2d 56.) We find nothing in those documents to cause us to alter our conclusion that the Legislature intended a six-month limitations period for an MMBA unfair practice charge to the PERB. The topic of a limitations period for an unfair practice charge is not discussed in any of the legislative documents, nor do the documents suggest that the Legislature regarded the MMBA as differing from other public employment labor laws under the PERB's jurisdiction in a manner that would require or justify a substantially longer limitations period.

IV. Retroactivity

[17] The PERB and the CSEA argue that if, as we have concluded, transfer of initial jurisdiction over MMBA unfair practice charges from the superior courts to the PERB shortened the limitations period from three years to six months, this shortened period may not be applied retrospectively to unfair practices occurring before July 1, 2001, the legislation's effective date or, indeed, to any unfair practice occurring before the Court of Appeal's decision.

[18, 19] Legislation that shortens a limitations period is considered procedural and is applied retroactively to preexisting causes of action, so long as parties are given a reasonable time in which to sue. (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 437, 186 Cal.Rptr. 228, 651 P.2d 815; *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122–123, 47 P.2d 716; *Carlson v. Blatt* (2001) 87 Cal. App.4th 646, 650–651, 105 Cal.Rptr.2d 42.) When necessary to provide a reasonable time to sue, a shortened limitations period may be applied prospectively so that it commences on the effective date of the statute, rather than on the date the cause of action accrued. (*Rubinstein v. Barnes* (1987) 195 Cal.App.3d 276, 281–282, 240 Cal.Rptr. 535; *Niagara Fire Ins. Co. v. Cole* (1965) 235 Cal.App.2d 40, 42–43, 44 Cal.Rptr. 889.)

Applying these legal principles, the Court of Appeal in this case concluded that the legislation vesting PERB with jurisdiction over MMBA unfair practice charges, effective July 1, 2001, shortened the applicable limitations period from three years to six months. This shortened limitations period applies retroactively to MMBA unfair practice charges based on conduct that occurred before July 1, 2001, provided that parties are given a reasonable time in which to file such charges with the PERB. Concluding that six months was a reasonable time in this context, the Court of Appeal held that for MMBA unfair practices occurring before July 1, 2001, a charge filed with the PERB was timely if brought within three years of the occurrence of the unfair practice, or within six months of July 1, 2001 (in other words, before January 1, 2002), whichever was sooner. We agree that this is a correct application of the controlling legal principles.

The PERB and the CSEA argue in substance that the Court of Appeal's holding retroactively extinguishes existing unfair practice claims because parties had no notice of the six-month limitations period until the Court of Appeal issued its decision. This assertion erroneously assumes that the Court of Appeal, rather than the Legislature, short-

ened the limitations period to six months and that this shortened limitations period took effect only when the Court of Appeal issued its decision. To the contrary, the Legislature established the six-month limitations period, effective July 1, 2001. After that date, there was no valid legal basis for any party, or for the PERB, to rely on the previous three-year limitations period, which had applied to judicial actions to enforce the MMBA. In determining the applicable limitations period, the Court of Appeal merely decided a legal question; it did not change any settled rule on which parties could reasonably have relied. (See *Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310, 318, 105 Cal. Rptr.2d 790, 20 P.3d 1086.) Its holding, which we adopt, did not constitute an unfair retroactive change in the law.

V. Disposition

The Court of Appeal's judgment is affirmed.

WE CONCUR: GEORGE, C.J., BAXTER, WERDEGAR, CHIN, BROWN and MORENO, JJ.

35 Cal.4th 1094

29 Cal.Rptr.3d 249

Philip Le FRANCOIS et al., Plaintiffs and Appellants,

v.

Prabhu GOEL et al., Defendants and Respondents.

No. S126630.

Supreme Court of California.

June 9, 2005.

As Modified June 10, 2005.

Background: The Superior Court of Santa Clara County, No. CV787632, Robert A. Baines, J., granted defendants' motion for summary judgment after motion had been denied by another judge, and entered judgment for defendants. Plaintiffs appealed. The Court of Appeal affirmed; 14 Cal. Rptr.3d. 321.

Holding: The Supreme Court granted review, superseding the opinion of the Court of Appeal, and in an opinion by Chin, J., held that statutes dealing with reconsideration of rulings may constitutionally limit the parties' ability to file repetitive motions, but not the trial court's ability, on its own motion, to reconsider its prior interim orders so it may correct its own errors; disapproving *Scott Co. v. United States Fidelity & Guaranty Ins. Co.*, 107 Cal. App.4th 197, 132 Cal.Rptr.2d 89; *Wozniak v. Lucutz*, 102 Cal.App.4th 1031, 126 Cal. Rptr.2d 310; *Kollander Construction, Inc. v. Superior Court*, 98 Cal.App.4th 304, 119 Cal.Rptr.2d 614; *Blake v. Ecker*, 93 Cal. App.4th 728, 113 Cal.Rptr.2d 422; and *Remsen v. Lavacot*, 87 Cal.App.4th 421, 104 Cal.Rptr.2d 612.

Reversed and remanded.

Concurring and dissenting opinion by Kennard, J.

Opinion 14 Cal.Rptr.3d. 321, superseded.

1. Constitutional Law ⇐52

The Legislature generally may adopt reasonable regulations affecting a court's inherent powers or functions, so long as the legislation does not defeat or materially impair a court's exercise of its constitutional power or the fulfillment of its constitutional function. West's Ann.Cal. Const. Art. 3, § 3.

2. Constitutional Law ⇐52

The separation of powers test applicable to statutes restricting trial courts' reconsideration of rulings is that the Legislature may regulate the courts' inherent power to resolve specific controversies between parties, but it may not defeat or materially impair the courts' exercise of that power. West's Ann.Cal. Const. Art. 3, § 3. West's Ann.Cal. C.C.P. §§ 437c(f)(2), 1008.

Exhibit 7

County of Los Angeles v. Commission on State Mandates
(2003)
110 Cal.App.4th 1176

110 Cal.App.4th 1176
Court of Appeal, Second District, Division 7, California.

COUNTY OF LOS ANGELES, Plaintiff and Respondent,
v.
COMMISSION ON STATE MANDATES, Defendant and Appellant;
Department of Finance, Real Party in Interest and Appellant.

No. B156870.
|
July 28, 2003.

Synopsis

Background: County petitioned for writ of mandate, seeking to vacate decision of the Commission on State Mandates which denied county's test claim for costs associated with statute requiring local law enforcement officers to participate in two hours of domestic violence training. The Superior Court, Los Angeles County, No. BS06497, Dzintra I. Janavs, J., granted the petition. Commission appealed.

[Holding:] The Court of Appeal, Muñoz (Aurelio), J., sitting by assignment, held that statute did not mandate any increased costs and thus Commission was not required to reimburse county for its costs.

Reversed with directions.

Attorneys and Law Firms

****422 *1178** Paul M. Starkey, Camille Shelton, Sacramento, and Katherine Tokarski, for Defendant and Appellant Commission on State Mandates.

Bill Lockyer, Attorney General, Andrea Lynn Hoch, Senior Assistant Attorney General, Louis R. Mauro and Catherine M. Van Aken, Supervising Deputy Attorneys General and Geoffrey L. Graybill, Deputy Attorney General, for Real Party in Interest and Appellant Department of Finance.

Lloyd W. Pellman, County Counsel and Stephen R. Morris, Principal Deputy County Counsel, for Plaintiff and Respondent County of Los Angeles.

Opinion

MÚNOZ (AURELIO), J.*

A 1995 amendment to Penal Code section 13519[1] requires local law enforcement officers to participate in two hours of domestic violence training. The issue on appeal is whether this amendment resulted in a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the time spent by local law enforcement officers in such domestic violence training, although such officers were already required to spend 24 hours in continuing education training and the domestic violence training could be included within this total.

This administrative mandamus proceeding was commenced by the County of Los Angeles (County) on a "test claim" filed with and denied by the ***1179** Commission on State Mandates (Commission) for the County's costs incurred pursuant to section 13519. The trial court found that California Constitution article XIII B, section 6 required the state to reimburse the County for domestic violence training because the County's needs and priorities might be detrimentally affected when the state took away two hours of training by mandating that two specific hours of training occur. The trial court remanded the proceedings to the Commission to determine the amount of costs actually incurred by the County. We reverse.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Article XIII B, section 6 of the California Constitution provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service...." (Cal. Const., art. XIII B, § 6.) The Commission is charged with hearing and deciding local agency claims of entitlement to reimbursement under article XIII B, section 6. (Gov.Code, § 17551, subd. (a).) Pursuit of such a claim is the exclusive remedy for this purpose (Gov.Code, § 17552), but the Commission's decisions are subject to review by administrative mandamus, under Code of Civil Procedure section 1094.5. (Gov.Code, § 17559, subd.

(b).) A "test claim" is "the first claim, **423 including claims joined or consolidated with the first claim, filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state." (Gov.Code, § 17521; see also *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 328–329, 331–333, 285 Cal.Rptr. 66, 814 P.2d 1308.)

In 1995, section 13519, subdivision (e) was amended to provide: "(e) Each law enforcement officer below the rank of supervisor who is assigned to patrol duties and would normally respond to domestic violence calls or incidents of domestic violence shall complete, every two years, an updated course of instruction on domestic violence that is developed according to the standards and guidelines developed pursuant to subdivision (d). The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government."[2]

*1180 Penal Code section 13510,[3] et seq. requires the State Commission on Peace Officer Standards and Training (POST) to promulgate regulations establishing minimum state standards relating to physical, mental, and moral fitness, and minimum training standards for law enforcement officers. Compliance with POST's requirements is voluntary. (Pen.Code, § 13510 et seq.) POST has a certification program for peace officers specified in sections 13510 and 13522 and for the California Highway Patrol. (Pen.Code, §§ 13510.1, subds.(a)-(c), 13510.3.)

On or about December 26, 1996, the County filed a "test claim"[4] pursuant to Government Code section 17522 with the Commission.[5] The test claim alleged that **424 neither local police officers nor their agencies were given any choice with respect to compliance with section 13519. However, in order to implement the training, the County was required to redirect its officers from their normal work in order to attend the two-hour domestic violence training. The County alleged this substitution of the work agenda of the state for that of the local government violated California Constitution article XIII B, section 6. Furthermore, the County pointed to language in *1181 Penal Code section 13519, subdivision (e), providing that, "The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government entities."

The test claim alleged that although POST bore the cost of producing two-hour telecourses on domestic violence, POST did not provide for any local law enforcement salary reimbursement for attendance at any type of POST-certified training, including the state-mandated costs for domestic violence training. Adherence to POST standards is voluntary by local law enforcement agencies, but POST requires a minimum of 24 hours of training every two years, to be chosen from a menu of available courses. POST does not dictate the courses that must be taken. POST courses include training in, among other things: interviewing techniques for detectives, defensive weapons, CPR, conflict resolution, bicycle patrol, ritual crime and hate group offenders, vehicle pullover and approach, confessions, courtroom demeanor, electronic vehicle recovery systems, vehicle theft investigation, and cultural awareness.

The POST program gives local law enforcement agencies flexibility in choosing training programs to meet their differing needs. In addition to domestic violence training, certain other programs are legislatively mandated: dealing with the developmentally disabled/mentally ill training (implemented July 1992); high speed vehicle pursuits (implemented November 1994); first aid/CPR (a 21–hour initial course, with a 12–hour refresher course every three years); missing persons (implemented January 1989); racial and cultural diversity (implemented August 1983); sexual harassment (implemented November 1994); and sudden infant death syndrome (implemented July 1990). The time requirements for these other required courses vary. Some elective courses require 40 hours to complete.

However, the County alleged because there were no existing resources available for the domestic violence training, the annual training costs of the County were increased as a result of section 13519. The County Sheriff's Department incurred costs of $170,351.45 for domestic violence training for the fiscal year 1996–1997.

In support of its test claim, the County submitted legislative materials relating to section 13519. These included: A July 5, 1995 memorandum in which the Assembly Committee on Appropriations stated that Senate Bill No. 132, proposing the changes **425 to 13519, understood the "training requirement could have significant costs to local law enforcement in terms of expense and public safety, as most departments will be forced to backfill for offices while the officers are being trained or will have to forego the *1182 backfilling and have fewer offices on patrol. Any monetary costs incurred by local law enforcement for the officer backfilling would be state-reimbursable." The Committee noted that, "Although this bill states that the costs of the additional domestic violence training be absorbed by POST within

existing resources, the reality is that this bill would create additional non-absorbable costs to POST since POST will be unable to exclude one type of training in favor of the domestic violence training, and instead will have to add this training to their current curriculum. The current curriculum of POST training is just as important to the maintaining of public safety as is the additional domestic violence training."

In addition, the Department of Finance recognized the fiscal impact of section 13519 on local law enforcement agencies, and opposed the adoption of Senate Bill No. 132. Diane M. Cummins, Deputy Director of the State Department of Finance, wrote to Senator Diane Watson on April 20, 1995, that, "This bill also specifies that training required pursuant to this measure 'shall be funded from existing resources', as specified. In so specifying, this bill would also require law enforcement agencies to modify existing training programs by increasing training requirements. Finance believes this bill contains a local mandate without providing necessary funding, thereby being in conflict with the California Constitution, which requires the state to fund local mandate costs. Although there is no specific information available regarding the level of additional costs which would be imposed on law enforcement agencies, the Department of Finance is opposed to legislation which would result in additional General Fund expenditures, given the State's ongoing fiscal constraints." The Department of Finance recognized that, "Adding mandatory domestic violence training requirement would result in an additional unknown cost for specified state and local law enforcement agencies...."

Furthermore, Gretchen Fretter, Chair of the California Academy Directors' Association (an organization of training center directors and police academy managers throughout the state) wrote Senator Watson on March 9, 1995, to express the association's concerns with Senate Bill No. 132. Fretter's analysis indicated that the mandate would incur a $300,000 price tag for each training cycle. The California State Sheriffs' Association also wrote to express concerns about Senate Bill No. 132, including that POST estimated the domestic violence training would add costs to local agencies of at least $750,000 per year. Glen Fine, the Deputy Executive Director of POST, on July 11, 1997, wrote to the Department of Finance to inform it that POST understood that the author of Senate Bill No. 132 was aware of POST's training requirements of 24 hours every two years, and it was "the author's intent ... that domestic violence update training become a statutorily required priority for inclusion within this 24 hours of training every two years."

***1183** POST issued a bulletin in February 1996 advising local law enforcement agencies of the new domestic violence training requirement.

The Department of Finance contended that the Legislature intended the domestic violence continuing education and training to be funded from existing resources. The department also contended that POST, which was charged with developing training ****426** standards for local law enforcement agencies, provided over $21 million in existing state funds for domestic violence training. POST pointed out that the drafter of the statute recognized the 24 hours of continuing education every two years, and intended the domestic violence training to be a priority to be included within this 24–hour requirement.

At the hearing before the Commission on the test claim, representatives of the County testified that POST refused to pay for the programs, putting the burdens on local governments, and POST itself had estimated the annual cost of the program at $750,000. A representative of the Sheriff's Department (Captain Dennis Wilson) testified that of the 24 hours required, any combination of courses could be used to meet the requirement. However, inclusion of the domestic violence training would take away two of those hours of training, resulting in only 22 hours. The Sheriff's Department would conduct domestic violence training even in the absence of the mandate; indeed; the Sheriff's Department actually conducted about 72 hours of training per officer per year. There was no funding for any of this training. The Sheriff's Department has 8,200 sworn officers, and two hours of training per officer adds up to 16,400 hours, which translates to 10 full-time officers for a year. Without funding for the domestic violence training, the Sheriff's Department therefore would lose the time equivalent of 10 officers for a year. Taking officers off the street impacts upon crime.

Martha Zavala testified on behalf of the County that the domestic violence training could not merely be subsumed within the 24 hours already required. With the training mandates already required by POST which exceed the 24–hour minimum, adding the domestic violence training only further exceeds the minimum 24 hours. There is no room to carve it out. Meeting POST requirements is not really an option. Thus, both the Sheriff's Department and the County agree they are seeking reimbursement of the costs of the training and the cost of replacing the officers on the street while in training.

A representative of POST testified that what POST provides in reimbursement to local law enforcement agencies is a small percentage of the real costs incurred. Where the training involved is through a telecourse, POST provides no reimbursement. There has been no

increase in POST's budget since the amendment to section 13519. About 30 of the courses provided by POST are mandated training.

***1184** A representative of the Department of Finance testified that the Department believed section 13519 did not create state-mandated reimbursable program because the legislation indicated it was the Legislature's intent not increase the training costs of local government, and the training could be fit within the existing 24–hour requirements.

The Commission's staff prepared an analysis in advance of the hearing which found against the County. The "Staff Analysis" pointed out that section 13519 was originally added by chapter 1609, Statutes of 1984.[6] Originally, the statute required ****427** that POST develop and implement a basic course of instruction for the training of law enforcement officers in the handling of domestic violence complaints, with local law enforcement agencies encouraged, but not required, to provide updates. These provisions of the 1984 version were the subject of a test claim filed by the City of Pasadena in 1990. That claim was denied because the original statute did not require local agencies to implement or pay for a domestic violence training program, did not increase the minimum basic training course hours or advanced officer training hours, and did not require local agencies to provide domestic violence training pursuant to the POST skills and knowledge standards.

Legally, the Staff Analysis pointed out that in order for a statute to impose a reimbursable state-mandated program, the statutory language must (1) direct or obligate an activity or task upon local government entities, and (2) the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. (See, e.g., *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202.) The Staff Analysis concluded that section 13519 did impose a new activity or program upon local law enforcement agencies. However, because the language of the statute requiring that the instruction be funded from existing resources, it was an open question whether the program imposed *mandated* costs. Because POST's minimum requirements remained at 24 hours before and after enactment of section 13519, there were no increased training hours and costs associated with the domestic violence training course. Instead, the course should be accommodated or absorbed by ***1185** local law enforcement agencies within their existing resources available for training. Thus, the Staff Analysis recommended denial of the test claim.

After the public hearings were held, the Commission adopted the findings of the Staff Analysis. The Commission issued its own statement of decision which substantially adopted the findings of the Staff Analysis.

Subsequently, the County filed a petition for writ of mandate with the trial court, seeking vacation of the Commission's decision. The County argued that the domestic violence training constituted a state-mandated reimbursable program because it (1) was mandatory, while the POST certification training was optional; and (2) the only way local agencies could avoid the costs of the new program would be to redirect their efforts from the training they were already providing as part of POST training, thereby losing flexibility to design programs to suit their own needs.

The Commission argued that the County's focus on "redirected" manpower costs was misplaced. Instead, the focus should be on whether the local law enforcement agencies actually experience increased expenditure of their tax revenues. (See, e.g., *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283, 101 Cal.Rptr.2d 784.) In *County of Sonoma,* the court stated that California Constitution article XIII B, section 6 was designed to prevent the state from forcing programs on local governments, and such a forced program is one which results in "increased actual expenditures ****428** of limited tax proceeds that are counted against the local government's spending limit. Section 6, located within a measure aimed at limiting expenditures, is expressly concerned with 'costs' incurred by local governments as a result of state-mandated programs, particularly when the costs of compliance with a new program restrict local spending in other areas." (*County of Sonoma,* at p. 1284, 101 Cal.Rptr.2d 784.) Because section 13519 did not require the County to incur "actual increased costs" because the domestic violence training could be subsumed within the 24–hour POST training requirement, no state reimbursement was required.

The Commission also argued the state had not required the County to incur increased training costs for salaries of officers to receive the two-hour training. POST's requirements did not change as a result of section 13519, and indeed, shortly after the enactment of section 13519, POST forwarded a bulletin to local law enforcement agencies suggesting they include domestic violence training within the 24–hour continuing training requirement.

***1186** The trial court heard argument, after which the trial court adopted its tentative statement of decision in which

it noted that, "Although it may be reasonable in some or even most cases for a deputy to eliminate an unrequired two-hour elective in favor of the required domestic violence instruction, what about cases where the County's needs and priorities would be affected detrimentally, if two hours of electives were taken away? At what point would additional mandated courses result in increased costs? [¶] The record also shows that, for some deputies, other state-required training already amounts to 24 hours or more per two-year period. For these deputies, the two hours of mandated domestic violence training cannot be accommodated by giving up other training but must be added on, for added cost. It appears that, if domestic violence instruction is to be funded from existing resources on a deputy-by-deputy basis, the County clearly does incur increased costs." The trial court granted the petition, and remanded the matter for consideration of the exact amount of increased costs.

DISCUSSION

I. STANDARD OF REVIEW.

[1] [2] [3] The determination whether the statute here at issue established a mandate under California Constitution article XIII B, section 6, is a question of law. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Under Government Code section 17559,[7] administrative mandamus is the exclusive means to challenge a decision of the Commission on a subvention claim. (*Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 980, 64 Cal.Rptr.2d 270.) "Government Code section 17559 governs the proceeding below and requires that the trial court review the decision of the Commission under the substantial evidence standard. Where the substantial evidence test is applied by the trial court, we are generally confined to inquiring whether substantial evidence supports the court's findings and judgment. [Citation.] However, we independently review the superior court's legal ****429** conclusions about the meaning and effect of constitutional and statutory provisions. [Citation.]" (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810, 53 Cal.Rptr.2d 521.)

*1187 II. SECTION 13519'S IMPOSITION OF A DOMESTIC VIOLENCE TRAINING COURT IS NOT A STATE–MANDATED PROGRAM WITHIN THE MEANING OF CONSTITUTION ARTICLE XIII B, SECTION 6 BECAUSE IT DOES NOT CONSTITUTE AN "INCREASED LEVEL OF SERVICE."

[4] The Commission essentially makes two arguments. First, it contends that the County did not incur "increased costs." Reimbursement to the County under Constitution article XIII B, section 6 is not required unless there is a showing of actual increased costs mandated by the state. (See, e.g., *County of Los Angeles v. State of California, supra,* 43 Cal.3d at pp. 54–55, 233 Cal.Rptr. 38, 729 P.2d 202; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66–67, 266 Cal.Rptr. 139, 785 P.2d 522.) In *City of Sacramento,* the court explained that the statutory concept of "costs mandated by the state" and the constitutional concept of article XIII B, section 6, are identical. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 67, fn. 11, 266 Cal.Rptr. 139, 785 P.2d 522.) Because of this limited, rather than broad definition, of "costs mandated by the state," article XIII B, section 6 does not provide reimbursement for every single increased cost. Thus, the trial court's finding that reimbursement was required where a statute results in a "redirection of local effort" or a "detrimental change in a local agency's needs and priorities" is not supported by the law. Rather, it constitutes an inappropriate injection of an equitable standard into the analysis.

Secondly, the Commission argues that no "mandate" exists. To the contrary, substantial evidence supports its finding that section 13519 does not result in *increased* costs because nothing in the statute requires the County, or any other local law enforcement agency, to incur actual increased costs. The total number of hours required (the 24 minimum hours of POST training) did not increase because of the domestic violence training; rather, POST still requires 24 hours and in fact after the passage of section 13519, POST forwarded a bulletin to law enforcement agencies recommending that they include domestic violence training within the 24-hour continuing professional training requirement. Because the POST standards are voluntary, if a local law enforcement agencies adds two hours of domestic violence training to either the POST requirement or its own requirements, it is doing so at its own discretion.

In response, the County points out that the Commission's conclusion is based upon the erroneous premise that local law enforcement agencies could escape increased costs simply by dropping two hours of their existing POST training and substituting the new domestic violence training. However, the evidence in the legislative history indicates that this was not the intent of the Legislature when it was considering section 13519, nor was it the position of ***1188** the Department of Finance. The County

also contends that local law enforcement agencies incur costs when they sacrifice their existing training programs for the new domestic violence training. Although POST does not dictate those courses for which a local law enforcement agency must offer training and POST does pay for much of the training material, most of the cost of POST training is borne by the local law enforcement agencies in the form of personnel costs while deputies spend 24 hours of work time receiving ****430** training. Furthermore, if a mere legislative directive to fund a new program with existing resources would let the state off the hook for reimbursement, then the constitutional rule of mandate reimbursement would be a nullity: any new state mandate can be funded by canceling other services. Because California Constitution article XIII B, section 6 was designed to prevent the elimination of the fiscal freedom of local governmental agencies to expend their limited available resources without being straightjacketed by state-mandated programs, the Commission's "within existing resources" rule would circumvent the purposes of article XIII B, section 6.

A. The Purposes of California Constitution Article XIII B, Section 6 Guide Our Analysis.

[5] In 1978, the voters approved Proposition 13, which added article XIII A to the California Constitution. Article XIII A "imposes a limit on the power of state and local governments to adopt and levy taxes. [Citation.]" (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486, 280 Cal.Rptr. 92, 808 P.2d 235.) In 1979, Proposition 4 added article XIII B to the Constitution, which imposed a complementary limit on governmental spending. (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 574, 7 Cal.Rptr.2d 245, 828 P.2d 147.) These two constitutional provisions "work in tandem, together restricting California government's power both to levy and to spend for public purposes." (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.) Their goal is to protect citizens from excessive taxation and government spending. (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 61, 233 Cal.Rptr. 38, 729 P.2d 202.)

[6] California Constitution article XIII B, section 6, provides in relevant part: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service." Article XIII B, section 6, prevents the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are "ill equipped" to assume increased financial responsibilities because of the taxing and spending limitations of articles XIII A and XIII B. (*County of Fresno v. State of California, supra,* 53 Cal.3d at p. 487, 280 Cal.Rptr. 92, 808 P.2d 235.) Section 6 thus requires the state "to pay for any new ***1189** governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. [Citation.]" (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1577, 15 Cal.Rptr.2d 547.)

[7] [8] [9] [10] [11] [12] [13] State mandate jurisprudence has established that in general, local agencies are not entitled to reimbursement of all increased costs mandated by state law, but only those resulting from a "new" program or an "increased level of service" imposed upon them by the state. (*Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835, 244 Cal.Rptr. 677, 750 P.2d 318.) A "program" is defined as a program which carries out the "governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202.) A program is "new" if the local governmental entity had not previously been required to ****431** institute it. (*City of San Jose v. State of California, supra,* 45 Cal.App.4th at p. 1812, 53 Cal.Rptr.2d 521.) State mandates are requirements imposed on local governments by legislation or executive orders. (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 50, 233 Cal.Rptr. 38, 729 P.2d 202.) Since the purpose of California Constitution article XIII B, section 6 is to avoid governmental programs from being forced on localities by the state, programs which are not unique to the government do not qualify; the programs must involve the provision of governmental services. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 68, 266 Cal.Rptr. 139, 785 P.2d 522.) Further, in order for a state mandate to be found, the local governmental entity must be required to expend the proceeds of its tax revenues. (*Redevelopment Agency of the City of San Marcos v. Commission on State Mandates, supra,* 55 Cal.App.4th at p. 986, 64 Cal.Rptr.2d 270.) Lastly, there must be compulsion to expend revenue. (*City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 780, 783, 200 Cal.Rptr. 642 [revisions to Code of Civil Procedure required entities exercising the power of eminent domain to compensate businesses for lost goodwill did not create state mandate, because the power of eminent domain was discretionary, and need not be exercised at all]; *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d

1203.) In *Lucia Mar,* the court explained article XIII B, section 6. "The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIIIB because the programs are not 'new.' " (*Lucia Mar Unified School District v. Honig, supra,* 44 Cal.3d at p. 836, 244 Cal.Rptr. 677, 750 P.2d 318.)

However, in spite of all of the above, "increased level of service" is not defined in California Constitution article XIII B, section 6 or in the ballot materials. ***1190** (*Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173, 275 Cal.Rptr. 449.) Furthermore, "Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate." (*City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197, 75 Cal.Rptr.2d 754.)

In *City of San Jose v. State of California, supra,* 45 Cal.App.4th 1802, 53 Cal.Rptr.2d 521, Government Code section 29550 authorized counties to charge cities and other local entities for costs of booking into county jails persons who had been arrested by employees of the cities and other entities. (45 Cal.App.4th at p. 1806, 53 Cal.Rptr.2d 521.) The State argued the measure merely reallocated booking costs, no shifting from state to local entities, therefore not within article XIII B, section 6. (45 Cal.App.4th at p. 1806, 53 Cal.Rptr.2d 521.) The city contended counties function as agents of the state, charged with enforcement of state's criminal laws; detaining and booking integral part of this process. (*Id.* at p. 1808, 53 Cal.Rptr.2d 521.) The Commission found maintenance of jails and detention of prisoners, had always been a local matter, and cities and counties were both forms of local government; therefore, there was no shift in costs between *state* and local entities.

Furthermore, the terms of Government Code section 29550 were discretionary, not mandatory. (*City of San Jose v. State of California, supra,* 45 Cal.App.4th at pp. 1808–1809, 53 Cal.Rptr.2d 521.) *City of San Jose* found no cost had been improperly transferred to the local government ****432** entities because the cost of capture, detention and housing of persons charged with crimes had traditionally been borne by the counties. (*Id.* at p. 1813, 53 Cal.Rptr.2d 521.) *City of San Jose* rejected the cities' argument that the county was acting as agent of the state because it was "not supported by recent case authority, nor does it square with definitions particular to subvention analysis." (*Id.* at p. 1814, 53 Cal.Rptr.2d 521.) California Constitution article XIII B treated cities and counties alike; Government Code section 17514 defines "costs mandated by the state" to mean any increased costs that a "local agency" is required to incur. Because both cities and counties were to be treated alike for purposes of subvention analysis, nothing in article XIII B, section 6 prohibits the shifting of costs between local government entities. (*City of San Jose,* at p. 1815, 53 Cal.Rptr.2d 521.)

In *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, Labor Code sections 4453, 4453.1 and 4460, increased the maximum weekly wage upon which temporary and permanent disability indemnity was computed from $231 to $262.50 per week. In addition, Labor Code section 4702 increased certain death benefits from $55,000 to $75,000. The trial court held that because the changes did not exceed costs of living changes, they did not create an "increased level of service." (43 Cal.3d at p. 52, 233 Cal.Rptr. 38, 729 P.2d 202.) The County argued the terms of California Constitution article XIII B, section 6, do not contain an exception for increased costs which do not exceed the inflation rate. (43 Cal.3d at p. 53, 233 Cal.Rptr. 38, 729 P.2d 202.) The County relied on certain repealed Revenue and ***1191** Taxation Code definitions which had equated any program which imposed "additional costs" as being within the constitutional provision of "increased level of service." (*Id.* at p. 53, 233 Cal.Rptr. 38, 729 P.2d 202.) *County of Los Angeles* rejected this interpretation. "If the Legislature had intended to continue to equate 'increased level of service' with 'additional costs,' then the provision would be circular: 'costs mandated by the state' are defined as 'increased costs' due to an 'increased level of service,' which, in turn, would be defined as 'additional costs.' " (*Id.* at p. 55, 233 Cal.Rptr. 38, 729 P.2d 202.) An examination of the language of California Constitution article XIII B, section 6 shows that "by itself, the term 'higher level of service' is meaningless." *Id.* at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202. Rather, it must be read in conjunction with the phrase " 'new program.' " *Ibid.* "Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.' " (*Ibid.*) By " 'program,' " the voters meant "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, imposed unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Ibid.*) 233 Cal.Rptr. 38, 729 P.2d 202.) The ballot materials provided that article XIII B, section 6 would "not allow the state government to *force programs* on local governments without the state paying for them." (43 Cal.3d at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202.) "Laws of

general application are not passed by the Legislature to 'force' programs on localities." (*Id.* at p. 57, 233 Cal.Rptr. 38, 729 P.2d 202.) In light of this, "[t]he language of section 6 is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay ****433** for any incidental increase in local costs.... If the electorate had intended such a far-reaching construction of section 6, the language would have explicitly indicated that the word 'program' was being used in such a unique fashion." (*Id.* at p. 57, 233 Cal.Rptr. 38, 729 P.2d 202.) Therefore, there was no need to pay for increase in worker's compensation, because it is not a program administered by local agencies to provide service to the general public. Local government entities are indistinguishable in this respect from private employers. (*Id.* at pp. 57–58, 233 Cal.Rptr. 38, 729 P.2d 202.)

In *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, chapter 2 of Statutes of 1978 extended mandatory coverage under the state's unemployment insurance laws to include state and local governments and nonprofit organizations. *City of Sacramento* held there was no obligation on the part of the state to provide funds because there was no "unique" obligation imposed upon local governments, nor was there any requirement of new or increased governmental services. (50 Cal.3d at p. 57, 266 Cal.Rptr. 139, 785 P.2d 522.) As the court stated, the measure was adopted to conform California's system to federal laws. (*Id.* at p. 58, 266 Cal.Rptr. 139, 785 P.2d 522.) Because the measure required local governments to provide unemployment benefits to their own employees, the state had not compelled provision of a new or increased level of service to the public at the local level. Rather, it had merely required local government to provide the same benefits as private ***1192** employers. (*Id.* at p. 67, 266 Cal.Rptr. 139, 785 P.2d 522.) The purpose of California Constitution article XIII B, section 6 was to avoid governmental programs from being forced on localities by the state: Therefore, programs which are not unique to the government do not qualify. (50 Cal.3d at p. 67, 266 Cal.Rptr. 139, 785 P.2d 522.) The benefits at issue here have nothing to do with the provision of governmental services, and are therefore not within the scope of section 6. (50 Cal.3d at p. 68, 266 Cal.Rptr. 139, 785 P.2d 522.)

In *Lucia Mar Unified School District v. Honig, supra,* 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318, Education Code section 59300 required school districts to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped. *Lucia Mar* held section 59300 constituted a "new" program of higher level of service because cost of program had been shifted from the state to a local entity. "The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of [California Constitution] article XIIIB because the programs are not 'new.' " (44 Cal.3d at p. 836, 244 Cal.Rptr. 677, 750 P.2d 318.)

On the other hand, in *County of San Diego v. State of California, supra,* 15 Cal.4th 68, 61 Cal.Rptr.2d 134, 931 P.2d 312, pursuant to 1982 legislation, the state withdrew from counties Medi–Cal funding for medically indigent persons (MIP's). (*Id.* at pp. 79–80, 61 Cal.Rptr.2d 134, 931 P.2d 312.) To offset this change in coverage, the state set up an account as a mechanism to transfer state funds to counties to pay for Medi–Cal expenses, and sufficient funds had been available in this account to enable the state to fully fund San Diego County's Medi–Cal costs. (*Id.* at p. 80, 61 Cal.Rptr.2d 134, 931 P.2d 312.) However, in fiscal year 1990–1991, insufficient funds were available. (*Ibid.*) The state argued that no mandate for reimbursement existed because the counties had always borne the responsibility of paying for indigent medical care pursuant to Welfare & Institutions Code section 17000. (*County of San Diego,* at pp. 91–92, 61 Cal.Rptr.2d 134, 931 P.2d 312.) In finding ****434** reimbursement was mandated, the Supreme Court found that at the time California Constitution article XIII B, section 6 was enacted, the state was fully funding Medi–Cal for MIP's and the County bore no responsibility for those costs. (*County of San Diego,* at p. 93, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Thus, in enacting Medi–Cal, the Legislature had shifted the cost of indigent medical care from the counties to the state. (*Id.* at pp. 96–97, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Given this background, the Legislature excluded MIP's from Medi–Cal, knowing full well that it would trigger the counties' obligation to pay for medical care as providers of last resort. (*Id.* at p. 98, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Therefore, the 1982 legislation "mandated a ' "new program" ' on counties by 'compelling them to accept financial responsibility in whole or in part for a program,' i.e., medical care for adult MIP's, 'which was funded entirely by the state before the advent of article XIII B.' " (*County of San Diego v. State of California, supra,* 15 Cal.4th 68 at p. 98, 61 Cal.Rptr.2d 134, 931 P.2d 312, citing *Lucia Mar Unified School District v. Honig, supra,* 44 Cal.3d at p. 836, 244 Cal.Rptr. 677, 750 P.2d 318.) Otherwise, " 'County taxpayers would be forced to accept new taxes or see the county ***1193** forced to cut existing programs further....' " (*County of San Diego v. State of*

California, supra, 15 Cal.4th 68 at p. 98, 61 Cal.Rptr.2d 134, 931 P.2d 312.)

The Commission relies heavily on *County of Sonoma v. Commission on State Mandates, supra,* 84 Cal.App.4th 1264, 101 Cal.Rptr.2d 784. In *County of Sonoma,* the challenged legislation added section 97.03 to the Revenue and Taxation Code, and reduced the amount of property tax revenue to be allocated to local government pursuant to a formula, allocating an equal portion to a "Educational Revenue Augmentation Fund (ERAF)" for distribution to school districts. (84 Cal.App.4th at pp. 1269–1270, 1275, 101 Cal.Rptr.2d 784.) The net effect of the legislation was to decrease counties' tax revenues, although school revenues remained stable, and satisfied the constitutional necessity of maintaining a minimum level of funding for schools pursuant to California Constitution article XIV, section 8. (84 Cal.App.4th at p. 1276, 101 Cal.Rptr.2d 784.) In *County of Sonoma,* the County argued that the reallocation of tax revenues constituted a state-mandated cost of a new program. (*Id.* at p. 1276, 101 Cal.Rptr.2d 784.) The court held that section 6 subvention was limited to "increases in actual costs." Because none of the County's tax revenues were expended, the legislation did not come within section 6. "Proposition 4 [the initiative enacting article XIII B] was aimed at controlling and capping government spending, not curbing changes in revenue allocations. Section 6 is an obvious [complement] to the goal of Proposition 4 in that it prevents the state from forcing extra programs on local governments in a manner that negates their careful budgeting of expenditures. A forced program that would negate such planning is one that results in increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit. Section 6, located within a measure aimed at limiting expenditures, is expressly concerned when 'costs' incurred by local government as a result of state-mandated programs, particularly with the costs of compliance with a new program *restrict local spending in other areas.*" (84 Cal.App.4th at pp. 1283–1284, 101 Cal.Rptr.2d 784 (emphasis added).)

County of Sonoma discerned a further requirement of California Constitution article XIII B, section 6: that the costs incurred must involve programs previously funded exclusively by the state. In imposing this limitation, *County of Sonoma* relied on language in ****435** *County of San Diego v. State of California, supra,* 15 Cal.4th 68, 61 Cal.Rptr.2d 134, 931 P.2d 312 that "section 6 prohibits the state from shifting to counties the costs of state programs for which the state assumed complete financial responsibility before adoption of section 6." (*County of San Diego v. State of California, supra,* 15 Cal.4th 68 at p. 99, fn. 20, 61 Cal.Rptr.2d 134, 931 P.2d 312.) *County of Sonoma* determined that because the statute at issue only involved a reallocation of funds between entities already jointly responsible for providing a service (education), no state-mandated reimbursable program existed. (*County of Sonoma v. Commission on State Mandates, supra,* 84 Cal.App.4th at p. 1289, 101 Cal.Rptr.2d 784.)

[14] [15] [16] ***1194** Based upon the principles discernable from the cases discussed, we find that in the instant case, the legislation does not mandate a "higher level of service." In the case of an existing program, an increase in existing costs does not result in a reimbursement requirement. Indeed, "costs" for purposes of California Constitution article XIII B, section 6, does not equal every increase in a locality's budget resulting from compliance with a new state directive. Rather, the state must be attempting to divest itself of its responsibility to provide fiscal support for a program, or forcing a new program on a locality for which it is ill-equipped to allocate funding.

We agree that POST certification is, for all practical purposes, not a "voluntary" program and therefore the County must, in order to comply with section 13519, add domestic violence training to its curriculum. POST training and certification is ongoing and extensive, and local law enforcement agencies may chose from a menu of course offerings to fulfill the 24–hour requirement. Adding domestic violence training obviously may displace other courses from the menu, or require the adding of courses. Officer downtime will be incurred. However, merely by adding a course requirement to POST's certification, the state has not shifted from itself to the County the burdens of state government. Rather, it has directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training.

Furthermore, the state has not shifted from itself the cost of a program previously administered and funded by the state. Instead, the state is requiring certain courses to be placed within an already existing framework of training. This loss of "flexibility" does not, in and of itself, require the County to expend funds that previously had been expended on the POST program by the state. Instead, "[t]he purpose for which state subvention of funds was created, to protected local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play" by a directive that POST-certified studies include domestic violence training. (*Redevelopment Agency of the City of San Marcos v. Commission on State Mandates, supra,* 55

Cal.App.4th at p. 986, 64 Cal.Rptr.2d 270.) Any increased costs are merely "incidental" to the cost of administering the POST certification.

[17] [18] While we are mindful that legislative disclaimers, findings and budget control language are not determinative to a finding of a state-mandated reimbursable program (*Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 541, 234 Cal.Rptr. 795), our interpretation is supported by the hortatory statutory language that, "The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase ****436** the annual training costs of local ***1195** government entities." (§ 13519.) Thus, while the County may lose some flexibility in tailoring its training programs, such loss of flexibility does not rise to the level of a state-mandated reimbursable program because the loss of flexibility is incidental to the greater goal of providing domestic violence training. Every increase in cost that results from a new state directive does not automatically result in a valid subvention claim where, as here, the directive can be complied with by a minimal reallocation of resources within the entity seeking reimbursement. Thus, while there may be a mandate, there are no increased costs mandated by section 13519.

DISPOSITION

The judgment of the trial court is reversed. The trial court is directed to enter a new and different judgment denying the County's petition for writ of mandate and reinstating the findings of the Commission.

We concur: PERLUSS, P.J., and WOODS, J.

All Citations

110 Cal.App.4th 1176, 2 Cal.Rptr.3d 419, 03 Cal. Daily Op. Serv. 6658, 2003 Daily Journal D.A.R. 8347

Footnotes

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 Hereafter section 13519.

2 The currently enacted version of this provision is found at section 13519, subdivision (g), and reads, "Each law enforcement officer below the rank of supervisor who is assigned to patrol duties and would normally respond to domestic violence calls or incidents of domestic violence shall complete, every two years, an updated course of instruction on domestic violence that is developed according to the standards and guidelines developed pursuant to subdivision (d). The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government entities." (Stats.1998, ch. 701, § 1, designated the paragraph following subd. (a) as subd. (b) and redesignated the remaining subdivisions accordingly; in redesignated subd. (c), inserted par. (5), listing the signs of domestic violence as an instruction topic, and redesignated pars. (5) to (16) as pars. (6) to (17).)

3 Penal Code section 13510, subdivision (a), provides in relevant part: "For the purpose of raising the level of competence of local law enforcement officers, [POST] shall adopt, and may from time to time amend, rules establishing minimum standards relating to physical, mental, and moral fitness that shall govern the recruitment of any city police officers, peace officer members of a county sheriff's office, marshals or deputy marshals of a municipal court, peace officer members of a county coroner's office...."

4 The test claim also challenged the incident-reporting requirements of Penal Code section 13730, which imposed a new program upon local law enforcement agencies to include in the domestic violence incident report additional information regarding the use of alcohol and controlled substances by the alleged abuser, and any prior domestic violence responses to the same address. The County did not contest the Commission's outcome relating to this portion of the test claim, and therefore this issue is not before us on appeal.

5 In 1984, the Legislature created a statutory procedure for determining whether a statute imposes state-mandated costs on a local agency within the meaning of California Constitution article XII B, section 6. (See Gov.Code, § 17500 et

seq.) The local agency files a test claim with the Commission, which holds a public hearing and determines whether the statute mandates a new program or increased level of service. (Gov.Code, §§ 17521, 17551, 17555.) If the Commission finds that a claim is reimbursable, it then determines the amount of reimbursement. (Gov.Code, § 17557.) The local agency then follows statutory procedures to obtain reimbursement. (See Gov.Code, § 17558 et seq.) Where the Commission finds no reimbursable mandate, the local agency can challenge this finding by administrative mandate proceedings under Code of Civil Procedure section 1094.5. (See Gov.Code, § 17552 [these provisions "provide the sole and exclusive procedure by which a local agency ... may claim reimbursement for costs mandated by the state as required by Section 6"].)

6 The history of section 13519 is as follows: Added by Statutes 1984, chapter 1609, section 2, pages 5711–5713. Amended by Statutes 1985, chapter 281, section 1, pages 1305–1306, effective July 26, 1985; Statutes 1989, chapter 850, section 3; Statutes 1991, chapter 912 (Sen. Bill No. 421), section 1, pages 4086–4088; Statutes 1993, chapter 1098 (Assem. Bill No. 1268), section 8, pages 6162–6163; Statutes 1995, chapter 965 (Sen. Bill No. 132), section 1, pages 7377–7380; Statutes 1998, chapter 606 (Sen. Bill No.1880), section 13; Statutes 1998, chapter 701 (Assem. Bill No. 2172), section 1; Statutes 1999, chapter 659 (Sen. Bill No. 355), section 4. The 1995 amendment, at issue here, rewrote subdivision (e), which prior to amendment read: "(e) Forty thousand dollars ($40,000) is appropriated from the Peace Officers Training Fund [POST] in augmentation of Item 8120–001–268 of the Budget Act of 1984, to support the travel, per diem, and associated costs for convening the necessary experts." (Stats.1993, ch. 1098, § 8, p. 6188.)

7 Government Code section 17559, subd. (b), provides: "A claimant or the state may commence a proceeding in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure to set aside a decision of the commission on the ground that the commission's decision is not supported by substantial evidence. The court may order the commission to hold another hearing regarding the claim and may direct the commission on what basis the claim is to receive a rehearing."

End of Document

Exhibit 8

County of Los Angeles v. State of California (1987)
43 Cal.3d 46

43 Cal.3d 46, 729 P.2d 202, 233 Cal.Rptr. 38

COUNTY OF LOS ANGELES et al., Plaintiffs and Appellants,
v.
THE STATE OF CALIFORNIA et al., Defendants and Respondents.
CITY OF SONOMA et al., Plaintiffs and Appellants,
v.
THE STATE OF CALIFORNIA et al., Defendants and Respondents

L.A. No. 32106.
Supreme Court of California
Jan 2, 1987.

SUMMARY

The trial court denied a petition for writ of mandate to compel the State Board of Control to approve reimbursement claims of local government entities, for costs incurred in providing an increased level of service mandated by the state for workers' compensation benefits. The trial court found that Cal. Const., art. XIII B, § 6, requiring reimbursement when the state mandates a new program or a higher level of service, is subject to an implied exception for the rate of inflation. In another action, the trial court, on similar claims, granted partial relief and ordered the board to set aside its ruling denying the claims. The trial court, in this second action, found that reimbursement was not required if the increases in benefits were only cost of living increases not imposing a higher or increased level of service on an existing program. Thus, the second matter was remanded due to insubstantial evidence and legally inadequate findings. (Superior Court of Los Angeles County, Nos. C 424301 and C 464829, Leon Savitch and John L. Cole, Judges.) The Court of Appeal, Second Dist., Div. Five, Nos. B001713 and B003561 affirmed the first action; the second action was reversed and remanded to the State Board of Control for further and adequate findings.

The Supreme Court reversed the judgment of the Court of Appeal, holding that the petitions lacked merit and should have been denied by the trial court without the necessity of further proceedings before the board. The court held that when the voters adopted art. XIII B, § 6, their intent was not to require the state to provide subvention whenever a newly enacted statute results incidentally in some cost to local agencies, but only to require subvention for the expense or increased cost of programs administered locally, and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. Thus, the court held, reimbursement was not required by art. XIII B, § 6. Finally, the court held that no pro tanto repeal of Cal. Const., art. XIV, § 4 (workers' compensation), was intended or made necessary by the adoption of art. XIII B, § 6. (Opinion by Grodin, J., with Bird, C. J., Broussard, Reynoso, Lucas and Panelli, JJ., concurring. Separate concurring opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Governments--Costs to Be Reimbursed.
When the voters adopted Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or increased cost of programs administered locally, and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities.

(2)
Statutes § 18--Repeal--Effect--"Increased Level of Service."
The statutory definition of the phrase "increased level of service," within the meaning of Rev. & Tax. Code, § 2207, subd. (a) (programs resulting in increased costs which local agency is required to incur), did not continue after it was specifically repealed, even though the Legislature, in enacting the statute, explained that the definition was declaratory of existing law. It is ordinarily presumed that the Legislature, by deleting an express provision of a statute, intended a substantial change in the law.

[See **Am.Jur.2d,** Statutes, § 384.]

(3)

Constitutional Law § 13--Construction of Constitutions--Language of Enactment.
In construing the meaning of an initiative constitutional provision, a reviewing court's inquiry is focused on what the voters meant when they adopted the provision. To determine this intent, courts must look to the language of the provision itself.

([4])
Constitutional Law § 13--Construction of Constitutions--Language of Enactment--"Program."
The word "program," as used in Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), refers to programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

([5])
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Governments--Increases in Workers' Compensation Benefits.
The provisions of Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), have no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive. Although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state- mandated programs or higher levels of service within the meaning of art. XIII B, § 6. Accordingly, the State Board of Control properly denied reimbursement to local governmental entities for costs incurred in providing state-mandated increases in workers' compensation benefits. (Disapproving *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258], to the extent it reached a different conclusion with respect to expenses incurred by local entities as the result of a newly enacted law requiring that all public employees be covered by unemployment insurance.)

[See **Cal.Jur.3d,** State of California, § 78.]

([6])
Constitutional Law § 14--Construction of Constitutions--Reconcilable and Irreconcilable Conflicts.
Controlling principles of construction require that in the absence of irreconcilable conflict among their various parts, constitutional provisions must be harmonized and construed to give effect to all parts.

([7])
Constitutional Law § 14--Construction of Constitutions--Reconcilable and Irreconcilable Conflicts--Pro Tanto Repeal of Constitutional Provision.
The goals of Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), were to protect residents from excessive taxation and government spending, and to preclude a shift of financial responsibility for governmental functions from the state to local agencies. Since these goals can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, the adoption of art. XIII B, § 6, did not effect a pro tanto repeal of Cal. Const., art. XIV, § 4, which gives the Legislature plenary power over workers' compensation.

COUNSEL
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GRODIN, J.

We are asked in this proceeding to determine whether legislation enacted in 1980 and 1982 increasing certain workers' compensation benefit payments is subject to the command of article XIII B of the California Constitution that local government costs mandated by the state must be funded by the state. The County of Los Angeles and the

City of Sonoma sought review by this court of a decision of the Court of Appeal which held that state-mandated increases in workers' compensation benefits that do not exceed the rise in the cost of living are not costs which must be borne by the state under article XIII B, an initiative constitutional provision, and legislative implementing statutes.

Although we agree that the State Board of Control properly denied plaintiffs' claims, our conclusion rests on grounds other than those relied upon by the Court of Appeal, and requires that its judgment be reversed. ([1]) We conclude that when the voters adopted article XIII B, section 6, their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or ***50** increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. In using the word "programs" they had in mind the commonly understood meaning of the term, programs which carry out the governmental function of providing services to the public. Reimbursement for the cost or increased cost of providing workers' compensation benefits to employees of local agencies is not, therefore, required by section 6.

We recognize also the potential conflict between article XIII B and the grant of plenary power over workers' compensation bestowed upon the Legislature by section 4 of article XIV, but in accord with established rules of construction our construction of article XIII B, section 6, harmonizes these constitutional provisions.

I

On November 6, 1979, the voters approved an initiative measure which added article XIII B to the California Constitution. That article imposed spending limits on the state and local governments and provided in section 6 (hereafter section 6): "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." No definition of the phrase "higher level of service" was included in article XIII B, and the ballot materials did not explain its meaning.[1]

The genesis of this action was the enactment in 1980 and 1982, after article XIII B had been adopted, of laws increasing the amounts which ***51** employers, including local governments, must pay in workers' compensation benefits to injured employees and families of deceased employees.

The first of these statutes, Assembly, Bill No. 2750 (Stats. 1980, ch. 1042, p. 3328), amended several sections of the Labor Code related to workers' compensation. The amendments of Labor Code sections 4453, 4453.1 and 4460 increased the maximum weekly wage upon which temporary and permanent disability indemnity is computed from $231 per week to $262.50 per week. The amendment of section 4702 of the Labor Code increased certain death benefits from $55,000 to $75,000. No appropriation for increased state-mandated costs was made in this legislation.[2]

Test claims seeking reimbursement for the increased expenditure mandated by these changes were filed with the State Board of Control in 1981 by the County of San Bernardino and the City of Los Angeles. The board rejected the claims, after hearing, stating that the increased maximum workers' compensation benefit levels did not change the terms or conditions under which benefits were to be awarded, and therefore did not, by increasing the dollar amount of the benefits, create an increased level of service. The first of these consolidated actions was then filed by the County of Los Angeles, the County of San Bernardino, and the City of San Diego, seeking a writ of mandate to compel the board to approve the reimbursement claims for costs incurred in providing an increased level of service mandated by the state pursuant to Revenue and Taxation Code section 2207.[3] They also sought a declaration that because the State of California and the board were obliged by article XIII B to reimburse them, they were not obligated to pay the increased benefits until the state provided reimbursement.

The superior court denied relief in that action. The court recognized that although increased benefits reflecting cost of living raises were not expressly ***52** excepted from the requirement of state reimbursement in section 6 the intent of article XIII B to limit governmental expenditures to the prior year's level allowed local governments to make adjustment for changes in the cost of living, by increasing their own appropriations. Because the Assembly Bill No. 2750 changes did not exceed cost of living changes, they

did not, in the view of the trial court, create an "increased level of service " in the existing workers' compensation program.

The second piece of legislation (Assem. Bill No. 684), enacted in 1982 (Stats. 1982, ch. 922. p. 3363), again changed the benefit levels for workers' compensation by increasing the maximum weekly wage upon which benefits were to be computed, and made other changes among which were: The bill increased minimum weekly earnings for temporary and permanent total disability from $73.50 to $168, and the maximum from $262.50 to $336. For permanent partial disability the weekly wage was raised from a minimum of $45 to $105, and from a maximum of $105 to $210, in each case for injuries occurring on or after January 1, 1984. (Lab. Code, § 4453.) A $10,000 limit on additional compensation for injuries resulting from serious and willful employer misconduct was removed (Lab. Code, § 4553), and the maximum death benefit was raised from $75,000 to $85,000 for deaths in 1983, and to $95,000 for deaths on or after January 1, 1984. (Lab. Code, § 4702.)

Again the statute included no appropriation and this time the statute expressly acknowledged that the omission was made "[n]otwithstanding section 6 of Article XIIIB of the California Constitution and section 2231 ... of the Revenue and Taxation Code." (Stats. 1982, ch. 922, § 17, p. 3372.)[4]

Once again test claims were presented to the State Board of Control, this time by the City of Sonoma, the County of Los Angeles, and the City of San Diego. Again the claims were denied on grounds that the statute made no change in the terms and conditions under which workers' compensation benefits were to be awarded, and the increased costs incurred as a result of higher benefit levels did not create an increased level of service as defined in Revenue and Taxation Code section 2207, subdivision (a).

The three claimants then filed the second action asking that the board be compelled by writ of mandate to approve the claims and the state to pay them, and that chapter 922 be declared unconstitutional because it was not adopted in conformity with requirements of the Revenue and Taxation Code or ***53** section 6. The trial court granted partial relief and ordered the board to set aside its ruling. The court held that the board's decision was not supported by substantial evidence and legally adequate findings on the presence of a state-mandated cost. The basis for this ruling was the failure of the board to make adequate findings on the possible impact of changes in the burden of proof in some workers' compensation proceedings (Lab. Code, § 3202.5); a limitation on an injured worker's right to sue his employer under the "dual capacity" exception to the exclusive remedy doctrine (Lab. Code, §§ 3601-3602); and changes in death and disability benefits and in liability in serious and wilful misconduct cases. (Lab. Code, § 4551.)

The court also held: "[T]he changes made by chapter 922, Statutes of 1982 may be excluded from state-mandated costs if that change effects a cost of living increase which does not impose a higher or increased level of service on an existing program." The City of Sonoma, the County of Los Angeles, and the City of San Diego appeal from this latter portion of the judgment only.

II

The Court of Appeal consolidated the appeals. The court identified the dispositive issue as whether legislatively mandated increases in workers' compensation benefits constitute a "higher level of service" within the meaning of section 6, or are an "increased level of service"[5] described in subdivision (a) of Revenue and Taxation Code section 2207. The parties did not question the proposition that higher benefit payments might constitute a higher level of "service." The dispute centered on whether higher benefit payments which do not exceed increases in the cost of living constitute a higher level of service. Appellants maintained that the reimbursement requirement of section 6 is absolute and permits no implied or judicially created exception for increased costs that do not exceed the inflation rate. The Court of Appeal addressed the problem as one of defining "increased level of service."

The court rejected appellants' argument that a definition of "increased level of service" that once had been included in section 2231, subdivision (e) of the Revenue and Taxation Code should be applied. That definition brought any law that imposed "additional costs" within the scope of "increased level of service." The court concluded that the repeal of section 2231 in 1975 (Stats. 1975, ch. 486, § 7, pp. 999-1000) and the failure of the Legislature by statute or the electorate in article XIII B to readopt the ***54** definition must be treated as reflecting an intent to change the law. (*Eu v. Chacon* (1976) 16 Cal.3d 465, 470 [128 Cal.Rptr. 1, 546 P.2d 289].)[6] On that basis the court concluded that increased costs were no longer tantamount to an increased level of service.

The court nonetheless assumed that an increase in costs mandated by the Legislature did constitute an increased level of service if the increase exceeds that in the cost of

living. The judgment in the second, or "Sonoma " case was affirmed. The judgment in the first, or "Los Angeles" case, however, was reversed and the matter "remanded" to the board for more adequate findings, with directions.[7]

III

The Court of Appeal did not articulate the basis for its conclusion that costs in excess of the increased cost of living do constitute a reimbursable increased level of service within the meaning of section 6. Our task in ascertaining the meaning of the phrase is aided somewhat by one explanatory reference to this part of section 6 in the ballot materials.

A statutory requirement of state reimbursement was in effect when section 6 was adopted. That provision used the same "increased level of service " phraseology but it also failed to include a definition of "increased level of service," providing only: "Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [¶] (a) Any law ... which mandates a new program or an increased level of service of an existing program." (Rev. & Tax. Code § 2207.) As noted, however, the definition of that term which had been ***55** included in Revenue and Taxation Code section 2164.3 as part of the Property Tax Relief Act of 1972 (Stats. 1972, ch. 1406, § 14.7, p. 2961), had been repealed in 1975 when Revenue and Taxation Code section 2231, which had replaced section 2164.3 in 1973, was repealed and a new section 2231 enacted. (Stats. 1975. ch. 486, §§ 6 & 7, p. 999.)[8] Prior to repeal, Revenue and Taxation Code section 2164.3, and later section 2231, after providing in subdivision (a) for state reimbursement, explained in subdivision (e) that " "Increased level of service' means any requirement mandated by state law or executive regulation ... which makes necessary expanded or additional costs to a county, city and county, city, or special district." (Stats. 1972, ch. 1406, § 14.7, p. 2963.)

([2]) Appellants contend that despite its repeal, the definition is still valid, relying on the fact that the Legislature, in enacting section 2207, explained that the provision was "declaratory of existing law." (Stats. 1975, ch. 486, § 18.6, p. 1006.) We concur with the Court of Appeal in rejecting this argument. "[I]t is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." (*Lake Forest Community Assn. v. County of Orange* (1978) 86 Cal.App.3d 394, 402 [150 Cal.Rptr. 286]; see also *Eu* v. *Chacon, supra*, 16 Cal.3d 465, 470.) Here, the revision was not minor: a whole subdivision was deleted. As the Court of Appeal noted, "A change must have been intended; otherwise deletion of the preexisting definition makes no sense."

Acceptance of appellants' argument leads to an unreasonable interpretation of section 2207. If the Legislature had intended to continue to equate "increased level of service" with "additional costs," then the provision would be circular: "costs mandated by the state" are defined as "increased costs" due to an "increased level of service," which, in turn, would be defined as "additional costs." We decline to accept such an interpretation. Under the repealed provision, "additional costs" may have been deemed tantamount to an "increased level of service," but not under the post-1975 statutory scheme. Since that definition has been repealed, an act of which the drafters of section 6 and the electorate are presumed to have been ***56** aware, we may not conclude that an intent existed to incorporate the repealed definition into section 6.

([3]) In construing the meaning of the constitutional provision, our inquiry is not focussed on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XIII B in 1979. To determine this intent, we must look to the language of the provision itself. (*ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 866 [210 Cal.Rptr. 226, 693 P.2d 811].) In section 6, the electorate commands that the state reimburse local agencies for the cost of any "new program or higher level of service." Because workers' compensation is not a new program, the parties have focussed on whether providing higher benefit payments constitutes provision of a higher level of service. As we have observed, however, the former statutory definition of that term has been incorporated into neither section 6 nor the current statutory reimbursement scheme.

([4]) Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term - programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on

local governments and do not apply generally to all residents and entities in the state.

The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: "Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them." (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase "to force programs on local governments" confirms that the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not ***57** for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not passed by the Legislature to "force" programs on localities.

The language of section 6 is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs. We believe that if the electorate had intended such a far-reaching construction of section 6, the language would have explicitly indicated that the word "program" was being used in such a unique fashion. (Cf. *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [128 Cal.Rptr. 673, 547 P.2d 449]; *Big Sur Properties v. Mott* (1976) 63 Cal.App.3d 99, 105 [132 Cal.Rptr. 835].) Nothing in the history of article XIII B that we have discovered, or that has been called to our attention by the parties, suggests that the electorate had in mind either this construction or the additional indirect, but substantial impact it would have on the legislative process.

Were section 6 construed to require state subvention for the incidental cost to local governments of general laws, the result would be far-reaching indeed. Although such laws may be passed by simple majority vote of each house of the Legislature (art. IV, § 8, subd. (b)), the revenue measures necessary to make them effective may not. A bill which will impose costs subject to subvention of local agencies must be accompanied by a revenue measure providing the subvention required by article XIII B. (Rev. & Tax. Code, §§ 2255, subd. (c).) Revenue bills must be passed by two-thirds vote of each house of the Legislature. (Art. IV, § 12, subd. (d).) Thus, were we to construe section 6 as applicable to general legislation whenever it might have an incidental effect on local agency costs, such legislation could become effective only if passed by a supermajority vote.[9] Certainly no such intent is reflected in the language or history of article XIII B or section 6.

([5]) We conclude therefore that section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation ***58** benefits that employees of private individuals or organizations receive.[10] Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (See Lab. Code, § 3201 et seq.) Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.

IV

([6]) Our construction of section 6 is further supported by the fact that it comports with controlling principles of construction which "require that in the absence of irreconcilable conflict among their various parts, [constitutional provisions] must be harmonized and construed to give effect to all parts. (*Clean Air Constituency* v. *California State Air Resources Bd.* (1974) 1 Cal.3d 801, 813-814 [114 Cal.Rptr. 577, 523 P.2d 617]; *Serrano v. Priest* (1971) 5 Cal.3d 584, 596 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]; *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645 [335 P.2d 672].)" (*Legislature* v. *Deukmejian* (1983) 34 Cal.3d 658, 676 [194 Cal.Rptr. 781, 669 P.2d 17].)

Our concern over potential conflict arises because article XIV, section 4,[11] gives the Legislature "plenary power, unlimited by any provision of ***59** this Constitution" over workers' compensation. Although seemingly unrelated to

workers' compensation, section 6, as we have shown, would have an indirect, but substantial impact on the ability of the Legislature to make future changes in the existing workers' compensation scheme. Any changes in the system which would increase benefit levels, provide new services, or extend current service might also increase local agencies' costs. Therefore, even though workers' compensation is a program which is intended to provide benefits to all injured or deceased employees and their families, because the change might have some incidental impact on local government costs, the change could be made only if it commanded a supermajority vote of two-thirds of the members of each house of the Legislature. The potential conflict between section 6 and the plenary power over workers' compensation granted to the Legislature by article XIV, section 4 is apparent.

The County of Los Angeles, while recognizing the impact of section 6 on the Legislature's power over workers' compensation, argues that the "plenary power" granted by article XIV, section 4, is power over the substance of workers' compensation legislation, and that this power would be unaffected by article XIII B if the latter is construed to compel reimbursement. The subvention requirement, it is argued, is analogous to other procedural ***60** limitations on the Legislature, such as the "single subject rule" (art. IV, § 9), as to which article XIV, section 4, has no application. We do not agree. A constitutional requirement that legislation either exclude employees of local governmental agencies or be adopted by a supermajority vote would do more than simply establish a format or procedure by which legislation is to be enacted. It would place workers' compensation legislation in a special classification of substantive legislation and thereby curtail the power of a majority to enact substantive changes by any procedural means. If section 6 were applicable, therefore, article XIII B would restrict the power of the Legislature over workers' compensation.

The City of Sonoma concedes that so construed article XIII B *would* restrict the plenary power of the Legislature, and reasons that the provision therefore either effected a pro tanto repeal of article XIV, section 4, or must be accepted as a limitation on the power of the Legislature. We need not accept that conclusion, however, because our construction of section 6 permits the constitutional provisions to be reconciled.

Construing a recently enacted constitutional provision such as section 6 to avoid conflict with, and thus pro tanto repeal of, an earlier provision is also consistent with and reflects the principle applied by this court in *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329 [178 Cal.Rptr. 801, 636 P.2d 1139]. There, by coincidence, article XIV, section 4, was the later provision. A statute, enacted pursuant to the plenary power of the Legislature over workers' compensation, gave the Workers' Compensation Appeals Board authority to discipline attorneys who appeared before it. If construed to include a transfer of the authority to discipline attorneys from the Supreme Court to the Legislature, or to delegate that power to the board, article XIV, section 4, would have conflicted with the constitutional power of this court over attorney discipline and might have violated the separation of powers doctrine. (Art. III, § 3.) The court was thus called upon to determine whether the adoption of article XIV, section 4, granting the Legislature plenary power over workers' compensation effected a pro tanto repeal of the preexisting, exclusive jurisdiction of the Supreme Court over attorneys.

We concluded that there had been no pro tanto repeal because article XIV, section 4, did not give the Legislature the authority to enact the statute. Article XIV, section 4, did not expressly give the Legislature power over attorney discipline, and that power was not integral to or necessary to the establishment of a complete system of workers' compensation. In those circumstances the presumption against implied repeal controlled. "It is well established that the adoption of article XIV, section 4 'effected a repeal *pro tanto*' of any state constitutional provisions which conflicted with that ***61** amendment. (*Subsequent Etc. Fund. v. Ind. Acc. Com.* (1952) 39 Cal.2d 83, 88 [244 P.2d 889]; *Western Indemnity Co.* v. *Pillsbury* (1915) 170 Cal. 686, 695, [151 P. 398].) A *pro tanto* repeal of conflicting state constitutional provisions removes 'insofar as necessary' any restrictions which would prohibit the realization of the objectives of the new article. (*Methodist Hosp. of Sacramento* v. *Saylor* (1971) 5 Cal.3d 685, 691-692 [97 Cal.Rptr. 1, 488 P.2d 161]; cf. *City and County of San Francisco v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 103, 115-117 [148 Cal.Rptr. 626, 583 P.2d 151].) Thus the question becomes whether the board must have the power to discipline attorneys if the objectives of article XIV, section 4 are to be effectuated. In other words, does the achievement of those objectives compel the modification of a power - the disciplining of attorneys - that otherwise rests exclusively with this court?" (*Hustedt v. Workers' Comp. Appeals Bd., supra*, 30 Cal.3d 329, 343.) We concluded that the ability to discipline attorneys appearing before it was not necessary to the expeditious resolution of workers' claims or the efficient administration of the agency. Thus, the absence of disciplinary power over attorneys would not preclude the board from achieving the objectives of article XIV, section 4, and no pro tanto repeal need be found.

([7]) A similar analysis leads to the conclusion here that no pro tanto repeal of article XIV, section 4, was intended or made necessary here by the adoption of section 6. The goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending. (*Huntington Park Redevelopment Agency* v. *Martin* (1985) 38 Cal.3d 100, 109-110 [211 Cal.Rptr. 133, 695 P.2d 220].) Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage - costs which all employers must bear - neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services.

Therefore, since the objectives of article XIII B and section 6 can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, section 6 did not effect a pro tanto repeal of the Legislature's otherwise plenary power over workers' compensation, a power that does not contemplate that the Legislature rather than the employer must fund the cost or increases in ***62** benefits paid to employees of local agencies, or that a statute affecting those benefits must garner a supermajority vote.

Because we conclude that section 6 has no application to legislation that is applicable to employees generally, whether public or private, and affects local agencies only incidentally as employers, we need not reach the question that was the focus of the decision of the Court of Appeal - whether the state must reimburse localities for state-mandated cost increases which merely reflect adjustments for cost-of-living in existing programs.

V

It follows from our conclusions above, that in each of these cases the plaintiffs' reimbursement claims were properly denied by the State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

In B001713, the Los Angeles case, the Court of Appeal reversed the judgment of the superior court denying the petition. In the B003561, the Sonoma case, the superior court granted partial relief, ordering further proceedings before the board, and the Court of Appeal affirmed that judgment.

The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

Bird, C. J., Broussard, J., Reynoso, J., Lucas, J., and Panelli, J., concurred.

MOSK, J.

I concur in the result reached by the majority, but I prefer the rationale of the Court of Appeal, i.e., that neither article XIII B, section 6, of the Constitution nor Revenue and Taxation Code sections 2207 and 2231 require state subvention for increased workers' compensation benefits provided by chapter 1042, Statutes of 1980, and chapter 922, Statutes of 1982, but only if the increases do not exceed applicable cost-of-living adjustments because such payments do not result in an increased level of service.

Under the majority theory, the state can order unlimited financial burdens on local units of government without providing the funds to meet those burdens. This may have serious implications in the future, and does violence to the requirement of section 2231, subdivision (a), that the state reimburse local government for "all costs mandated by the state."

In this instance it is clear from legislative history that the Legislature did not intend to mandate additional burdens, but merely to provide a cost-of-living ***63** adjustment. I agree with the Court of Appeal that this was permissible.

Appellants' petition for a rehearing was denied February 26, 1987. ***64**

Footnotes

1 The analysis by the Legislative Analyst advised that the state would be required to "reimburse local governments for the cost of complying with 'state mandates.' 'State mandates' are requirements imposed on local governments by legislation or executive orders." Elsewhere the analysis repeats: "[T]he initiative would establish a requirement that the state provide funds to reimburse local agencies for the cost of complying with state mandates. ...
The one ballot argument which made reference to section 6, referred only to the "new program" provision, stating, "Additionally, this measure [¶] (1) will not allow the state government to force programs on local governments without the state paying for them."

2 The bill was approved by the Governor and filed with the Secretary of State on September 22, 1980. Prior to this, the Assembly gave unanimous consent to a request by the bill's author that his letter to the Speaker stating the intent of the Legislation be printed in the Assembly Journal. The letter stated: (1) that the Assembly Ways and Means Committee had recommended approval without appropriation on grounds that the increases were a result of changes in the cost of living that were not reimbursable under either Revenue and Taxation Code section 2231, or article XIII B; (2) the Senate Finance Committee had rejected a motion to add an appropriation and had approved a motion to concur in amendments of the Conference Committee deleting any appropriation.
Legislative history confirms only that the final version of Assembly Bill No. 2750, as amended in the Assembly on April 16, 1986, contained no appropriation. As introduced on March 4, 1980, with a higher minimum salary of $510 on which to base benefits, an unspecified appropriation was included.

3 The superior court consolidated another action by the County of Butte, Novato Fire Protection District, and the Galt Unified School District with that action. Neither those plaintiffs nor the County of San Bernardino are parties to the appeal.

4 The same section "recognized," however, that a local agency "may pursue any remedies to obtain reimbursement available to it" under the statutes governing reimbursement for state-mandated costs in chapter 3 of the Revenue and Taxation Code, commencing with section 2201.

5 The court concluded that there was no legal or semantic difference in the meaning of the terms and considered the intent or purpose of the two provisions to be identical.

6 The Court of Appeal also considered the expression of legislative intent reflected in the letter by the author of Assembly Bill No. 2750 (see fn. 2, *ante*). While consideration of that expression of intent may have been proper in construing Assembly Bill No. 2750, we question its relevance to the proper construction of either section 6, adopted by the electorate in the prior year, or of Revenue and Taxation Code section 2207, subdivision (a) enacted in 1975. (Cf. *California Employment Stabilization Co.* v. *Payne* (1947) 31 Cal.2d 210, 213-214 [187 P.2d 702].) There is no assurance that the Assembly understood that its approval of printing a statement of intent as to the later bill was also to be read as a statement of intent regarding the earlier statute, and it was not relevant to the intent of the electorate in adopting section 6.
The Court of Appeal also recognized that the history of Assembly Bill No. 2750 and Statutes 1982, chapter 922, which demonstrated the clear intent of the Legislature to omit any appropriation for reimbursement of local government expenditures to pay the higher benefits precluded reliance on reimbursement provisions included in benefit-increase bills passed in earlier years. (See e.g., Stats. 1973, chs. 1021 and 1023.)

7 We infer that the intent of the Court of Appeal was to reverse the order denying the petition for writ of mandate and to order the superior court to grant the petition and remand the matter to the board with directions to set aside its order and reconsider the claim after making the additional findings. (See Code Civ. Proc. § 1094.5, subd. (f).)

8 Pursuant to the 1972 and successor 1973 property tax relief statutes the Legislature had included appropriations in measures which, in the opinion of the Legislature, mandated new programs or increased levels of service in existing programs (see, e.g., Stats. 1973, ch. 1021, § 4, p. 2026; ch. 1022, § 2, p. 2027; Stats. 1976, ch. 1017, § 9, p. 4597) and reimbursement claims filed with the State Board of Control pursuant to Revenue and Taxation Code sections 2218-2218.54 had been honored. When the Legislature fails to include such appropriations there is no judicially enforceable remedy for the statutory violation notwithstanding the command of Revenue and Taxation Code section 2231, subdivision (a) that "[t]he state shall reimburse each local agency for all 'costs mandated by the state,' as defined in Section 2207" and the additional command of subdivision (b) that any statute imposing such costs "provide an appropriation therefor." (*County of Orange v. Flournoy* (1974) 42 Cal.App.3d 908, 913 [117 Cal.Rptr. 224].)

9 Whether a constitutional provision which requires a supermajority vote to enact substantive legislation, as opposed to funding the program, may be validly enacted as a Constitutional amendment rather than through revision of the Constitution is an open question. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228 [149 Cal.Rptr. 239, 583 P.2d 1281].)

10 The Court of Appeal reached a different conclusion in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258], with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as to whether the expense was a "state mandated cost," rather than as whether the provision of an employee benefit was a "program or service" within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved.

11 Section 4: "The Legislature is hereby *expressly vested with plenary power, unlimited by any provision of this Constitution*, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.
"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.
"The Legislature shall have power to provide for the payment of an award to the state in the case of the death, arising out of and in the course of the employment, of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer for awards to employees of the employer.
"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed." (Italics added.)

End of Document

Exhibit 9

Fire Fighters Union v. City of Vallejo (1974)
12 Cal.3d 608

12 Cal.3d 608, 526 P.2d 971, 116 Cal.Rptr. 507, 87 L.R.R.M. (BNA) 2453, 75 Lab.Cas. P 53,473

FIRE FIGHTERS UNION, LOCAL 1186, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, Plaintiff and Appellant,
v.
CITY OF VALLEJO et al., Defendants and Appellants

S.F. No. 23098.
Supreme Court of California
October 2, 1974.

SUMMARY

A union of city fire fighters won a writ of mandate directing the city to proceed to arbitration on issues of "Reduction of Personnel," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedures," pursuant to city charter arbitration provisions granting city employees the right to bargain on "wages, hours and working conditions," but withholding that right as to matters involving the "merits, necessity or organization of any governmental service." (Superior Court of Solano County, No. 53187, Ellis R. Randall, Judge.)

The Supreme Court modified the judgment, affirmed it as modified, and remanded the case to the superior court with directions to issue a writ of mandamus requiring the city to proceed to arbitrate the designated issues in accordance with the reviewing court's opinion. The "Reduction of Personnel" proposal was held to be arbitrable only insofar as it affects the working conditions and safety of the employees and the matters of seniority and reinstatement which are included in the proposal. The "Vacancies and Promotions" proposal was held to be arbitrable, but the arbitrators were directed to hear facts to determine whether the deputy fire chief's position is supervisory within the general principle excluding supervisory employees from bargaining units. The "Schedule of Hours" proposal was held to be arbitrable in full. And the "Constant Manning Procedures" proposal was held to be arbitrable to the extent that it affects the working conditions and safety of the employees.

In Bank. (Opinion by Tobriner, J., expressing the unanimous view of the court.) *609

HEADNOTES

Classified to California Digest of Official Reports

(1)
Labor § 114--Subjects of Collective Bargaining.
The Legislature, in excepting from the scope of bargaining in public employee labor matters the "merits, necessity, or organization" of any service or activity provided by law or executive order, as the limitation is expressed in Gov. Code, § 3504, apparently did not intend to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions, but intended thereby to forestall the inclusion of managerial policy decisions within such interests.

(2)
Municipal Corporations § 78--Charters--Construction--Collective Bargaining--National Labor Relations Act Analogies.
The bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment they may render in interpreting the scope of bargaining under a city charter granting city employees the right to bargain on "wages, hours and working conditions," but withholding that right as to matters involving the "merits, necessity or organization of any governmental service."

(3)
Labor § 190--Matters Arbitrable--Firefighters' Hours.
Under city charter arbitration provisions granting city employees the right to bargain on "wages, hours and working conditions," but withholding that right as to matters involving the "merits, necessity or organization of any governmental service," the issue of a schedule of hours by which the union proposed a maximum of 40 hours per week on 8-hour shifts, and 56 hours per week on 24-hour shifts was negotiable and arbitrable.

(4)
Labor § 185--Matters Arbitrable--Vacancies and Promotions.
Under city charter arbitration provisions granting city employees the right to bargain on "wages, hours and working conditions," but withholding that right as to matters involving the "merits, necessity or organization of any governmental service," the union's vacancies and

promotions proposal was arbitrable, inasmuch as it was concerned with fire fighters' job security and opportunities for advancement. However, in the absence of evidence before the reviewing court in mandamus proceedings as to whether a deputy fire chief's duties are supervisory, within the general principle excluding supervisory employees from bargaining units, the question whether the vacancies and promotions proposal applies to him was a matter for determination by the arbitrators.

([5])
Labor § 190--Matters Arbitrable--Wages, Hours and Working Conditions-- Firefighters' Manning Schedule.
Under city charter arbitration provisions granting city employees the right to bargain on "wages, hours and working conditions," but withholding that right as to matters involving the "merits, necessity or organization of any governmental service," a proposal that the manning schedule presently in effect with respect to fire fighters be continued for the term of the new agreement was arbitrable to the extent that it affects the working conditions and safety of the employees.

([6])
Labor § 190--Matters Arbitrable--Wages, Hours and Working Conditions-- Number of Firefighters.
Under city charter arbitration provisions granting city employees the right to bargain on "wages, hours and working conditions," but withholding that right as to matters involving the "merits, necessity or organization of any governmental service," the union's proposal which would require that the city bargain with respect to any decision to reduce the number of fire fighters was arbitrable only insofar as it affects the working conditions and safety of the remaining employees and the matters of seniority and reinstatement which are included in the proposal.

([7])
Labor § 111--Collective Bargaining--Public Policy.
State policy favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization.

[See **Cal.Jur.2d,** Labor, § 130; **Am.Jur.2d,** Labor and Labor Relations, § 1246.]

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TOBRINER, J.

In this case of first impression we must delineate the function of the court in interpreting a provision for arbitration in a city charter affecting public employees. Specifically we are asked, prior to the arbitration proceeding itself, to reconcile clauses which substantively overlap: a provision that grants city employees the right to bargain on "wages, hours and working conditions" but withholds that right as to matters involving the "merits, necessity or organization of any governmental service." As we shall explain, our attempt now to define the issues of arbitration so that they assume the shape of rigid categories would be to reach premature judgments without benefit of the factual foundations of an arbitral record and to impede the arbitration process itself. We therefore largely leave to the arbitrators the moulding and resolution of the issues, subject to the proviso that neither party may be bound by a decision in excess of the arbitrators' jurisdiction.

In 1971, during negotiations between representatives of the City of Vallejo and the Fire Fighters Union as to the terms of a new contract, the parties failed to agree on 28 issues. Pursuant to the process prescribed in the city charter, they submitted the disputed matters to mediation and fact finding. When these procedures failed to effect a resolution, the city agreed to submit 24 of the issues to arbitration but contended that four other issues, namely "Personnel Reduction," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure," involved the "merits, necessity or organization" of the fire fighting service and did not come under the arbitrable provisions. The city refused to accept the recommendations of the fact finding panel with respect to these issues or to submit them to arbitration.

On December 22, 1971, prior to the scheduled hearing before the board *612 of arbitrators, the Fire Fighters Union filed a complaint in the Solano Superior Court

seeking mandate to compel the city to submit the four disputed issues to arbitration. The court found for the union on all the issues, stating: "[T]he evidence introduced here supports findings that the issues 'Reduction of Personnel,' 'Vacancies and Promotions,' 'Schedule of Hours' and 'Constant Manning Procedures,' are related to 'wages, hours and conditions of employment' .... [W]hile the issues might also apply to the exclusionary language 'but not on matters involving the merits, necessity or organization of any service or activity provided by law,' to so hold would be to defeat the overriding purpose of the Meyers-Milias-Brown Act and section 809 of the Vallejo charter, namely to provide peace and harmony with the city's public safety employees. The court cannot engage in judicial legislation and write into the Vallejo charter words or meaning that are not there." The court therefore ordered that a peremptory writ of mandate issue directing the city to proceed to arbitration on the disputed issues.[1] The city appeals.

The present controversy therefore involves an interpretation of the Vallejo City Charter provisions which govern public employee contract negotiations. The provisions for multi-level resolution of disputes at issue were drafted by a board of freeholders for incorporation in a new city charter in response to a strike by city police and fire fighters in July of 1969. These proposals, with the exception of a provision for final binding arbitration, were accepted by the city council and embodied in section 809 of the city charter. Section 809 sets up a "system of collective negotiating" and provides that city employees shall have the right to "negotiate on matters of wages, hours and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law. ..." The section further provides that if the parties cannot reach agreement, they must submit successively to mediation and fact finding.[2] ***613**

The arbitration provisions rejected by the city council were submitted to the citizens of Vallejo in a referendum in 1970 and approved. The electorate added to the city charter section 810 which provides that if representatives of the city and its employees do not reach agreement after the report of the fact finding committee under section 809, the issues upon which they fail to agree shall be submitted to binding arbitration.[3] ***614**

The scope of bargaining provision in the Vallejo City Charter in large measure parallels that set out in the Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510).[4] Government Code section 3504 reads: "The scope of representation shall 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." Therefore, interpretation of the scope of bargaining language in the Vallejo charter necessarily bears upon the meaning of the same language in the Meyers-Milias-Brown Act.[5]

In the instant case, as we have stated, we are called upon to render a preliminary decision as to the scope of the arbitration. The arbitration process, however, is an ongoing one in which normally an arbitrator, rather than a court, will narrow and define the issues, rejecting those matters over which he cannot properly exercise jurisdiction because they fall exclusively within the rights of management. As Professor Grodin has observed: "... collective bargaining and issues arbitration are together a dynamic process, in which the positions of the parties and their interaction with the arbitrator is in a state of constant flux. Proposals get modified and non-negotiable positions become negotiable as the parties sort out their priorities, develop ***615** understanding of the implications of their positions, and perceive alternative solutions which they may not previously have considered. To determine what is arbitrable and what is not against this changing context is a bit like trying a balancing act in the middle of a rushing torrent." (Grodin, *California Public Employee Bargaining Revisited: The MMB Act in the Appellate Courts* (1974) Cal. Pub. Employee Rel. No. 21, p. 17.)

To a large extent the rendition of the definitions involved in this case will be welded by the facts developed in arbitration itself. We put the proposition in these words in *Butchers' Union Local 229 v. Cudahy Packing Co.* (1967) 66 Cal.2d 925, 938 [59 Cal.Rptr. 713, 428 P.2d 849]: "Because arbitration substitutes for economic warfare the peaceful adjudication of disputes, and because controversy takes on ephemeral shapes and unforeseeable forms, courts do not congeal arbitration provisions into fixed molds but give them dynamic sweep." We therefore must be careful not to restrict unduly the *scope* of the arbitration by an overbroad definition of "merits, necessity or organization." Nor does this cautious judicial approach expose the city to an excessive assertion of the arbitrators' jurisdiction; the city council *after* the rendition of the award may reject any award that invades its authority over matters involving "merits, necessity or organization" since the charter itself limits the scope of the arbitration decision to that which is "consistent with applicable law."[6]

With this caveat in mind, we approach the specific

problem of reconciling the two vague, seemingly overlapping phrases of the statute: "wages, hours and working conditions," which, broadly read could encompass practically any conceivable bargaining proposal; and "merits, necessity or organization of any service" which, expansively interpreted, could swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city's discretion.

In attempting to reconcile these provisions, we note that the phrase "wages, hours and other terms and conditions of employment" in the MMBA was taken directly from the National Labor Relations Act[7] (hereinafter ***616** NLRA). (See Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 749.) The Vallejo charter only slightly changed the phrasing to "wages, hours and working conditions." A whole body of federal law has developed over a period of several decades interpreting the meaning of the federal act's "wages, hours and other terms and conditions of employment."

In the past we have frequently referred to such federal precedent in interpreting parallel language in state labor legislation. Thus, for example, in *Englund* v. *Chavez* (1972) 8 Cal.3d 572, 576 [105 Cal.Rptr. 521, 504 P.2d 457], we determined the reach of the California Jurisdictional Strike Act in part by reference to judicial construction of similar language in the National Labor Relations Act. Similarly, in *Petri Cleaners, Inc. v. Automotive Employees, etc., Local No. 88* (1960) 53 Cal.2d 455, 459 [2 Cal.Rptr. 470, 349 P.2d 76], we referred to judicial interpretation of the "interfere with, restrain and coerce" language in section 8(a)(1) and (2) of the NLRA to aid us in interpreting the meaning of "interfered with, dominated or controlled" in Labor Code section 1117.

The origin and meaning of the second phrase - excepting "merits, necessity or organization" from the scope of bargaining - cannot claim so rich a background. ([1]) Apparently the Legislature included the limiting language not to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions but rather to forestall any expansion of the language of "wages, hours and working conditions" to include more general managerial policy decisions.

Although the NLRA does not contain specific wording comparable to the "merits, necessity or organization" terminology in the city charter and the state act, the underlying fear that generated this language - that is, that wages, hours and working conditions could be expanded beyond reasonable boundaries to deprive an employer of his legitimate management prerogatives - lies imbedded in the federal precedents under the NLRA. As a review of federal case law in this field demonstrates, the trepidation that the union would extend its province into matters that should properly remain in the hands of employers has been incorporated into the interpretation of the scope of "wages, hours and terms and conditions of employment."[8] ***617** Thus, because the federal decisions effectively reflect the same interests as those that prompted the inclusion of the "merits, necessity or organization" bargaining limitation in the charter provision and state act, the federal precedents provide reliable if analogous authority on the issue.

The City of Vallejo objects to the use of NLRA precedents because of the alleged differences between employment relations in the public and private sectors. Although we recognize that there are certain basic differences between employment in the public and private sectors,[9] the adoption of legislation providing for public employment negotiation on wages, hours and working conditions just as in the private sector demonstrates that the Legislature found public sector and private sector employment relations sufficiently similar to warrant similar bargaining provisions.[10] ([2]) We therefore conclude that the bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the Vallejo charter.

We now turn to an analysis of the specific bargaining proposals which are at issue here.

1. *Schedule of Hours*

([3]) The issue of Schedule of Hours by which the union proposed a maximum of 40 hours per week for fire fighters on 8-hour shifts and 56 hours per week for fire fighters on 24-hour shifts is clearly negotiable and arbitrable despite the city's argument that it involves the "organization" of the fire service. The Vallejo charter provides explicitly that city employees shall have the right to bargain on matters of wages, *hours* and working conditions; ***618** furthermore, working hours and work days have been held to be bargainable subjects under the National Labor Relations Act. In *Meat Cutters v. Jewel Tea* (1965) 381 U.S. 676, 691 [14 L.Ed.2d 640, 650, 85 S.Ct. 1596] the United States Supreme Court held that the limitation of butchers' work hours to the period of 9 a.m. to 6 p.m. was a mandatory subject of bargaining. The city cites no authority to the contrary. Accordingly, we conclude that Schedule of Hours is a negotiable issue.

2. *Vacancies and Promotions*

([4]) The union's Vacancies and Promotions proposal concerns fire fighters' job security and opportunities for advancement and therefore relates to the terms and conditions of their employment. (Cf. *District 50, United Mine Workers, Local 13942 v. N.L.R.B.* (4th Cir. 1966) 358 F.2d 234.) Similar proposals for union hiring hall arrangements have been held to involve terms and conditions of employment under the National Labor Relations Act and to constitute mandatory subjects of bargaining. (*N.L.R.B. v. Tom Joyce Floors, Inc.* (9th Cir. 1965) 353 F.2d 768, 771.)

The city contends that this proposal may not apply to appointment or promotion to the position of deputy fire chief. Although the Vallejo charter does not contain any provision for determining the proper bargaining unit, supervisory or managerial employees are routinely excluded from the bargaining units under the National Labor Relations Act. (*N.L.R.B. v. Gold Spot Dairy, Inc.* (10th Cir. 1970) 432 F.2d 125; see *N.L.R.B. v. Bell Aerospace Co.* (1974) 416 U.S. 267 [40 L.Ed.2d 134, 94 S.Ct. 1757]; by analogy, we conclude that under the charter the union can claim no right to bargain as to supervisory positions.

We are presented with no facts which disclose whether the deputy fire chief's duties are supervisory; his title alone does not constitute a sufficient basis for excluding him from the bargaining unit. We therefore conclude that this issue should be submitted to the arbitrators who will hear the facts which will enable them to determine whether the deputy fire chief's duties are indeed supervisory. If so, the union's Vacancies and Promotions proposal does not apply to him or his position because he is not a member of the bargaining unit.

3. *Constant Manning Procedure*

An examination of this issue illustrates the wisdom of judicial self-restraint in attempting pre-arbitral definitions of the scope of arbitration. Apparently the union originally sought to add one engine company and to increase the personnel assigned to the existing engine companies. If these ***619** union demands required the building of a new fire house or the purchase of new equipment, they could very well intrude upon management's role of formulating policy. In view of the union's counterclaim that such a station and equipment were necessary for the safety of the men, this issue could have presented a complex problem. But the very flow of the proceedings washed away these questions because the union altered its position and accepted the recommendation of the fact finding committee "that the manning schedule presently in effect be continued without change during the term of the new Memorandum of Agreement." Hence we do not face the problem of whether the construction of a new fire house and the purchase of new equipment would intrude upon managerial prerogatives of policy making.

Although the city challenges even the limited status quo version of the manpower issue, contending that the fact finding ruling involves the "merits" and "organization" of the fire department and is therefore excluded from the scope of bargaining, we cannot conclude at this stage that the manpower proposal is necessarily nonarbitrable.

The city argues that manpower level in the fire department is inevitably a matter of fire prevention policy, and as such lies solely within the province of management. If the relevant evidence demonstrates that the union's manpower proposal is indeed directed to the question of maintaining a particular standard of fire prevention within the community, the city's objection would be well taken.

The union asserts, however, that its current manpower proposal is not directed at general fire prevention policy, but instead involves a matter of workload and safety for employees, and accordingly falls within the scope of negotiation and arbitration. Because the tasks involved in fighting a fire cannot be reduced, the union argues that the number of persons manning the fire truck or comprising the engine company fixes and determines the amount of *work* each fire fighter must perform. Moreover, because of the hazardous nature of the job, the union also claims that the number of persons available to fight the fire directly affects the *safety* of each fire fighter.

([5]) Insofar as the manning proposal at issue does in fact relate to the questions of employee workload and safety, decisions under the National Labor Relations Act fully support the union's contention that the proposal is arbitrable. First the federal authorities uniformly recognize "workload"[11] ***620** issues as mandatory subjects of bargaining whose determination may not be reserved to the sole discretion of the employer. (See, e.g., *Gallenkamp Stores Co.* v. *N.L.R.B.* (9th Cir. 1968) 402 F.2d 525, 529, fn. 4.) Thus, for example, in *Beacon Piece Dyeing & Finishing Co., Inc.* (1958) 121 N.L.R.B. 953, 954, 956, the National Labor Relations Board held that an employer could not unilaterally increase an employee's workload by assigning to him the operation of an extra machine. Similarly, the courts have recognized rules and practices affecting employees safety as mandatory

subjects of bargaining since they indirectly concern the terms and conditions of his employment. (*N.L.R.B.* v. *Gulf Power Company* (5th Cir. 1967) 384 F.2d 822.)

Moreover, a recent California public employment case, *Los Angeles County Employees Assn. Local 660 v. County of Los Angeles* (1973) 33 Cal.App.3d 1 [108 Cal.Rptr. 625], affords additional support for the union's position. In interpreting the scope of bargaining language in the Meyers-Milias-Brown Act - language which, as pointed out earlier, largely parallels the scope of negotiation provision under the Vallejo City Charter - the *Los Angeles County Employees* court held that the county was required to negotiate with the union with respect to the size of the caseloads carried by social service eligibility workers. Because the caseload, i.e., "workload," of the social workers effectively determined the number of these workers needed to service the recipients of aid, bargaining over the size of caseloads in *Los Angeles County Employees* was in reality comparable to bargaining over "manning" levels.[12] In the case before us, the union claims that the fire fighters, like the Los Angeles social workers, are essentially demanding a particular workload but have framed their demand in terms of "manning," that is the number of people available to fight each fire.

Given the parties' divergent characterizations of the instant manpower proposal, either one of which may well be accurate, we believe the proper course must be to submit the issue to the arbitrators so that a factual record may be established. The nature of the evidence presented to the arbitrators should largely disclose whether the manpower issue primarily involves the workload and safety of the men ("wages, hours and working conditions") ***621** or the policy of fire prevention of the city ("merits, necessity or organization of any governmental service"). On the basis of such a record, the arbitrators can properly determine in the first instance whether or not, and to what extent, the present manpower proposal is arbitrable.

Furthermore, the parties themselves, or the arbitrators, in the ongoing process of arbitration, might suggest alternative solutions for the manpower problem that might remove or transform the issue. Indeed, the union in the instant case has already abandoned one position and assumed another. These are the elements and considerations that argue against preliminary court rulings that would dam up the stream of arbitration by premature limitations upon the process, thwarting its potential destination of the resolution of the issues. Hence we hold that the charter provision as to "merits, necessity or organization" of the service does not at this time preclude the arbitration of the union proposal that the manning schedule presently in effect be continued for the term of the new agreement.

4. *Personnel Reduction*

([6]) Finally, the union advanced a Personnel Reduction proposal which would require that the city bargain with the union with respect to any decision to reduce the number of fire fighters. Under the proposal, any reduction would be on a least-seniority basis, and no new employees could be hired until all those laid off were given an opportunity to return. The city objects to that part of the proposal requiring bargaining on a decision to reduce personnel and contends that any such matter is not negotiable because it involves the merits, necessity or organization of the fire fighting service.

A reduction of the entire fire fighting force based on the city's decision that as a matter of policy of fire prevention the force was too large would not be arbitrable in that it is an issue involving the organization of the service.

Thus cases under the NLRA indicate that an employer has the right unilaterally to decide that a layoff is necessary, although it must bargain about such matters as the *timing* of layoffs and the *number* and *identity* of the employees affected. (*N.L.R.B. v. United Nuclear Corporation* (10th Cir. 1967) 381 F.2d 972.) In some situations, such as that in which a layoff results from a decision to subcontract out bargaining unit work, the decision to subcontract and lay off employees is subject to bargaining. (*Fibreboard Corp. v. Labor Board* (1964) 379 U.S. 203 [13 L.Ed.2d 233, 85 S.Ct. 398, 6 A.L.R.3d 1130].) The fact, however, that the decision to lay off results ***622** in termination of one or more individuals' employment is not *alone* sufficient to render the decision itself a subject of bargaining. (*N.L.R.B.* v. *Dixie Ohio Express Co.* (6th Cir. 1969) 409 F.2d 10.)

On the other hand, because of the nature of fire fighting, a reduction of personnel may affect the fire fighters' working conditions by increasing their workload and endangering their safety in the same way that general manning provisions affect workload and safety. To the extent, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration for the same reasons indicated in the prior discussion of the manning proposal.

Our conclusion that the issues of Personnel Reduction, Vacancies and Promotions, Schedule of Hours and Constant Manning Procedure, except as limited above, involve the wages, hours or working conditions of fire

fighters and are negotiable requires in the context of this suit that the City of Vallejo submit these issues to arbitration. We in no way evaluate the merit of the union proposals, but hold only that under the Vallejo charter they are arbitrable.

Such a result comports with the strong public policy in California favoring peaceful resolution of employment disputes by means of arbitration. ([7]) We have declared that state policy in California "favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization." (*Posner* v. *Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 180 [14 Cal.Rptr. 297, 363 P.2d 313].) In this case the voters of the City of Vallejo similarly declared that they consider arbitration to be the most appropriate means of resolving labor disputes. Through section 810 the citizens of Vallejo delegated to a board of arbitrators the power to render a final and binding decision in labor disputes "to the extent permitted by law" after considering "all factors relevant to the issues from the standpoint of both the employer and the employee, including the City's financial condition."[13]

At the same time Vallejo voters provided that any employee who participated in a strike against the city should be automatically terminated. (§ 810.) Thus, the employee's *quid pro quo* for this no-strike provision consisted ***623** of the arbitrability of all disputes (see *Boys Markets v. Clerks Union* (1970) 398 U.S. 235 [26 L.Ed.2d 199, 90 S.Ct. 1583]); the arbitration and no-strike provisions were interdependent. Any interpretation of the Vallejo charter which improperly failed to require arbitration on the full range of negotiable issues would not only erroneously curtail arbitration but would invite the very labor strife which the charter provisions seek to prevent.

For the foregoing reasons we dispose of the issues as follows: (1) The Schedule of Hours proposal must be submitted to arbitration in full. (2) The proposal as to Vacancies and Promotions is arbitrable. The arbitrators shall additionally hear the facts to determine whether the position of deputy fire chief is a supervisory one and thus excluded from the bargaining unit. If so, the Vacancies and Promotions proposal cannot apply to the deputy fire chief position. (3) The proposal that the manning schedule presently in effect be continued without change during the term of the new agreement is arbitrable to the extent that it affects the working conditions and safety of the employees. (4) As to Personnel Reduction, the proposal to reduce personnel is arbitrable only insofar as it affects the working conditions and safety of the remaining employees. Matters of seniority and reinstatement included in the Personnel Reduction proposal are arbitrable.

We affirm the judgment as herein modified and remand the case to the superior court with directions to issue a writ of mandamus requiring the City of Vallejo to proceed to arbitrate the issues of "Reduction of Personnel," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure" in accordance with this opinion. Each party shall bear its own costs on appeal.

Wright, C. J., McComb, J., Mosk, J., Burke, J., Sullivan, J., and Clark, J., concurred. ***624**

Footnotes

1 The court rejected the union's contention that the California Arbitration Act, Code of Civil Procedure section 1280 et seq., applied to this dispute, holding that it had no jurisdiction under the arbitration act and could not issue an order to arbitrate. The court upheld the writ of mandate to compel the city to arbitrate, however, because the union had no other plain, speedy and adequate remedy. Since the union did not initially seek an order to arbitrate under section 1281.2 of the act, but proceeded in the superior court with a petition for writ of mandate, we need not resolve the issue of the applicability of the California Arbitration Act.

2 Section 809 provides: "Consistent with applicable law, the City Council shall by ordinance provide a system of collective negotiating to include:
"a. It shall be the right of City employees individually or collectively to negotiate on matters of wages, hours, and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law, or on any matter arising out of Sections 803(n) or 803(o) of this Charter.
"b. The City Council shall direct the City Manager and/or his designated representative(s) to negotiate in good faith with recognized employee organizations.
"c. Agreements reached between City representatives authorized in (b) above and the representatives of recognized employee organizations shall be submitted in writing to the City Council for its approval, modification, or rejection.
"d. There shall be established a timetable for the total process of collective negotiations, including mediation and fact finding, as herein provided, which will, if successful, assume a final agreement between the parties no less than 45 days before the end of the current fiscal year.

"e. If, after a period of time to be set forth in the ordinance, no agreement can be reached between City representatives authorized in (b) above and the representatives of recognized employee organizations or if the City Council refuses to ratify the agreement arrived at or modifies such agreement in any manner unacceptable to said employee organizations, the parties shall request the State Conciliation Service, or other available impartial third-party mediation service mutually acceptable to the parties, to provide a mediator in accordance with its usual procedures.
"f. If no agreement between the parties has been reached within 10 days after the date for start of mediation, a fact-finding committee of three shall be appointed to deal with the disputed issues. One member of the fact-finding committee shall be appointed by the City Council, one member shall be appointed by the recognized employee organization, and those two appointed shall name a third, who shall be the chairman. If they are unable to agree upon a third, they shall select the third member from a list of five names to be provided by the State Conciliation service. The fact-finding committee shall make public its report, with recommendations, within 30 days. The Council shall then promptly consider and act upon the report."

3 Section 810 provides: "Consistent with applicable law, the ordinance adopted by the Council under Section 809 shall in addition include a requirement that if the parties do not reach agreement within 10 days after the report and recommendations of the fact-finding committee, the issues shall be submitted to arbitration. The Board of Arbitrators shall be composed of three persons; one appointed by the City Council, one appointed by the recognized employee organization, and those two appointed shall appoint a third, who shall be chairman. If they are unable to agree upon a third, they shall select the third member from a list of five names to be provided by the State Conciliation Service. No member of the fact-finding committee shall be a member of the Board of Arbitrators. The arbitrators shall consider all factors relevant to the isues from the standpoint of both the employer and the employee, including the City's financial condition. To the extent permitted by law, the decision of a majority of the Board of Arbitrators shall be final and binding upon the parties. The cost of arbitration shall be borne equally by all parties.
"The Council shall also provide in said ordinance that any employee who fails to report for work without good and just cause during negotiations or who participates in strike against the City of Vallejo will be considered to have terminated his employment with the City, and the Council shall have no power to provide, by reinstatement or otherwise, for the return or reentry of said employee into the City service except as a new employee who is employed in accordance with the regular employment practices of the City in effect for the particular position of employment."

4 The Meyers-Milias-Brown Act [hereinafter MMBA] applies to all local government employees in California. It provides for negotiation ("meet and confer") and mediation but not fact-finding or binding arbitration. (Gov. Code, §§ 3505 and 3505.2.)

5 The meaning of the scope of bargaining language in the Vallejo charter does not differ from the meaning of such language in the MMBA because of the existence of dispute resolution provisions in the charter not present in the MMBA. The essential difference between the bargaining rights afforded Vallejo employees and those afforded local government employees in general under the MMBA relates only to the *remedies* available when negotiation breaks down and *not* to the scope of negotiation required.
The charter provides that "[i]t shall be the right of City employees ... to *negotiate* on *matters* of wages, hours and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity. ..." (Italics added.) If no agreement is reached on *these matters*, they must be submitted to mediation, then fact-finding, then arbitration. The matters which are submitted to the three levels of dispute resolution are those upon which the parties *negotiate* but do not reach agreement. There is nothing in either section 809 or 810 which can be interpreted to exclude any matters which are subject to negotiation from subsequent submission to mediation, fact-finding and arbitration. Therefore interpretation of the scope of negotiation under the Vallejo charter is necessarily an interpretation of the scope of arbitration.

6 California authorities establish that after an arbitration decision has been rendered, judicial review is available to determine whether the arbitrators have exceeded their powers. (See, e.g., *Morris v. Zuckerman* (1968) 69 Cal.2d 686, 691 [72 Cal. Rptr. 880, 446 P.2d 1000]; *National Indemnity Co. v. Superior Court* (1972) 27 Cal.App.3d 345, 349 [103 Cal.Rptr. 606]; *Firestone Tire & Rubber Co. v. United Rubber Workers* (1959) 168 Cal.App.2d 444, 449 [335 P.2d 990]; *Flores* v. *Barman* (1955) 130 Cal.App.2d 282, 287 [279 P.2d 81]; *Drake v. Stein* (1953) 116 Cal.App.2d 779, 785 [254 P.2d 613].)

7 The NLRA provides that "to bargain collectively is ... to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment ...." (29 U.S.C. § 158(d)).

8 Thus federal cases have held an employer need not bargain about a decision to shut down one of its plants for economic reasons (*N.L.R.B. v. Royal Plating & Polishing Co.* (3d Cir. 1965) 350 F.2d 191), nor about a decision based on economic considerations alone to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner (*N.L.R.B. v. Transmarine Navigation Corporation* (9th Cir. 1967) 380 F.2d 933).

Furthermore, a decision to relocate the employer's plant to another location for economic reasons has been held "clearly within the realm of managerial discretion" and not subject to bargaining on the union's demand (*N.L.R.B. v. Rapid Bindery, Inc.* (2d Cir. 1961) 293 F.2d 170, 176).

9 See generally Shaw & Clark, *Practical Differences Between Public & Private Sector Collective Bargaining* (1972) 19 U.C.L.A.L.Rev. 867; Wellington & Winter, *The Limits of Collective Bargaining in Public Employment* (1969) 78 Yale L.J. 1107; Report of the Western Assembly on Collective Bargaining in American Government (1972) pages 4-5; *Project: Collective Bargaining and Politics in Public Employment* (1972) 19 U.C.L.A.L.Rev. 887.

10 The Assembly Advisory Council on Public Employee Relations reached the same conclusion after studying arguments of alleged differences between the public and private sectors. (Final Rep., p. 139, Mar. 15, 1973.) Furthermore, we applied private sector precedent in interpreting another aspect of the MMBA in *Social Workers' Union, Local 535 v. Alameda Welfare Dept.* (1974) 11 Cal.3d 382 [113 Cal.Rptr. 461, 521 P.2d 453].

11 In the private sector employees rarely seek higher "manning" levels but instead usually frame similar demands in terms of reducing "workload." In one case, however, a union did phrase its proposal in "manning" terms, demanding an increase in the number of employees assigned to operate a specific 10-inch mill. The National Labor Relations Board found the proposal to constitute a mandatory subject of bargaining. (*Timken Roller Bearing Co.* (1946) 70 N.L.R.B. 500, 504-505, revd. on other grounds (6th Cir. 1947) 161 F.2d 949.)

12 The city argues that the *Los Angeles County Employees* case is distinguishable from the instant matter because it only concerned the "negotiability" of the caseload issue and not its "arbitrability." As noted above (see fn. 5, *supra*), however, under the charter provision at issue in this case, the *scope* of negotiation and the *scope* of arbitration are identical.

13 An amicus has contended that the disputed issues are not arbitrable because submission of them to arbitration constitutes an unconstitutional delegation of legislative power. Arbitration of public employment disputes has been held constitutional by state supreme courts in *State v. City of Laramie* (Wyo. 1968) 437 P.2d 295 and *City of Warwick v. Warwick Regular Firemen's Ass'n* (1969) 106 R.I. 109 [256 A.2d 206].
To the extent that the arbitrators do not proceed beyond the provisions of the Vallejo charter there is no unlawful delegation of legislative power.

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Exhibit 10

Kinlaw v. State of California (1991)
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hicle. Yet it cannot be rationally argued that a car two miles from its driver is within the driver's "immediate presence," that is, in an area in which the driver could exercise physical control over the vehicle.

Still another example reveals the defects of the majority's approach. Let us assume that the victim and defendant had merely decided to go for a walk, and that a third party stole the car from the lot where it was parked when the victim was a quarter-mile away. The victim, who was walking away from the car and down a narrow trail with defendant at the time of the theft, would not have known the car was gone until he returned. In other words, in all probability the car would not have been within the victim's sensory perception at the time it was taken. If the "immediate presence" requirement of the robbery statute is not tested by sensory perception, however, then it is difficult to see what it means. For instance, defendant and his companions could have walked with the victim not a quarter-mile, but a mile, or three miles, or five, and apparently the immediate presence requirement would still be met under the majority's approach. The majority's "relative proximity" theory thus nullifies the statutory requirement of immediate presence.

Second, the majority finds the immediate presence requirement of the robbery statute satisfied on a "luring away" theory. Under the majority's approach, robbery is committed when the defendant "uses peaceful means to move the victim away from a place where the victim could physically protect the property, then employs force or fear upon the victim in order to make good the theft or escape." (Maj. opn., *ante*, at p. 47 of 285 Cal.Rptr., p. 1289 of 814 P.2d.)

This approach presumes that the elements of robbery can occur over a theoretically limitless time span. But less than 10 months ago, the members of this court unanimously agreed that the term immediate presence means "an area over which the victim, *at the time force or fear was employed*, could be said to exercise some physical control." (*People v. Hayes, supra*, 52 Cal.3d at p. 627, 276 Cal.Rptr. 874, 802 P.2d 376, italics added.) The majority's conclusion in this case—that a defendant who lures the victim away from the immediate presence of the property, then employs force or fear, can be guilty of robbery—directly conflicts with this unambiguous language from our recent decision in *Hayes*.

The majority correctly finds that the evidence supports a conclusion that the key to the victim's car was taken from his person by means of force or fear. But because, as the majority observes, we cannot be certain under the circumstances of this case that the jury based its robbery finding on the taking of the key and not the car, this rationale alone cannot support the robbery special circumstance. (See *People v. Green* (1980) 27 Cal.3d 1, 70, 164 Cal.Rptr. 1, 609 P.2d 468.) Accordingly, I would strike the robbery special circumstance, and affirm the death verdict in this case based solely on the lying-in-wait special circumstance.

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Frances KINLAW et al., Plaintiffs and Appellants,

v.

STATE of California, Kenneth Kizer as Director of the Department of Health Services, etc., et al., Defendants and Respondents.

No. S014349.

Supreme Court of California, In Bank.

Aug. 30, 1991.

Medically indigent adults and taxpayers brought action against State and director of Department of Health Services of State, alleging that State had shifted its financial responsibility for funding of

health care for poor onto counties without providing necessary funding, in violation of constitutional article prohibiting State from avoiding its spending limits by shifting programs and their financial burdens to local governments. The Superior Court, Alameda County, No. 632120-4, Henry Ramsey, Jr., and Demetrios P. Agretelis, JJ., granted summary judgment to State. Plaintiffs appealed. The Court of Appeal reversed and remanded. The Supreme Court granted review, 269 Cal.Rptr. 492, 790 P.2d 1289, superseding opinion of Court of Appeal. The Supreme Court, Baxter, J., held that plaintiffs lacked standing.

Court of Appeal reversed.

Broussard, J., issued dissenting opinion in which Mosk, J., joined.

Opinion, 265 Cal.Rptr. 760, superseded.

1. States ⇐115, 168½

Medically indigent adults and taxpayers lacked standing to challenge State's alleged violation of constitutional article prohibiting State from avoiding its spending limits by shifting programs and their financial burdens to local governments; administrative procedures established by Legislature, which are available only to local agencies and school districts directly affected by state mandate, are exclusive means by which State's obligations under that constitutional article are to be determined and enforced. West's Ann.Cal. Const. Art. 13B, § 6.

2. Constitutional Law ⇐82(1)

Unless exercise of constitutional right is unduly restricted, court must limit enforcement to procedures established by Legislature.

3. States ⇐115

For purposes of medically indigent adults' challenge to shift of portion of costs of medically indigent care program by State to county, constitutional article prohibiting State from avoiding its spending limits by shifting programs and their financial burdens to local governments did not provide remedy of reinstatement to Medi-Cal pending further action by State; remedy for failure to fund program is declaration that mandate is unenforceable, and that relief is available only after determination that mandate exists and Legislature has failed to include costs in local government claims bill, and only on petition by county. West's Ann.Cal.Gov.Code § 17612; West's Ann.Cal. Const. Art. 13B, § 6.

Stephen D. Schear, Stephen E. Ronfeldt, Armando M. Menocal III, Lois Salisbury, Laura Schulkind and Kirk McInnis, San Francisco, for plaintiffs and appellants.

Catherine I. Hanson, Astrid G. Meghrigian, Alice P. Mead, Alan K. Marks, County Counsel, San Bernardino, Paul F. Mordy, Deputy County Counsel, De Witt W. Clinton, County Counsel, Los Angeles, Robert M. Fesler, Asst. County Counsel, Frank J. DaVanzo, Deputy County Counsel, Weissburg & Aronson, Mark S. Windisch, Carl Weissburg and Howard W. Cohen as amici curiae on behalf of plaintiffs and appellants.

John K. Van de Kamp and Daniel E. Lungren, Attys. Gen., N. Eugene Hill, Asst. Atty. Gen., Richard M. Frank, Asher Rubin and Carol Hunter, Deputy Attys. Gen., Sacramento, for defendants and respondents.

BAXTER, Justice.

Plaintiffs, medically indigent adults and taxpayers, seek to enforce section 6 of article XIIIB (hereafter, section 6) of the California Constitution through an action for declaratory and injunctive relief. They invoked the jurisdiction of the superior court as taxpayers pursuant to Code of Civil Procedure section 526a and as persons affected by the alleged failure of the state to comply with section 6. The superior court granted summary judgment for defendants State of California and Director of the Department of Health Services, after concluding that plaintiffs lacked standing to prosecute the action. On appeal, the Court of Appeal held that plaintiffs have standing and that the action is not barred by the availability of administrative remedies.

We reverse. The administrative procedures established by the Legislature, which are available only to local agencies and school districts directly affected by a state mandate, are the exclusive means by which the state's obligations under section 6 are to be determined and enforced. Plaintiffs therefore lack standing.

I

STATE MANDATES

Section 6, adopted on November 6, 1979, as part of an initiative measure imposing spending limits on state and local government, also imposes on the state an obligation to reimburse local agencies for the cost of most programs and services which they must provide pursuant to a state mandate if the local agencies were not under a preexisting duty to fund the activity. It provides:

"Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

"(a) Legislative mandates requested by the local agency affected;

"(b) Legislation defining a new crime or changing an existing definition of a crime; or

"(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

A complementary provision, section 3 of article XIIIB, provides for a shift from the state to the local agency of a portion of the spending or "appropriation" limit of the state when responsibility for funding an activity is shifted to a local agency:

"The appropriations limit for any fiscal year ... shall be adjusted as follows: [¶] (a) In the event that the financial responsibility of providing services is transferred, in whole or in part, ... from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount."

II

PLAINTIFFS' ACTION

The underlying issue in this action is whether the state is obligated to reimburse the County of Alameda, and shift to Alameda County a concomitant portion of the state's spending limit, for the cost of providing health care services to medically indigent adults who prior to 1983 had been included in the state Medi-Cal program. Assembly Bill No. 799 (1981–1982 Reg. Sess.) (AB 799) (Stats.1982, ch. 328, p. 1568) removed medically indigent adults from Medi-Cal effective January 1, 1983. At the time section 6 was adopted, the state was funding Medi-Cal coverage for these persons without requiring any county financial contribution.

Plaintiffs initiated this action in the Alameda County Superior Court. They sought relief on their own behalf and on behalf of a class of similarly situated medically indigent adult residents of Alameda County. The only named defendants were the State of California, the Director of the Department of Health Services, and the County of Alameda.

In the complaint for declaratory and injunctive relief, plaintiffs sought an injunction compelling the state to restore Medi-Cal eligibility to medically indigent adults or to reimburse the County of Alameda for the cost of providing health care to those persons. They also prayed for a declaration that the transfer of responsibility from the state-financed Medi-Cal program to the counties without adequate reimbursement violated the California Constitution.[1]

1. The complaint also sought a declaration that the county was obliged to provide health care services to indigents that were equivalent to those available to nonindigents. This issue is

At the time plaintiffs initiated their action neither Alameda County, nor any other county or local agency, had filed a reimbursement claim with the Commission on State Mandates (Commission).[2]

Whether viewed as an action seeking restoration of Medi-Cal benefits, one to compel state reimbursement of county costs, or one for declaratory relief, therefore, the action required a determination that the enactment of AB 799 created a state mandate within the contemplation of section 6. Only upon resolution of that issue favorably to plaintiffs would the state have an obligation to reimburse the county for its increased expense and shift a portion of its appropriation limit, or to reinstate Medi-Cal benefits for plaintiffs and the class they seek to represent.

The gravamen of the action is, therefore, enforcement of section 6.[3]

III

ENFORCEMENT OF ARTICLE XIIIB, SECTION 6

[1] In 1984, almost five years after the adoption of article XIIIB, the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6. (§ 17500.) The Legislature did so because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process. The necessity for the legislation was explained in section 17500:

"The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIIIB of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, *it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.*" (Italics added.)

In part 7 of division 4 of title 2 of the Government Code, "State-Mandated Local Costs," which commences with section 17500, the Legislature created the Commission (§ 17525), to adjudicate disputes over the existence of a state-mandated program (§§ 17551, 17557) and to adopt procedures for submission and adjudication of reimbursement claims (§ 17553). The five-member Commission includes the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and

not before us. The County of Alameda aligned itself with plaintiffs in the superior court and did not oppose plaintiffs' effort to enforce section 6.

2. On November 23, 1987, the County of Los Angeles filed a test claim with the Commission. San Bernardino County joined as a test claimant. The Commission ruled against the counties, concluding that no state mandate had been created. The Los Angeles County Superior Court subsequently granted the counties' petition for writ of mandate (Code Civ.Proc., § 1094.5), reversing the Commission, on April 27, 1989. (No. C-731033.) An appeal from that judgment is presently pending in the Court of Appeal. (*County of Los Angeles v. State of California* No. B049625.)

3. Plaintiffs argue that they seek only a declaration that AB 799 created a state mandate and an injunction against the shift of costs until the state decides what action to take. This is inconsistent with the prayer of their complaint which sought an injunction requiring defendants to restore Medi-Cal eligibility to all medically indigent adults until the state paid the cost of full health services for them. It is also unavailing.

An injunction against enforcement of a state mandate is available only after the Legislature fails to include funding in a local government claims bill following a determination by the Commission that a state mandate exists. (Gov. Code, § 17612.) Whether plaintiffs seek declaratory relief and/or an injunction, therefore, they are seeking to enforce section 6.

All further statutory references are to the Government Code unless otherwise indicated.

Research, and a public member experienced in public finance. (§ 17525.)

The legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies (§ 17554),[4] establishes the method of payment of claims (§§ 17558, 17561), and creates reporting procedures which enable the Legislature to budget adequate funds to meet the expense of state mandates (§§ 17562, 17600, 17612, subd. (a).)

Pursuant to procedures which the Commission was authorized to establish (§ 17553), local agencies [5] and school districts [6] are to file claims for reimbursement of state-mandated costs with the Commission (§§ 17551, 17560), and reimbursement is to be provided only through this statutory procedure. (§§ 17550, 17552.)

The first reimbursement claim filed which alleges that a state mandate has been created under a statute or executive order is treated as a "test claim." (§ 17521.) A public hearing must be held promptly on any test claim. At the hearing on a test claim or on any other reimbursement claim, evidence may be presented not only by the claimant, but also by the Department of Finance and any other department or agency potentially affected by the claim. (§ 17553.) Any interested organization or individual may participate in the hearing. (§ 17555.)

A local agency filing a test claim need not first expend sums to comply with the alleged state mandate, but may base its claim on estimated costs. (§ 17555.) The Commission must determine both whether a state mandate exists and, if so, the amount to be reimbursed to local agencies and school districts, adopting "parameters and guidelines" for reimbursement of any claims relating to that statute or executive order. (§ 17557.) Procedures for determining whether local agencies have achieved statutorily authorized cost savings and for offsetting these savings against reimbursements are also provided. (§ 17620 et seq.) Finally, judicial review of the Commission decision is available through petition for writ of mandate filed pursuant to Code of Civil Procedure section 1094.5. (§ 17559.)

The legislative scheme is not limited to establishing the claims procedure, however. It also contemplates reporting to the Legislature and to departments and agencies of the state which have responsibilities related to funding state mandates, budget planning, and payment. The parameters and guidelines adopted by the Commission must be submitted to the Controller who is to pay subsequent claims arising out of the mandate. (§ 17558.) Executive orders mandating costs are to be accompanied by an appropriations bill to cover the costs if the costs are not included in the budget bill, and in subsequent years the costs must be included in the budget bill. (§ 17561, subds. (a) & (b).) Regular review of the costs is to be made by the Legislative Analyst who must report to the Legislature and recommend whether the mandate should be continued. (§ 17562.) The Commission is also required to make semiannual reports to the Legislature of the number of mandates found and the estimated reimbursement cost to the state. (§ 17600.) The Legislature must then adopt a "local government claims bill." If that bill does not include funding for a state mandate, an affected local agency or school district may seek a declaration from the superior court for the County of Sacramento that the mandate is unenforceable,

4. The test claim by the County of Los Angeles was filed prior to that proposed by Alameda County. The Alameda County claim was rejected for that reason. (See § 17521.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the issues the majority elects to address instead in this proceeding. Los Angeles County declined a request from Alameda County that it be included in the test claim because the two counties' systems of documentation were so similar that joining Alameda County would not be of any benefit. Alameda County and these plaintiffs were, of course, free to participate in the Commission hearing on the test claim. (§ 17555.)

5. "'Local agency' means any city, county, special district, authority, or other political subdivision of the state." (§ 17518.)

6. "'School district' means any school district, community college district, or county superintendant of schools." (§ 17519.)

and an injunction against enforcement. (§ 17612.)

Additional procedures, enacted in 1985, create a system of state-mandate apportionments to fund reimbursement. (§ 17615 et seq.)

It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of section 6 lies in these procedures. The statutes create an administrative forum for resolution of state mandate claims, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. It also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid (§ 17612).

The legislative intent is clearly stated in section 17500: "It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIIIB of the California Constitution and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution...." And section 17550 states: "Reimbursement of local agencies and school districts for costs mandated by the state shall be provided pursuant to this chapter."

Finally, section 17552 provides: "This chapter shall provide *the sole and exclusive procedure* by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIIIB of the California Constitution." (Italics added.)

In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce section 6 of article XIIIB.

IV

EXCLUSIVITY

Plaintiffs argued, and the Court of Appeal agreed, that the existence of an administrative remedy by which affected local agencies could enforce their right under section 6 to reimbursement for the cost of state mandates did not bar this action because the administrative remedy is available only to local agencies and school districts.

The Court of Appeal recognized that the decision of the County of Alameda, which had not filed a claim for reimbursement at the time the complaint was filed, was a discretionary decision which plaintiffs could not challenge. (*Dunn v. Long Beach L. & W. Co.* (1896) 114 Cal. 605, 609, 610–611, 46 P. 607; *Silver v. Watson* (1972) 26 Cal.App.3d 905, 909, 103 Cal.Rptr. 576; *Whitson v. City of Long Beach* (1962) 200 Cal.App.2d 486, 506, 19 Cal.Rptr. 668; *Elliott v. Superior Court* (1960) 180 Cal. App.2d 894, 897, 5 Cal.Rptr. 116.) The court concluded, however, that public policy and practical necessity required that plaintiffs have a remedy for enforcement of section 6 independent of the statutory procedure.

The right involved, however, is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services. Section 6 provides that the "state shall provide a subvention of funds *to reimburse ... local governments....*" (Italics added.) The administrative remedy created by the Legislature is adequate to fully implement section 6. That Alameda County did not file a reimbursement claim does not establish that the enforcement remedy is inadequate. Any of the 58 counties was free to file a claim, and other counties did so. The test claim is now before the Court of Appeal. The administrative procedure has operated as intended.

[2] The Legislature has the authority to establish procedures for the implementation of local agency rights under section 6 of article XIIIB. Unless the exercise of a constitutional right is unduly restricted, the court must limit enforcement to the procedures established by the Legislature. (*Peo-*

ple v. Western Air Lines, Inc. (1954) 42 Cal.2d 621, 637, 268 P.2d 723; *Chesney v. Byram* (1940) 15 Cal.2d 460, 463, 101 P.2d 1106; *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 75, 222 Cal.Rptr. 750.)

Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost of services to medically indigent adults is unpersuasive. Plaintiffs' interest, although pressing, is indirect and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind. Nothing in article XIIIB or other provision of law controls the county's expenditure of the funds plaintiffs claim must be paid to the county. To the contrary, section 17563 gives the local agency complete discretion in the expenditure of funds received pursuant to section 6, providing: "Any funds received by a local agency or school district pursuant to the provisions of this chapter may be used for any public purpose."

The relief plaintiffs seek in their prayer for state reimbursement of county expenses is, in the end, a reallocation of general revenues between the state and the county. Neither public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues. The Legislature has established a procedure by which the county may claim any revenues to which it believes it is entitled under section 6. That test-claim statute expressly provides that not only the claimant, but also "any other interested organization or individual may participate" in the hearing before the Commission (§ 17555) at which the right to reimbursement of the costs of such mandate is to be determined. Procedures for receiving any claims must "provide for presentation of evidence by the claimant, the Department of Finance and any other affected department or agency, *and any other interested person.*" (§ 17553. Italics added.) Neither the county nor an interested individual is without an opportunity to be heard on these questions. These procedures are both adequate and exclusive.[7]

[3] The alternative relief plaintiffs seek—reinstatement to Medi-Cal pending further action by the state—is not a remedy available under the statute, and thus is not one which this court may award. The remedy for failure to fund a program is a declaration that the mandate is unenforceable. That relief is available only after the Commission has determined that a mandate exists and the Legislature has failed to include the cost in a local government claims bill, and only on petition by the county. (§ 17612.)[8]

Moreover, the judicial remedy approved by the Court of Appeal permits resolution of the issues raised in a state mandate claim without the participation of those officers and individuals the Legislature deems necessary to a full and fair exposition and resolution of the issues. Neither the Controller nor the Director of Finance

7. Plaintiffs' argument that the Legislature's failure to make provision for individual enforcement of section 6 before the Commission demonstrates an intent to permit legal actions is not persuasive. The legislative statement of intent to relegate all mandate disputes to the Commission is clear. A more likely explanation of the failure to provide for test cases to be initiated by individuals lies in recognition that (1) because section 6 creates rights only in governmental entities, individuals lack sufficient beneficial interest in either the receipt or expenditure of reimbursement funds to accord them standing; and (2) the number of local agencies having a direct interest in obtaining reimbursement is large enough to ensure that citizen interests will be adequately represented.

8. Plaintiffs are not without a remedy if the county fails to provide adequate health care, however. They may enforce the obligation imposed on the county by Welfare and Institutions Code sections 17000 and 17001, and by judicial action. (See, e.g., *Mooney v. Pickett* (1971) 4 Cal.3d 669, 94 Cal.Rptr. 279, 483 P.2d 1231.)

was named a defendant in this action. The Treasurer and the Director of the Office of Planning and Research did not participate. All of these officers would have been involved in determining the question as members of the Commission, as would the public member of the Commission. The judicial procedures were not equivalent to the public hearing required on test claims before the Commission by section 17555. Therefore, other affected departments, organizations, and individuals had no opportunity to be heard.[9]

Finally, since a determination that a state mandate has been created in a judicial proceeding rather than one before the Commission does not trigger the procedures for creating parameters and guidelines for payment of claims, or for inclusion of estimated costs in the state budget, there is no source of funds available for compliance with the judicial decision other than the appropriations for the Department of Health Services. Payment from those funds can only be at the expense of another program which the department is obligated to fund. No public policy supports, let alone requires, this result.

The superior court acted properly in dismissing this action.

The judgment of the Court of Appeal is reversed.

LUCAS, C.J., and PANELLI, KENNARD and ARABIAN, JJ., concur.

BROUSSARD, Justice, dissenting.

I dissent. For nine years the Legislature has defied the mandate of article XIIIB of the California Constitution (hereafter article XIIIB). Having transferred responsibility for the care of medically indigent adults (MIA's) to county governments, the Legislature has failed to provide the counties with sufficient money to meet this responsibility, yet the Legislature computes its own appropriations limit as if it fully funded the program. The majority, however, declines to remedy this violation because, it says, the persons most directly harmed by the violation—the medically indigent who are denied adequate health care—have no standing to raise the matter. I disagree, and will demonstrate that (1) plaintiffs have standing as citizens to seek a declaratory judgment to determine whether the state is complying with its constitutional duty under article XIIIB; (2) the creation of an administrative remedy whereby counties and local districts can enforce article XIIIB does not deprive the citizenry of its own independent right to enforce that provision; and (3) even if plaintiffs lacked standing, our recent decision in *Dix v. Superior Court* (1991) 53 Cal.3d 442, 279 Cal.Rptr. 834, 807 P.2d 1063 permits us to reach and resolve any significant issue decided by the Court of Appeal and fully briefed and argued here. I conclude that we should reach the merits of the appeal.

On the merits, I conclude that the state has not complied with its constitutional obligation under article XIIIB. To prevent the state from avoiding the spending limits imposed by article XIIIB, section 6 of that article prohibits the state from transferring previously state-financed programs to local governments without providing sufficient funds to meet those burdens. In 1982, however, the state excluded the medically indigent from its Medi-Cal program, thus shifting the responsibility for such care to the counties. Subvention funds provided by the state were inadequate to reimburse the counties for this responsibility, and became less adequate every year. At the same time, the state continued to compute its spending limit as if it fully financed the entire program. The result is exactly what article XIIIB was intended to prevent: the state enjoys a falsely inflated spending limit; the county is compelled to assume a burden it cannot afford; and the medically indigent receive inadequate health care.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs—citizens, taxpayers, and persons in need of medical care—allege that

9. For this reason, it would be inappropriate to address the merits of plaintiff's claim in this proceeding. (Cf. *Dix v. Superior Court* (1991) 53 Cal.3d 442, 279 Cal.Rptr. 834, 807 P.2d 1063.) Unlike the dissent, we do not assume that in representing the state in this proceeding, the Attorney General necessarily represented the interests and views of these officials.

the state has shifted its financial responsibility for the funding of health care for MIA's to the counties without providing the necessary funding and without any agreement transferring appropriation limits, and that as a result the state is violating article XIIIB. Plaintiffs further allege they and the class they claim to represent cannot, consequently, obtain adequate health care from the County of Alameda, which lacks the state funding to provide it. The county, although nominally a defendant, aligned itself with plaintiffs. It admits the inadequacy of its program to provide medical care for MIA's but blames the absence of state subvention funds.[1]

At hearings below, plaintiffs presented uncontradicted evidence regarding the enormous impact of these statutory changes upon the finances and population of Alameda County. That county now spends about $40 million annually on health care for MIA's, of which the state reimburses about half. Thus, since article XIIIB became effective, Alameda County's obligation for the health care of MIA's has risen from zero to more than $20 million per year. The county has inadequate funds to discharge its new obligation for the health care of MIA's; as a result, according to the Court of Appeal, uncontested evidence from medical experts presented below shows that, "The delivery of health care to the indigent in Alameda County is in a state of shambles; the crisis cannot be overstated...." "Because of inadequate state funding, some Alameda County residents are dying, and many others are suffering serious diseases and disabilities, because they cannot obtain adequate access to the medical care they need...." "The system is clogged to the breaking point.... All community clinics ... are turning away patients." "The funding received by the county from the state for MIAs does not approach the actual cost of providing health care to the MIAs. As a consequence, inadequate resources available to county health services jeopardize the lives and health of thousands of people...."

The trial court acknowledged that plaintiffs had shown irreparable injury, but denied their request for a preliminary injunction on the ground that they could not prevail in the action. It then granted the state's motion for summary judgment. Plaintiffs appealed from both decisions of the trial court.

The Court of Appeal consolidated the two appeals and reversed the rulings below. It concluded that plaintiffs had standing to bring this action to enforce the constitutional spending limit of article XIIIB, and that the action is not barred by the existence of administrative remedies available to counties. It then held that the shift of a portion of the cost of medical indigent care by the state to Alameda County constituted a state-mandated new program under the provisions of article XIIIB, which triggered that article's provisions requiring a subvention of funds by the state to reimburse Alameda County for the costs of such program it was required to assume. The judgments denying a preliminary injunction and granting summary judgment for defendants were reversed. We granted review.

II. STANDING

A. *Plaintiffs have standing to bring an action for declaratory relief to determine whether the state is complying with article XIIIB.*

Plaintiffs first claim standing as taxpayers under Code of Civil Procedure section 526a, which provides that: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county ..., may be maintained

1. The majority states that "Plaintiffs are not without a remedy if the county fails to provide adequate health care.... They may enforce the obligation imposed on the county by Welfare and Institutions Code sections 17000 and 17001, and by judicial action." (Maj. opn., *ante*, p. 72, fn. 8 of 285 Cal.Rptr., p. 1314, fn. 8 of 814 P.2d.)

The majority fails to note that plaintiffs have already tried this remedy, and met with the response that, owing to the state's inadequate subvention funds, the county cannot afford to provide adequate health care.

against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein...." As in *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439, 261 Cal.Rptr. 574, 777 P.2d 610, however, it is "unnecessary to reach the question whether plaintiffs have standing to seek an injunction under Code of Civil Procedure section 526a, because there is an independent basis for permitting them to proceed." Plaintiffs here seek a declaratory judgment that the transfer of responsibility for MIA's from the state to the counties without adequate reimbursement violates article XIIIB. A declaratory judgment that the state has breached its duty is essentially equivalent to an action in mandate to compel the state to perform its duty. (See *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 9, 270 Cal.Rptr. 796, 793 P.2d 2, which said that a declaratory judgment establishing that the state has a duty to act provides relief equivalent to mandamus, and makes issuance of the writ unnecessary.) Plaintiffs further seek a mandatory injunction requiring that the state pay the health costs of MIA's under the Medi-Cal program until the state meets its obligations under article XIIIB. The majority similarly characterize plaintiffs' action as one comparable to mandamus brought to enforce section 6 of article XIIIB.

We should therefore look for guidance to cases that discuss the standing of a party seeking a writ of mandate to compel a public official to perform his or her duty.[2] Such an action may be brought by any person "beneficially interested" in the issuance of the writ. (Code Civ.Proc., § 1086.) In *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796, 166 Cal.Rptr. 844, 614 P.2d 276, we explained that the "requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." We quoted from Professor Davis, who said, "One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable." (Pp. 796–797, 166 Cal.Rptr. 844, 614 P.2d 276, quoting Davis, 3 Administrative Law Treatise (1958) p. 291.) Cases applying this standard include *Stocks v. City of Irvine* (1981) 114 Cal.App.3d 520, 170 Cal.Rptr. 724, which held that low-income residents of Los Angeles had standing to challenge exclusionary zoning laws of suburban communities which prevented the plaintiffs from moving there; *Taschner v. City Council, supra*, 31 Cal.App.3d 48, 107 Cal. Rptr. 214, which held that a property owner has standing to challenge an ordinance which may limit development of the owner's property; and *Felt v. Waughop* (1924) 193 Cal. 498, 225 P. 862, which held that a city voter has standing to compel the city clerk to certify a correct list of candidates for municipal office. Other cases illustrate the limitation on standing: *Carsten v. Psychology Examining Com., supra*, 27 Cal.3d 793, 166 Cal.Rptr. 844, 614 P.2d 276 held that a member of the committee who was neither seeking a license nor in danger of losing one had no standing to challenge

2. It is of no importance that plaintiffs did not request issuance of a writ of mandate. In *Taschner v. City Council* (1973) 31 Cal.App.3d 48, 56, 107 Cal.Rptr. 214 (overruled on other grounds in *Assoc. Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 596, 135 Cal.Rptr. 41, 557 P.2d 473), the court said that "[a]s against a general demurrer, a complaint for declaratory relief may be treated as a petition for mandate [citations], and where a complaint for declaratory relief alleges facts sufficient to entitle plaintiff to mandate, it is error to sustain a general demurrer without leave to amend."

In the present case, the trial court ruled on a motion for summary judgment, but based that ruling not on the evidentiary record (which supported plaintiffs' showing of irreparable injury) but on the issues as framed by the pleadings. This is essentially equivalent to a ruling on demurrer, and a judgment denying standing could not be sustained on the narrow ground that plaintiffs asked for the wrong form of relief without giving them an opportunity to correct the defect. (See *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 127–128, 109 Cal.Rptr. 724.)

a change in the method of computing the passing score on the licensing examination; *Parker v. Bowron* (1953) 40 Cal.2d 344, 254 P.2d 6 held that a union official who was neither a city employee nor a city resident had no standing to compel a city to follow a prevailing wage ordinance; and *Dunbar v. Governing Board of Grossmont Junior College Dist.* (1969) 275 Cal.App.2d 14, 79 Cal.Rptr. 662 held that a member of a student organization had standing to challenge a college district's rule barring a speaker from campus, but persons who merely planned to hear him speak did not.

No one questions that plaintiffs are affected by the lack of funds to provide care for MIA's. Plaintiffs, except for plaintiff Rabinowitz, are not merely citizens and taxpayers; they are medically indigent persons living in Alameda County who have been and will be deprived of proper medical care if funding of MIA programs is inadequate. Like the other plaintiffs here, plaintiff Kinlaw, a 60–year–old woman with diabetes and hypertension, has no health insurance. Plaintiff Spier has a chronic back condition; inadequate funding has prevented him from obtaining necessary diagnostic procedures and physiotherapy. Plaintiff Tsosie requires medication for allergies and arthritis, and claims that because of inadequate funding she cannot obtain proper treatment. Plaintiff King, an epileptic, says she was unable to obtain medication from county clinics, suffered seizures, and had to go to a hospital. Plaintiff "Doe" asserts that when he tried to obtain treatment for AIDS-related symptoms, he had to wait four to five hours for an appointment and each time was seen by a different doctor. All of these are people personally dependent upon the quality of care of Alameda County's MIA program; most have experienced inadequate care because the program was underfunded, and all can anticipate future deficiencies in care if the state continues its refusal to fund the program fully.

The majority, however, argues that the county has no duty to use additional subvention funds for the care of MIA's because under Government Code section 17563 "[a]ny funds received by a local agency ... pursuant to the provisions of this chapter may be used for any public purpose." Since the county may use the funds for other purposes, it concludes that MIA's have no special interest in the subvention.[3]

This argument would be sound if the county were already meeting its obligations to MIA's under Welfare and Institutions Code section 17000. If that were the case, the county could use the subvention funds as it chose, and plaintiffs would have no more interest in the matter than any other county resident or taxpayer. But such is not the case at bar. Plaintiffs here allege that the county is not complying with its duty, mandated by Welfare and Institutions Code section 17000, to provide health care for the medically indigent; the county admits its failure but pleads lack of funds. Once the county receives adequate funds, it must perform its statutory duty under section 17000 of the Welfare and Institutions Code. If it refused, an action in mandamus would lie to compel performance. (See *Mooney v. Pickett* (1971) 4 Cal.3d 669, 94 Cal.Rptr. 279, 483 P.2d 1231.) In fact, the county has made clear throughout this litigation that it would use the subvention funds to provide care for MIA's. The majority's conclusion that plaintiffs lack a special, beneficial interest in the state's compliance with article XIIIB ignores the practical realities of health care funding.

Moreover, we have recognized an exception to the rule that a plaintiff must be beneficially interested. "Where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question

3. The majority's argument assumes that the state will comply with a judgment for plaintiffs by providing increased subvention funds. If the state were instead to comply by restoring Medi-Cal coverage for MIA's, or some other method of taking responsibility for their health needs, plaintiffs would benefit directly.

enforced." (*Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100–101, 162 P.2d 627.) We explained in *Green v. Obledo* (1981) 29 Cal.3d 126, 144, 172 Cal.Rptr. 206, 624 P.2d 256, that this "exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.... It has often been invoked by California courts. [Citations.]"

Green v. Obledo presents a close analogy to the present case. Plaintiffs there filed suit to challenge whether a state welfare regulation limiting deductibility of work-related expenses in determining eligibility for aid to families with dependent children (AFDC) assistance complied with federal requirements. Defendants claimed that plaintiffs were personally affected only by a portion of the regulation, and had no standing to challenge the balance of the regulation. We replied that "[t]here can be no question that the proper calculation of AFDC benefits is a matter of public right [citation], and plaintiffs herein are certainly citizens seeking to procure the enforcement of a public duty. [Citation.] It follows that plaintiffs have standing to seek a writ of mandate commanding defendants to cease enforcing [the regulation] in its entirety." (29 Cal.3d at p. 145, 172 Cal.Rptr. 206, 624 P.2d 256.)

We again invoked the exception to the requirement for a beneficial interest in *Common Cause v. Board of Supervisors, supra*, 49 Cal.3d 432, 261 Cal.Rptr. 574, 777 P.2d 610. Plaintiffs in that case sought to compel the county to deputize employees to register voters. We quoted *Green v. Obledo, supra*, 29 Cal.3d 126, 144, 172 Cal.Rptr. 206, 624 P.2d 256, and concluded that "[t]he question in this case involves a public right to voter outreach programs, and plaintiffs have standing as citizens to seek its vindication." (49 Cal.3d at p. 439, 261 Cal.Rptr. 574, 777 P.2d 610.) We should reach the same conclusion here.

B. *Government Code sections 17500–17630 do not create an exclusive remedy which bars citizen-plaintiffs from enforcing article XIIIB.*

Four years after the enactment of article XIIIB, the Legislature enacted Government Code sections 17500 through 17630 to implement article XIIIB, section 6. These statutes create a quasi-judicial body called the Commission on State Mandates, consisting of the state Controller, state Treasurer, state Director of Finance, State Director of the Office of Planning and Research, and one public member. The commission has authority to "hear and decide upon [any] claim" by a local government that it "is entitled to be reimbursed by the state" for costs under article XIIIB. (Gov.Code, § 17551, subd. (a).) Its decisions are subject to review by an action for administrative mandamus in the superior court. (See Gov.Code, § 17559.)

The majority maintains that a proceeding before the Commission on State Mandates is the exclusive means for enforcement of article XIIIB, and since that remedy is expressly limited to claims by local agencies or school districts (Gov.Code, § 17552), plaintiffs lack standing to enforce the constitutional provision.[4] I disagree, for two reasons.

4. The majority emphasizes the statement of purpose of Government Code section 17500: "The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under section 6 of article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary, and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs."

The "existing system" to which Government Code section 17500 referred was the Property Tax Relief Act of 1972 (Rev. & Tax.Code, §§ 2201–2327), which authorized local agencies and school boards to request reimbursement from the state Controller. Apparently dissatisfied with this remedy, the agencies and boards were bypassing the Controller and bringing actions directly in the courts. (See, e.g., *County of*

First, Government Code section 17552 expressly addressed the question of exclusivity of remedy, and provided that "[t]his chapter shall provide the sole and exclusive procedure by which *a local agency or school district* may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIIIB of the California Constitution." (Italics added.) The Legislature was aware that local agencies and school districts were not the only parties concerned with state mandates, for in Government Code section 17555 it provided that "any other interested organization or individual may participate" in the commission hearing. Under these circumstances the Legislature's choice of words—"the sole and exclusive procedure by which a local agency or school district may claim reimbursement"—limits the procedural rights of those claimants only, and does not affect rights of other persons. *Expressio unius est exclusio alterius*—"the expression of certain things in a statute necessarily involves exclusion of other things not expressed." (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403, 135 Cal.Rptr. 266.)

The case is similar in this respect to *Common Cause v. Board of Supervisors, supra,* 49 Cal.3d 432, 261 Cal.Rptr. 574, 777 P.2d 610. Here defendants contend that the counties' right of action under Government Code sections 17551–17552 impliedly excludes any citizen's remedy; in *Common Cause* defendants claimed the Attorney General's right of action under Elections Code section 304 impliedly excluded any citizen's remedy. We replied that "the plain language of section 304 contains no limitation on the right of private citizens to sue to enforce the section. To infer such a limitation would contradict our long-standing approval of citizen actions to require governmental officials to follow the law, expressed in our expansive interpretation of taxpayer standing [citations], and our recognition of a 'public interest' exception to the requirement that a petitioner for writ of mandate have a personal beneficial interest in the proceedings [citations]." (49 Cal.3d at p. 440, 261 Cal.Rptr. 574, 777 P.2d 610, fn. omitted.) Likewise in this case the plain language of Government Code sections 17551–17552 contain no limitation on the right of private citizens, and to infer such a right would contradict our long-standing approval of citizen actions to enforce public duties.

The United States Supreme Court reached a similar conclusion in *Rosado v. Wyman* (1970) 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442. In that case New York welfare recipients sought a ruling that New York had violated federal law by failing to make cost-of-living adjustments to welfare grants. The state replied that the statute giving the Department of Health, Education and Welfare authority to cut off federal funds to noncomplying states constituted an exclusive remedy. The court rejected the contention, saying that "[w]e are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." (P. 420, 90 S.Ct. p. 1222.) The principle is clear: the persons actually harmed by illegal state action, not only some administrator who has no personal stake in the matter, should have standing to challenge that action.

Second, article XIIIB was enacted to protect taxpayers, not governments. Sections 1 and 2 of article XIIIB establish strict limits on state and local expenditures, and require the refund of all taxes collected in excess of those limits. Section 6 of article XIIIB prevents the state from evading those limits and burdening county taxpayers by transferring financial responsibility for a program to a county, yet counting the cost of that program toward the limit on state expenditures.

These provisions demonstrate a profound distrust of government and a disdain for excessive government spending. An exclusive remedy under which only governments can enforce article XIIIB, and the taxpayer-citizen can appear only if a government

Contra Costa v. State of California (1986) 177 Cal.App.3d 62, 222 Cal.Rptr. 750.) The legislative declaration refers to this phenomena. It does not discuss suits by individuals.

has first instituted proceedings, is inconsistent with the ethos that led to article XIIIB. The drafters of article XIIIB and the voters who enacted it would not accept that the state Legislature—the principal body regulated by the article—could establish a procedure under which the only way the article can be enforced is for local governmental bodies to initiate proceedings before a commission composed largely of state financial officials.

One obvious reason is that in the never-ending attempts of state and local government to obtain a larger proportionate share of available tax revenues, the state has the power to coerce local governments into foregoing their rights to enforce article XIIIB. An example is the Brown–Presley Trial Court Funding Act (Gov.Code, § 77000 et seq.), which provides that the county's acceptance of funds for court financing may, in the discretion of the Governor, be deemed a waiver of the counties' rights to proceed before the commission on all claims for reimbursement for state-mandated local programs which existed and were not filed prior to passage of the trial funding legislation.[5] The ability of state government by financial threat or inducement to persuade counties to waive their right of action before the commission renders the counties' right of action inadequate to protect the public interest in the enforcement of article XIIIB.

The facts of the present litigation also demonstrate the inadequacy of the commission remedy. The state began transferring financial responsibility for MIA's to the counties in 1982. Six years later no county had brought a proceeding before the commission. After the present suit was filed, two counties filed claims for 70 percent reimbursement. Now, nine years after the 1982 legislation, the counties' claims are pending before the Court of Appeal. After that court acts, and we decide whether to review its decision, the matter may still have to go back to the commission for hearings to determine the amount of the mandate—which is itself an appealable order. When an issue involves the life and health of thousands, a procedure which permits this kind of delay is not an adequate remedy.

In sum, effective, efficient enforcement of article XIIIB requires that standing to enforce that measure be given to those harmed by its violation—in this case, the medically indigent—and not vested exclusively in local officials who have no personal interest at stake and are subject to financial and political pressure to overlook violations.

C. *Even if plaintiffs lack standing this court should nevertheless address and resolve the merits of the appeal.*

Although ordinarily a court will not decide the merits of a controversy if the plaintiffs lack standing (see *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 90, 181 Cal.Rptr. 549, 642 P.2d 460), we recog-

5. "(a) The initial decision by a county to opt into the system pursuant to Section 77300 *shall constitute a waiver of all claims for reimbursement for state-mandated local programs not theretofore approved by the State Board of Control, the Commission on State Mandates, or the courts to the extent the Governor, in his discretion, determines that waiver to be appropriate;* provided, that a decision by a county to opt into the system pursuant to Section 77300 beginning with the second half of the 1988–89 fiscal year shall not constitute a waiver of a claim for reimbursement based on a statute chaptered on or before the date the act which added this chapter is chaptered, which is filed in acceptable form on or before the date the act which added this chapter is chaptered. A county may petition the Governor to exempt any such claim from this waiver requirement; and the Governor, in his discretion, may grant the exemption in whole or in part. The waiver shall not apply to or otherwise affect any claims accruing after initial notification. Renewal, renegotiation, or subsequent notification to continue in the program shall not constitute a waiver. [¶] (b) The initial decision by a county to opt into the system pursuant to Section 77300 shall constitute a waiver of any claim, cause of action, or action whenever filed, with respect to the Trial Court Funding Act of 1985, Chapter 1607 of the Statutes of 1985, or Chapter 1211 of the Statutes of 1987." (Gov.Code, § 77203.5, italics added.)

"As used in this chapter, 'state-mandated local program' *means any and all reimbursements owed or owing by operation of either Section 6 of Article XIIIB of the California Constitution,* or Section 17561 of the Government Code, or both." (Gov.Code, § 77005, italics added.)

nized an exception to this rule in our recent decision in *Dix v. Superior Court, supra,* 53 Cal.3d 442, 279 Cal.Rptr. 834, 807 P.2d 1063 (hereafter *Dix*). In *Dix,* the victim of a crime sought to challenge the trial court's decision to recall a sentence under Penal Code section 1170. We held that only the prosecutor, not the victim of the crime, had standing to raise that issue. We nevertheless went on to consider and decide questions raised by the victim concerning the trial court's authority to recall a sentence under Penal Code section 1170, subdivision (d). We explained that the sentencing issues "are significant. The case is fully briefed and all parties apparently seek a decision on the merits. Under such circumstances, we deem it appropriate to address [the victim's] sentencing arguments for the guidance of the lower courts. Our discretion to do so under analogous circumstances is well settled. [Citing cases explaining when an appellate court can decide an issue despite mootness.]" (53 Cal.3d at p. 454, 279 Cal.Rptr. 834, 807 P.2d 1063.) In footnote we added that "Under article VI, section 12, subdivision (b) of the California Constitution ..., we have jurisdiction to 'review the *decision of the Court of Appeal* in any cause.' (Italics added.) Here the Court of Appeal's decision addressed two issues—standing and merits. Nothing in section 129(b) suggests that, having rejected the Court of Appeal's conclusion on the preliminary issue of standing, we are foreclosed from 'review[ing]' the second subject addressed and resolved in its decision." (P. 454, fn. 8, 279 Cal. Rptr. 834, 807 P.2d 1063.)

I see no grounds on which to distinguish *Dix.* The present case is also one in which the Court of Appeal decision addressed both standing and merits. It is fully briefed. Plaintiffs and the county seek a decision on the merits. While the state does not seek a decision on the merits in this proceeding, its appeal of the superior court decision in the mandamus proceeding brought by the County of Los Angeles (see maj. opn., *ante,* p. 68 of 285 Cal.Rptr., p. 1310 of 814 P.2d) shows that it is not opposed to an appellate decision on the merits.

The majority, however, notes that various state officials—the Controller, the Director of Finance, the Treasurer, and the Director of the Office of Planning and Research—did not participate in this litigation. Then in a footnote, the majority suggests that this is the reason they do not follow the *Dix* decision. (*Ante,* p. 73, fn. 9 of 285 Cal.Rptr., p. 1315, fn. 9 of 814 P.2d.) In my view, this explanation is insufficient. The present action is one for declaratory relief against the state. It is not necessary that plaintiffs also sue particular state officials. (The state has never claimed that such officials were necessary parties.) I do not believe we should refuse to reach the merits of this appeal because of the nonparticipation of persons who, if they sought to participate, would be here merely as amici curiae.[6]

The case before us raises no issues of departmental policy. It presents solely an issue of law which this court is competent to decide on the briefs and arguments presented. That issue is one of great significance, far more significant than any raised in *Dix.* Judges rarely recall sentencing under Penal Code section 1170, subdivision (d); when they do, it generally affects only the individual defendant. In contrast, the legal issue here involves immense sums of money and affect budgetary planning for both the state and counties. State and county governments need to know, as soon as possible, what their

6. It is true that these officials would participate in a proceeding before the Commission on State Mandates, but they would do so as members of an administrative tribunal. On appellate review of a commission decision, its members, like the members of the Public Utilities Commission or the Workers' Compensation Appeals Board, are not respondents and do not appear to present their individual views and positions. For example, in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318, in which we reviewed a commission ruling relating to subvention payments for education of handicapped children, the named respondents were the State Superintendent of Public Instruction, the Department of Education, and the Commission on State Mandates. The individual members of the commission were not respondents and did not participate.

rights and obligations are; legislators considering proposals to deal with the current state and county budget crisis need to know how to frame legislation so it does not violate article XIIIB. The practical impact of a decision on the people of this state is also of great importance. The failure of the state to provide full subvention funds and the difficulty of the county in filling the gap translate into inadequate staffing and facilities for treatment of thousands of persons. Until the constitutional issues are resolved the legal uncertainties may inhibit both levels of government from taking the steps needed to address this problem. A delay of several years until the Los Angeles case is resolved could result in pain, hardship, or even death for many people. I conclude that, whether or not plaintiffs have standing, this court should address and resolve the merits of the appeal.

D. *Conclusion as to standing.*

As I have just explained, it is not necessary for plaintiffs to have standing for us to be able to decide the merits of the appeal. Nevertheless, I conclude that plaintiffs have standing both as persons "beneficially interested" under Code of Civil Procedure section 1086 and under the doctrine of *Green v. Obledo, supra*, 29 Cal.3d 126, 172 Cal.Rptr. 206, 624 P.2d 256, to bring an action to determine whether the state has violated its duties under article XIIIB. The remedy given local agencies and school districts by Government Code sections 17500–17630 is, as Government Code section 17552 states, the exclusive remedy by which those bodies can challenge the state's refusal to provide subvention funds, but the statute does not limit the remedies available to individual citizens.

III. MERITS OF THE APPEAL

A. *State funding of care for MIA's.*

Welfare and Institutions Code section 17000 requires every county to "relieve and support" all indigent or incapacitated residents, except to the extent that such persons are supported or relieved by other sources.[7] From 1971 until 1982, and thus at the time article XIIIB became effective, counties were not required to pay for the provision of health services to MIA's, whose health needs were met through the state-funded Medi-Cal program. Since the medical needs of MIA's were fully met through other sources, the counties had no duty under Welfare and Institutions Code section 17000 to meet those needs. While the counties did make general contributions to the Medi-Cal program (which covered persons other than MIA's) from 1971 until 1978, at the time article XIIIB became effective in 1980, the counties were not required to make any financial contributions to Medi-Cal. It is therefore undisputed that the counties were not required to provide financially for the health needs of MIA's when article XIIIB became effective. The state funded all such needs of MIA's.

In 1982, the Legislature passed Assembly Bill No. 799 (1981–1982 Reg.Sess.; Stats.1982, ch. 328, pp. 1568–1609) (hereafter AB No. 799), which removed MIA's from the state-funded Medi-Cal program as of January 1, 1983, and thereby transferred to the counties, through the County Medical Services Plan which AB No. 799 created, the financial responsibility to provide health services to approximately 270,000 MIA's. AB No. 799 required that the counties provide health care for MIA's, yet appropriated only 70 percent of what the state would have spent on MIA's had those persons remained a state responsibility under the Medi-Cal program.

Since 1983, the state has only partially defrayed the costs to the counties of providing health care to MIA's. Such state funding to counties was initially relatively constant, generally more than $400 million per year. By 1990, however, state funding

7. Welfare and Institutions Code section 17000 provides that "[e]very county ... shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions."

had decreased to less than $250 million. The state, however, has always included the full amount of its former obligation to provide for MIA's under the Medi-Cal program in the year preceding July 1, 1980, as part of its article XIIIB "appropriations limit," i.e., as part of the base amount of appropriations on which subsequent annual adjustments for cost of living and population changes would be calculated. About $1 billion has been added to the state's adjusted spending limit for population growth and inflation *solely* because of the state's inclusion of all MIA expenditures in the appropriation limit established for its base year, 1979–1980. The state has not made proportional increases in the sums provided to counties to pay for the MIA services funded by the counties since January 1, 1983.

B. *The function of article XIIIB.*

Our recent decision in *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486–487, 280 Cal.Rptr. 92, 808 P.2d 235 (hereafter *County of Fresno*), explained the function of article XIIIB and its relationship to article XIIIA, enacted one year earlier:

"At the June 6, 1978, Primary Election, article XIIIA was added to the Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new 'special taxes.'" (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231–232, 149 Cal.Rptr. 239, 583 P.2d 1281.) The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522 (*City of Sacramento*).)

"At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

"'Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes.'" (*City of Sacramento, supra*, 50 Cal.3d at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.)

"Article XIII B of the Constitution was intended ... to provide 'permanent protection for taxpayers from excessive taxation' and 'a reasonable way to provide discipline in tax spending at state and local levels.' (See *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446, 170 Cal.Rptr. 232, quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument in favor of Prop. 4, p. 18.) To this end, it establishes an 'appropriations limit' for both state and local governments (Cal. Const., art. XIII B, § 8, subd. (h)) and allows no 'appropriations subject to limitation' in excess thereof (*id.*, § 2).[8] (See *County of Placer v. Corin, supra*, 113 Cal.App.3d at p. 446, 170 Cal.Rptr. 232.) It defines the relevant 'appropriations subject to limitation' as 'any authorization to expend during a fiscal year the proceeds of taxes....' (Cal. Const., art. XIII B, § 8, subd. (b).)" (*County of Fresno, supra*, 53 Cal.3d at p. 486, 280 Cal.Rptr. 92, 808 P.2d 235.)

Under section 3 of article XIIIB the state may transfer financial responsibility for a program to a county if the state and county mutually agree that the appropriation limit of the state will be decreased and that of the county increased by the same amount.[9]

8. Article XIIIB, section 1 provides: "The total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of such entity of government for the prior year adjusted for changes in the cost of living and population except as otherwise provided in this Article."

9. Section 3 of article XIIIB reads in relevant part: "The appropriations limit for any fiscal year ... shall be adjusted as follows:

"(a) In the event that the financial responsibility of providing services is transferred, in whole or in part ... from one entity of government to another, then for the year in which such transfer becomes effective the appropria-

Absent such an agreement, however, section 6 of article XIIIB generally precludes the state from avoiding the spending limits it must observe by shifting to local governments programs and their attendant financial burdens which were a state responsibility prior to the effective date of article XIIIB. It does so by requiring that "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the cost of such program or increased level of service...." [10]

"Section 6 was included in article XIIIB in recognition that article XIIIA of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles* [*v. State of California* (1987)] 43 Cal.3d 46, 61 [233 Cal.Rptr. 38, 729 P.2d 202].) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues." (*County of Fresno, supra*, 53 Cal.3d at p. 487, 280 Cal.Rptr. 92, 808 P.2d 235.)

C. *Applicability of article XIIIB to health care for MIA's.*

The state argues that care of the indigent, including medical care, has long been a county responsibility. It claims that although the state undertook to fund this responsibility from 1979 through 1982, it was merely temporarily (as it turned out) helping the counties meet their responsibilities, and that the subsequent reduction in state funding did not impose any "new program" or "higher level of service" on the counties within the meaning of section 6 of article XIIIB. Plaintiffs respond that the critical question is not the traditional roles of the county and state, but who had the fiscal responsibility on November 6, 1979, when article XIIIB took effect. The purpose of article XIIIB supports the plaintiffs' position.

As we have noted, article XIIIA of the Constitution (Proposition 13) and article XIIIB are complementary measures. The former radically reduced county revenues, which led the state to assume responsibility for programs previously financed by the counties. Article XIIIB, enacted one year later, froze both state and county appropriations at the level of the 1988-1989 budgets—a year when the budgets included state financing for the prior county programs, but not county financing for these programs. Article XIIIB further limited the state's authority to transfer obligations to the counties. Reading the two together, it seems clear that article XIIIB was intended to limit the power of the Legislature to retransfer to the counties those obligations which the state had assumed in the wake of Proposition 13.

Under article XIIIB, both state and county appropriations limits are set on the basis of a calculation that begins with the budgets in effect when article XIIIB was enacted. If the state could transfer to the county a program for which the state at that time had full financial responsibility, the county could be forced to assume additional financial obligations without the right to appropriate additional moneys. The state, at the same time, would get credit toward its appropriations limit for expenditures it did not pay. County tax-

tion limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount...."

10. Section 6 of article XIIIB further provides that the "Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." None of these exceptions apply in the present case.

payers would be forced to accept new taxes or see the county forced to cut existing programs further; state taxpayers would discover that the state, by counting expenditures it did not pay, had acquired an actual revenue surplus while avoiding its obligation to refund revenues in excess of the appropriations limit. Such consequences are inconsistent with the purpose of article XIIIB.

Our decisions interpreting article XIIIB demonstrate that the state's subvention requirement under section 6 is not vitiated simply because the "program" existed before the effective date of article XIIIB. The alternate phrase of section 6 of article XIIIB, " 'higher level of service[,]' ... must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that *the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'program.'*" (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202, italics added.)

Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318, presents a close analogy to the present case. The state Department of Education operated schools for severely handicapped students, but prior to 1979 *school districts were required by statute to contribute* to education of those students from the district at the state schools. In 1979, in response to the restrictions on school district revenues imposed by Proposition 13, the statutes requiring such district contributions were repealed and the state assumed full responsibility for funding. The state funding responsibility continued until June 28, 1981, when Education Code section 59300 (hereafter section 59300), requiring school districts to share in these costs, became effective.

The plaintiff districts filed a test claim before the commission, contending they were entitled to state reimbursement under section 6 of article XIIIB. The commission found the plaintiffs were not entitled to state reimbursement, on the rationale that the increase in costs to the districts compelled by section 59300 imposed no new program or higher level of services. The trial and intermediate appellate courts affirmed on the ground that section 59300 called for only an " 'adjustment of costs' " of educating the severely handicapped, and that "*a shift in the funding of an existing program is not a new program or a higher level of service*" within the meaning of article XIIIB. (*Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d at p. 834, 244 Cal.Rptr. 677, 750 P.2d 318, italics added.)

We reversed, rejecting the state's theories that the funding shift to the county of the subject program's costs does not constitute a new program. "[There can be no] doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are concerned, since *at the time section 59300 became effective* they were not required to contribute to the education of students from their districts at such schools. [¶] ... To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIIIB. That article imposed spending limits on state and local governments, and it followed by one year the adoption by initiative of article XIIIA, which severely limited the taxing power of local governments.... [¶] The intent of the section would plainly be violated if the state could, while retaining administrative control[11] of programs it has supported with state tax money,

11. The state notes that, in contrast to the program at issue in *Lucia Mar*, it has not retained administrative control over aid to MIA's. But the quoted language from *Lucia Mar*, while appropriate to the facts of that case, was not intended to establish a rule limiting article XIIIB, section 6, to instances in which the state retains administrative control over the program that it requires the counties to fund. The constitutional language admits of no such limitation, and its recognition would permit the Legislature to evade the constitutional requirement.

simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIIIB because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, *or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIIIB, the result seems equally violative of the fundamental purpose underlying section 6 of that article.*" (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at pp. 835–836, 244 Cal. Rptr. 677, 750 P.2d 318, fn. omitted, italics added.)

The state seeks to distinguish *Lucia Mar* on the ground that the education of handicapped children in state schools had never been the responsibility of the local school district, but overlooks that the local district had previously been required to contribute to the cost. Indeed the similarities between *Lucia Mar* and the present case are striking. In *Lucia Mar,* prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971–1979 the state and county shared the cost of caring for MIA's under the Medi-Cal program. In 1979, following enactment of Proposition 13, the state took full responsibility for both programs. Then in 1981 (for handicapped children) and 1982 (for MIA's), the state sought to shift some of the burden back to the counties. To distinguish these cases on the ground that care for MIA's is a county program but education of handicapped children a state program is to rely on arbitrary labels in place of financial realities.

The state presents a similar argument when it points to the following emphasized language from *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318: "[B]ecause section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts—*an obligation the school districts did not have at the time article XIIIB was adopted*—it calls for plaintiffs to support a 'new program' within the meaning of section 6." (P. 836, 244 Cal. Rptr. 677, 750 P.2d 318, fn. omitted, italics added.) It urges *Lucia Mar* reached its result *only* because the "program" requiring school district funding in that case *was not required by statute* at the effective date of article XIIIB. The state then argues that the case at bench is distinguishable because it contends Alameda County had a continuing obligation *required by statute* antedating that effective date, which had only been "temporarily" [12] suspended when article XIIIB became effective. I fail to see the distinction between a case—*Lucia Mar*—in which no existing statute as of 1979 imposed an obligation on the local government and one—this case—in which the statute existing in 1979 imposed no obligation on local government.

The state's argument misses the salient point. As I have explained, the application of section 6 of article XIIIB does not depend upon when the program was created, but upon who had the burden of funding it when article XIIIB went into effect. Our conclusion in *Lucia Mar* that the educational program there in issue was a "new" program as to the school districts was not based on the presence or absence of any antecedent statutory obligation therefor. *Lucia Mar* determined that whether the program was new *as to the districts* depended on *when* they were compelled to assume the obligation to partially fund an existing program which they had not funded at the time article XIIIB became effective.

The state further relies on two decisions, *Madera Community Hospital v. County of Madera* (1984) 155 Cal.App.3d 136, 201 Cal.Rptr. 768 and *Cooke v. Superior Court* (1989) 213 Cal.App.3d 401, 261 Cal.Rptr. 706, which hold that the county has a statutory obligation to provide medical care for indigents, but that it need not provide pre-

12. The state's repeated emphasis on the "temporary" nature of its funding is a form of post hoc reasoning. At the time article XIIIB was enacted, the voters did not know which programs would be temporary and which permanent.

cisely the same level of services as the state provided under Medi-Cal.[13] Both are correct, but irrelevant to this case.[14] The county's obligation to MIA's is defined by Welfare and Institutions Code section 17000, not by the former Medi-Cal program.[15] If the state, in transferring an obligation to the counties, permits them to provide less services than the state provided, the state need only pay for the lower level of services. But it cannot escape its responsibility entirely, leaving the counties with a state-mandated obligation and no money to pay for it.

The state's arguments are also undercut by the fact that it continues to use the approximately $1 billion in spending authority, generated by its previous total funding of the health care program in question, as a portion of its initial *base spending limit* calculated pursuant to sections 1 and 3 of article XIIIB. In short, the state may maintain here that care for MIA's is a county obligation, but when it computes its appropriation limit it treats the entire cost of such care as a state program.

IV. CONCLUSION

This is a time when both state and county governments face great financial difficulties. The counties, however, labor under a disability not imposed on the state, for article XIIIA of the Constitution severely restricts their ability to raise additional revenue. It is, therefore, particularly important to enforce the provisions of article XIIIB which prevent the state from imposing additional obligations upon the counties without providing the means to comply with these obligations.

The present majority opinion disserves the public interest. It denies standing to enforce article XIIIB both to those persons whom it was designed to protect—the citizens and taxpayers—and to those harmed by its violation—the medically indigent adults. And by its reliance on technical grounds to avoid coming to grips with the merits of plaintiffs' appeal, it permits the state to continue to violate article XIIIB and postpones the day when the medically indigent will receive adequate health care.

MOSK, J., concurs.

13. It must, however, provide a *comparable* level of services. (See *Board of Supervisors v. Superior Court* (1989) 207 Cal.App.3d 552, 564, 254 Cal.Rptr. 905.)

14. Certain language in *Madera Community Hospital v. County of Madera, supra,* 155 Cal.App.3d 136, 201 Cal.Rptr. 768, however, is questionable. That opinion states that the "Legislature intended that County bear an obligation to its poor and indigent residents, *to be satisfied from county funds,* notwithstanding federal or state programs which exist concurrently with County's obligation and alleviate, to a greater or lesser extent, County's burden." (P. 151, 201 CalRptr. 768.) Welfare and Institutions Code section 17000 by its terms, however, requires the county to provide support to residents only "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Consequently, to the extent that the state or federal governments provide care for MIA's, the county's obligation to do so is reduced pro tanto.

15. The county's right to subvention funds under article XIIIB arises because its duty to care for MIA's is a state-mandated responsibility; if the county had no duty, it would have no right to funds. No claim is made here that the funding of medical services for the indigent shifted to Alameda County is not a program "'mandated'" by the state; i.e., that Alameda County has any option other than to pay these costs. (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at pp. 836–837, 244 Cal.Rptr. 677, 750 P.2d 318.)

54 Cal.3d 289
285 Cal.Rptr. 86

Dieter NICKELSBERG, Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD and Los Angeles Unified School District, Respondents.

No. S013121.

Supreme Court of California, In Bank.

Aug. 30, 1991.

Claimant appealed decision of Workers' Compensation Appeals Board that

Exhibit 11

***San Diego Housing Commission v. Public Emp.Relations Board* (2016)**
246 Cal.App.4th 1

246 Cal.App.4th 1
Court of Appeal,
Fourth District, Division 1, California.

SAN DIEGO HOUSING COMMISSION, Plaintiff and Appellant,
v.
PUBLIC EMPLOYMENT RELATIONS BOARD, Defendant and Appellant;
Service Employees International Union, Local 221, Real Party in Interest and Respondent

D066237
|
Filed March 30, 2016

Synopsis
Background: After Public Employment Relations Board granted union's request that dispute with city housing commission regarding layoffs of two union employees be submitted to a factfinding panel, commission filed action seeking a declaratory judgment and a writ of mandate prohibiting Board from ordering the use of factfinding procedures, determining the use of factfinding procedures is not permitted, and restraining the parties from using factfinding procedures on matters unrelated to the negotiation of memorandum of understanding (MOU). The Superior Court, San Diego County, No. 37–2012–00087278–CU–WM–CTL, Ronald L. Styn and Kevin A. Enright, JJ., granted commission's motion for summary judgment and issued judgment and writ of mandate. Union appealed.

[Holding:] The Court of Appeal, McConnell, P.J., held that Meyers–Milias–Brown Act's factfinding procedures apply to any bargaining impasse over negotiable terms and conditions of employment.

Reversed and remanded.

**631 APPEALS from a judgment of the Superior Court of San Diego County, Ronald L. Styn and Kevin A. Enright, Judges. Judgment reversed; cross-appeal dismissed as moot. (Super. Ct. No. 37–2012–00087278–CU–WM–CTL)

Attorneys and Law Firms

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McCONNELL, P.J.

INTRODUCTION

*6 This appeal requires us to decide whether the provisions in the Meyers–Milias–Brown Act (Act) (Gov.Code, § 3500 et seq.)[1] for impasse resolution through advisory factfinding (factfinding provisions) apply to impasses **632 arising during the negotiation of any bargainable matter or only to impasses arising during the negotiation of a comprehensive memorandum of understanding (MOU).[2] We conclude the factfinding provisions apply to impasses arising during the negotiation of any bargainable matter. As the trial court determined otherwise, we reverse the court's judgment and remand the matter for further proceedings consistent with our decision.

BACKGROUND

The San Diego Housing Commission (Commission) is a local public agency subject to the Act. (§ 3501, subd. (c).) Service Employees International Union, Local 221 (Union) is an employee organization and the exclusive representative of certain Commission employees. The Public Employment Relations Board (Board) is a quasi-judicial administrative agency modeled after the National Labor Relations Board and administers the Act. (*County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 916, 157 Cal.Rptr.3d 481, 301 P.3d 1102 (*County of Los Angeles*); §§ 3501, subd. (f), 3509, subd. (a), 3541, subd. (g).)

[1] [2]After the Commission and the Union reached an impasse in their negotiations over the effects of the Commission's decision to lay off two employees represented by the Union, the Union made a written request to the Board for the parties' dispute to be submitted to a factfinding panel under section 3505.4, *7 subdivision (a).[3] When the Board granted the request over the Commission's objection, the Commission filed this action seeking a declaratory judgment and a writ of mandate prohibiting the Board from ordering the use of factfinding procedures in this case, determining the use of factfinding procedures is not permitted under the circumstances of this case, and restraining the parties from using factfinding procedures on matters unrelated to the negotiation of an MOU.[4]

**633 The Commission subsequently filed a motion for summary judgment, arguing the Commission was entitled to a declaratory judgment and writ of mandate as a matter of law because the Act's factfinding provisions applied only to an impasse arising during the negotiation of a comprehensive MOU, not to an impasse arising during the negotiation of a discrete, bargainable issue. The court agreed with the Commission's interpretation of the Act and granted the Commission's motion. The court then issued a judgment declaring the Act's factfinding provisions only apply to an impasse arising from the negotiation of a new or successor MOU and do not apply to an impasse arising from any other negotiations. The court also issued a writ of mandate *8 commanding the Board to dismiss the factfinding proceedings requested by the Union, to rescind any requirement for the Commission to participate in factfinding proceedings for impasses not involving the negotiation of a new or successor MOU, and to reject any requests for the Commission to participate in factfinding proceedings for impasses not involving the negotiation of a new or successor MOU. The court later denied the Commission's motion for attorney fees under Code of Civil Procedure section 1021.5.

DISCUSSION

I

The resolution of this appeal turns on the proper interpretation of the Act's factfinding provisions. The interpretation of a statute presents a question of law, which we review independently. (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 189, 195 Cal.Rptr.3d 220, 361 P.3d 319; *Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1026, 169 Cal.Rptr.3d 228 (*Santa Clara*).)

" 'Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.] We must look to the statute's words and give them their usual and ordinary meaning. [Citation.] The statute's plain meaning controls the court's interpretation unless its words are ambiguous.' [Citations.] If the words in the statute do not, by themselves, provide a reliable indicator of legislative intent, '[s]tatutory ambiguities often may be resolved by examining the context in which the language appears and adopting the construction which best serves to harmonize the statute internally and with related statutes. [Citation.]' [Citation.] ' "Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute ...; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]." [Citations.]' [Citation.] If the statute is ambiguous, we may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy." (*People v. Arias* (2008) 45 Cal.4th 169, 177, 85 Cal.Rptr.3d 1, 195 P.3d 103.)

II

A

[3] [4] [5]The Act imposes a duty on a public agency to "meet and confer in good faith" with a recognized union, "regarding wages, hours, and other terms and conditions of employment ... prior to arriving at a determination *9 of policy or course of **634 action." (§ 3505.) The duty to bargain applies to a decision "directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls." (*International Assn. of Fire Fighters, Local 188, AFL–CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272, 120 Cal.Rptr.3d 117, 245 P.3d 845 (*Fire Fighters 188*).) The duty to bargain also applies to a fundamental management or policy decision if the decision directly affects employment and " 'the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about' " the decision. (*Id.* at pp. 273, 274, 120 Cal.Rptr.3d 117, 245

P.3d 845; *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 638, 47 Cal.Rptr.3d 69, 139 P.3d 532.) Thus, the duty to bargain extends to matters beyond what might typically be incorporated into a comprehensive MOU, including, as here, the implementation and effects of a decision to lay off employees. (*Fire Fighters 188, supra,* at p. 277.)

B

Before the passage of AB 646, if a public agency and a union reached an impasse in their negotiations, the Act permitted the parties to mutually agree to engage in mediation (§ 3505.2), but did not require the parties to engage in factfinding or any other impasse procedure. (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25–26, 132 Cal.Rptr. 668, 553 P.2d 1140; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 614, fn. 4, 116 Cal.Rptr. 507, 526 P.2d 971.) If there was no impasse procedure applicable by local law or by the parties' agreement, the public agency could unilaterally impose its last, best and final offer. (*Santa Clara, supra,* 224 Cal.App.4th at p. 1034, 169 Cal.Rptr.3d 228.)

C

The absence of mandatory impasse procedures in the Act prompted the introduction of AB 646. (*Santa Clara, supra,* 224 Cal.App.4th at p. 1035, fn. 5, 169 Cal.Rptr.3d 228.) With AB 646's passage, if a public agency and a union reach an impasse in their negotiations, the union may now require the public agency to participate in one type of impasse procedure—submission of the parties' differences to a factfinding panel for advisory findings and recommendations—before the public agency may unilaterally impose its last, best, and final offer. (§§ 3505.4, subd. (a), 3505.5, subd. (a), 3505.7.)[5]

***10** Upon submission of the parties' differences to a factfinding panel, the panel ****635** must meet with the parties "and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate." (§ 3505.4, subd. (c).) In arriving at its findings and recommendations, the panel must consider, weigh, and be guided by several criteria, including "[t]he interests and welfare of the public and the financial ability of the agency"; a "[c]omparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies"; "[t]he consumer price index for goods and services, commonly known as the cost of living"; and "[t]he overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received." (§ 3505.4, subd. (d)(4)-(7).)[6]

[6]If the parties do not settle their dispute within a specified or agreed upon period, the factfinding panel must make advisory findings and recommendations, which the public agency must make publicly available within a specified time after their receipt. (§ 3505.5, subd. (a).) Provided the public ***11** agency is not subject to interest arbitration,[7] the public agency may proceed to implement its last, best, and final offer, but not an MOU, after the public agency exhausts any applicable mediation and factfinding procedures and conducts a public hearing regarding the impasse. (§ 3505.7.) The public agency's unilateral implementation of its last, best, and final offer "shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law." (*Ibid.*)

III

A

[7]Around the time the court entered its judgment, the Board issued a decision ****636** addressing the statutory interpretation question at issue in this appeal. (*County of Contra Costa* (2014) PERB Dec. No. Ad–410–M [2014 Cal. PERB LEXIS 14].) The Board held the Legislature intended the Act's factfinding procedures to apply "to any bargaining impasse over negotiable terms and conditions of employment, and not only to impasses over new or successor [MOUs]." (*Id.* at pp. *2–3.) The Board reaffirmed this holding in a subsequent decision. (*City & County of San Francisco* (2014) PERB Dec. No. Ad–419–M [2014 Cal. PERB LEXIS 48].)

The Board based its holding on several factors. First, the Act does not contain any language expressly limiting its factfinding provisions to impasses occurring during the

negotiation of a comprehensive MOU. (*County of Contra Costa, supra,* 2014 Cal. PERB LEXIS 14 at pp. *51–52.) Second, the Board had consistently applied the analogous factfinding provisions in the Educational Employment Relations Act (EERA) (§§ 3548.1 through 3548.3) and Higher Education Employer–Employee Relations Act (HEERA) (§§ 3591 through 3593) to all types of bargaining disputes, not just disputes arising in the context of a negotiation for a comprehensive MOU. (*County of Contra Costa,* at pp. *15, 38–43, 68–69.) Third, interpreting the Act's factfinding provisions to apply to any bargaining disputes is consistent with the legislative history of AB 646. (*County of Contra Costa,* at pp. *55–59.) Finally, interpreting the Act's factfinding provisions to apply to any bargaining dispute is consistent with the parties' continuous duty to bargain on any bargainable issue and prepare an MOU after reaching an agreement. (*Id.* at pp. *64–67.)

***12** B

[8] [9]Although statutory interpretation is ultimately a judicial function, the Board is vested with the authority to interpret the Act. (*Santa Clara, supra,* 224 Cal.App.4th at p. 1026, 169 Cal.Rptr.3d 228; *Burke v. Ipsen* (2010) 189 Cal.App.4th 801, 809, 117 Cal.Rptr.3d 91.) " '[The Board] is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." ' " (*County of Los Angeles, supra,* 56 Cal.4th at p. 922, 157 Cal.Rptr.3d 481, 301 P.3d 1102.) Consequently, we must defer to the Board's interpretation of the Act unless the Board's interpretation is clearly erroneous. (*Ibid.*; *Santa Clara,* at p. 1026, 169 Cal.Rptr.3d 228.)

[10]Amici curiae League of California Cities and California State Association of Counties (Amici) contend the Board's decisions interpreting the Act are entitled to no deference because they were created for the purpose of assisting the Board in this litigation. However, the timing of the Board's decision does not affect the deference we must accord to the decision. (*S. Bay Union Sch. Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 502, 506–507, 279 Cal.Rptr. 135 ["[O]ur construction of legal principles can be influenced by other, even later, pronouncements of the administrative agency"].) Further, judicial comity and restraint preclude us from speculating about any ulterior motives the Board may have had in reaching its decision. (See *In re Shaputis* (2011) 53 Cal.4th 192, 217–218, 134 Cal.Rptr.3d 86, 265 P.3d 253.)

IV

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The Commission does not directly contest any of the Board's reasons for broadly interpreting the Act's factfinding provisions, ****637** including the most compelling reason—there is no language in the Act expressly limiting the factfinding provisions to particular types of impasses. Instead, the Commission asserts four reasons why, notwithstanding the lack of limiting language in the Act, we should interpret the factfinding provisions to apply only to impasses occurring in the context of negotiations for comprehensive MOUs. First, the Commission points to the list of criteria in section 3505.4, subdivision (d), that a factfinding panel "shall" consider and weigh before reaching its findings and recommendations. (See fn. 6, *ante.*) In the Commission's view, these criteria—particularly the criteria requiring the consideration of the comparable wages, hours, and working conditions of other public ***13** agencies; the consumer price index for goods and services; and the overall compensation employees currently receive (§ 3505.4, subd. (d)(5)-(7))—only make sense for impasses occurring in the context of negotiations for comprehensive MOUs. To conclude otherwise, the Commission contends, would render much of the language in this subdivision surplusage.

2

[11] [12]However, as the Board points out, the criteria listed in section 3505.4, subdivision (d), are virtually identical to the criteria contained in analogous provisions of the EERA. (See § 3548.2, subd. (b).) The only difference between the statutes is that the Act includes a requirement for the factfinding panel to consider local rules, regulations, or ordinances (§ 3505.4, subd. (d)(2)), a criterion not expected to be included in the EERA because the criterion is not generally relevant to public school employment relations. Since at least 2008, the Board has applied the factfinding provisions of the EERA to all types of impasses, not just impasses arising during

negotiations of comprehensive MOUs.[8] (See, e.g., *Chico Unified School Dist.* (2008) FF–623 < http://www.perb.ca.gov//ffpdfs/FR0623.pdf> [as of Sept. 26, 2008].) The Legislature presumably knew of the Board's practice when it passed AB 646 in 2011.[9] (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1017–1018, 9 Cal.Rptr.2d 358, 831 P.2d 798.) Therefore, we cannot reasonably infer from the language of section 3505.4, subdivision (d), a legislative intent to limit the application of the factfinding provisions in the manner the Commission asserts.

Moreover, if we were to limit the application of the Act's factfinding provisions to only those impasses in which all eight of the listed criteria are relevant, which is the logical extension of the Commission's position, there would be few, if any, circumstances in which the factfinding provisions ****638** could ever be utilized. As the Board explained in its decision in *City & County of* ***14** *San Francisco, supra,* 2014 Cal. PERB LEXIS 48: "Even in a factfinding proceeding concerning a new or successor MOU, not every one of the eight criteria is necessarily applicable to the issues that divide the parties. When parties reach an impasse in negotiations over a comprehensive MOU, they have usually agreed to at least some terms prior to reaching impasse on more intractable proposals. Issues that impede final agreement can be economic, or non-economic.... Where the issues are non-economic, it is unlikely the factfinding panel would spend time comparing wages and hours of comparable public agencies or assessing the consumer price index in arriving at its recommendations. Thus, the listing of eight criteria that factfinders are to consider does not demonstrate that factfinding applies only to comprehensive MOUs.... [M]id-term bargaining disputes, or disputes over the effects of layoffs or some other proposed economic reduction, can involve issues that are just as complex as disputes over comprehensive MOUs. The eight listed criteria can be equally applicable or equally not applicable to any bargaining dispute, whether it be a mid-term re-opener, a single issue, effects bargaining, or a comprehensive MOU." (*Id.* at pp. *22–24.)

B

1

Next, the Commission points to the language in section 3505.7 allowing a public agency to implement its last, best, and final offer after exhausting any applicable mediation and factfinding procedures, but precluding the public agency from implementing an MOU. (See fn. 5, *ante.*) The Commission asserts the Legislature would not have used the "any applicable" language in the statute if it had intended the factfinding procedures to apply to any bargainable dispute. The Commission further asserts the language precluding the implementation of an MOU logically reflects the intent only to apply the factfinding procedures to resolve an impasse arising from the negotiation of an MOU.

2

One key difficulty with the Commission's position is that the language upon which it relies was part of the Act before the Legislature added the factfinding provisions. The language was derived from the original section 3505.4 with minimal revisions to accommodate the addition of the factfinding provisions.[10] (***15** *Dailey v. City of San Diego* (2013) 223 Cal.App.4th 237, 254, fn. 4, 167 Cal.Rptr.3d 123; see fn. 3, *ante,* for a history of section 3505.4.) Consequently, the language offers no particular insight into the intended scope of the factfinding provisions.

In addition, the "any applicable" language is more logically and reasonably construed as a recognition that neither mediation nor factfinding will necessarily ****639** occur after an impasse. Mediation will only occur if the parties mutually agree to it. (§ 3505.2.) Factfinding will only occur if the union requests it. (§ 3505.4, subd. (a).) If the parties choose not to mediate their dispute or the union chooses not to request a factfinding, then there would not be "any applicable" mediation or factfinding procedures to exhaust before the public agency could implement its last, best, and final offer.

Likewise, the language precluding the implementation of an MOU is more logically and reasonably construed as a recognition that, at the point a public agency implements its last, best, and final offer, there has not been an understanding or an agreement between the parties to implement. This construction is consistent with section 3505.1, which indicates a binding MOU is the result of a tentative agreement between the public agency's and the union's negotiators that has been adopted by the public agency's governing body.[11]

C

The Commission also relies on references in AB 646's legislative history the Commission believes indicate the Act's factfinding provisions ***16** were directed solely at addressing failed efforts to negotiate collective bargaining agreements. (See, e.g., Assem. Conc. Sen. Amends. to Assem. Bill No. 646 (2011–2012 Reg. Sess.) as amended June 22, 2011, p. 2 ["According to the author, 'Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures *where efforts to negotiate a collective bargaining agreement have failed,*' " (italics added)]; *id.* at p. 3 ["AB 646 undermines a local agency's authority to establish local rules for resolving impasse and the requirement that a local agency engage in factfinding *may delay rather than speed the conclusion of contract negotiations,*" (italics added)].)

[13]However, these references are to arguments made by the supporters and opponents of AB 646. While the Legislature knew of these arguments because they were noted in committee reports and analyses, we generally do not consider references showing the motive or understanding of the bill's author or other interested persons in determining legislative intent. (*Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 759, 162 Cal.Rptr.3d 158.) Such references are entitled to no weight "unless they reiterate legislative discussion and events leading up to the bill's passage." (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 348, 110 Cal.Rptr.3d 628, 232 P.3d 625.) Even if we could consider the Commission's proffered references, the references are not illuminating because they focus on the ****640** mandatory nature of the factfinding provisions, not the scope of their application.

D

Finally, the Commission contends the Board's reliance on decisions interpreting the EERA and the HEERA is misplaced because these statutory schemes differ fundamentally from the Act in their treatment of impasse and factfinding. Specifically, the Commission points out that under the Act, the parties must mutually agree to mediation, and under the other statutory schemes, either party may compel mediation. (§§ 3505.2, 3548, 3590.) In addition, under the Act, only a union may initiate factfinding, and under the other two statutory schemes, either party may initiate factfinding after a mediator declares factfinding to be appropriate. (§§ 3505.4, 3548.1, subd. (a), 3591.) Further, under the Act, the parties must pay the cost of mediation and factfinding, and under the other statutory schemes, the Board may be required to absorb some of the costs. (§§ 3505.5, subds. (b) & (c), 3548.3, subds. (b) & (c), 3593, subd. (b).)

While these procedural distinctions indeed exist, the Commission has not explained nor is it apparent how they are relevant to the intended application of the Act's factfinding provisions, much less how they compel a conclusion ***17** the factfinding provisions only apply to impasses during negotiations of comprehensive MOUs. This omission in the Commission's analysis notably weakens the Commission's position, particularly since there is no material distinction in the three statutory schemes' descriptions of what may be submitted to a factfinding panel. (§§ 3505.4, subd. (a) [parties' "differences" may be submitted to a factfinding panel]; 3548.1, subd. (a) [parties' "differences" may be submitted to a factfinding panel]; 3591 [parties' "differences" may be submitted to a factfinding panel].)[12]

Amici attempt to fill the analytical gap by arguing the word "differences" does not have the same contextual meaning in the Act as it does in the other two statutory schemes. Citing to section 3548 and section 3590, Amici contend the contextual meaning of "differences" in the other two statutory schemes is an impasse "over matters within the scope of representation."[13] Since the Act does not contain ****641** the "within the scope of representation" language, Amici Curiae posit the Legislature must have intended for the word "differences" in the Act to mean something other than an impasse over matters within the scope of representation. We are unpersuaded by this argument because it ignores the fact the Act is a public sector labor relations statute and, as such, "matters within the scope of representation" is the implicit context for all of its provisions. For the reasons stated in part IV.B, *ante,* we are also unpersuaded by Amici's reliance on the MOU language in section 3505.7 to divine the contextual meaning of "differences."

***18** E

In addition to being unconvincing, the Commission's position is inconsistent with the Act's general purpose. (*Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321, 74 Cal.Rptr.3d 891, 180 P.3d 935 [when construing a statute, courts ultimately must choose the construction most closely fitting the Legislature's apparent intent, with a view to promoting, not defeating the statute's general purpose].) The Act is intended "to promote full communication between public employers and their

employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (§ 3500, subd. (a).) The Act is also intended "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." (*Ibid.*)

Applying the factfinding provisions only to impasses arising from MOU negotiations would hinder this purpose by depriving the parties of an orderly method for resolving disputes arising during the negotiation of supplemental matters. Such a result would also be anomalous since the Act makes no other procedural or substantive distinction between the negotiation of comprehensive MOUs and the negotiation of supplemental matters. Indeed, we cannot fathom why the need for an orderly method of resolving disputes would be less acute during the negotiation of supplemental matters than during the negotiation of comprehensive MOUs. The negotiation of supplemental matters is not necessarily less complex nor is the outcome necessarily less important than the negotiation of comprehensive MOUs. For this and the other reasons stated in this opinion, we conclude the Board correctly interpreted the Act's factfinding provisions to apply to all impasses and not just impasses arising during negotiations of comprehensive MOUs. As the trial court determined otherwise, we reverse the judgment and remand the matter for further proceedings consistent with this decision.

V

Given our resolution of the Board's appeal, we need not decide the Commission's cross-appeal of the court's orders on the Commission's motion for attorney fees and the Board's motion to tax costs. Therefore, we dismiss the Commission's cross-appeal as moot.

***19** DISPOSITION

The judgment is reversed. The Commission's cross-appeal is dismissed as moot. The matter is remanded to the trial court for further proceedings consistent with this decision. The Board is awarded its costs on appeal.

WE CONCUR:

****642** McINTYRE, J.

AARON, J.

All Citations

246 Cal.App.4th 1, 200 Cal.Rptr.3d 629, 16 Cal. Daily Op. Serv. 3491, 2016 Daily Journal D.A.R. 3129

Footnotes

1 Further statutory references are to the Government Code unless otherwise specified.

2 We ordered this appeal considered with the appeal in *County of Riverside v. Public Employment Relations Board* (Mar. 30, 2016, D069065) —— Cal.App.4th ——, 200 Cal.Rptr.3d 573, 2016 WL 1238737.

3 Section 3505.4 was originally enacted in 2000. (Stats.2000, ch. 316, § 1.) In 2011, the Legislature adopted Assembly Bill No. 646 (AB 646), which repealed the original version of section 3505.4 and replaced it with new sections 3505.4, 3505.5, and 3505.7. (Stats.2011, ch. 680, §§ 1–4.) Subdivision (a) of the new section 3505.4 authorized an employee organization to request the parties' differences be submitted to a factfinding panel for advisory findings and recommendations after the parties reached an impasse they were unable to resolve through mutually agreed upon mediation and before the public agency imposed its last, best, and final offer.

In 2012, after this action was filed, the Legislature amended subdivision (a) of section 3505.4 to authorize an employee organization to request the parties' differences be submitted to a factfinding panel for advisory findings and recommendations even if the parties had not first attempted to resolve the impasse through mutually agreed upon mediation. The Legislature also added subdivision (e) to section 3505.4, which precludes an employee organization from waiving its right to request a factfinding panel. (Stats.2012, ch. 314, § 1.) Because the 2012 amendments do not affect the resolution of this appeal, our references to section 3505.4 are to the amended, or

current, version of the code section.
Current section 3505.4, subdivision (a), provides in part: "[A]n employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The [Board] shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel."

4 The parties informed us at oral argument the two affected employees no longer work for the Commission. None of the parties contends this case is moot. "A case is moot when the reviewing court cannot provide the parties with practical, effectual relief. [Citation.] In such cases, the appeal generally should be dismissed. [Citation.] But even if a case is technically moot, the court has inherent power to decide it where the issues presented are important and of continuing interest." (*City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 417–418, 100 Cal.Rptr.3d 396.) Even if this action "is technically moot, given the important issues presented, 'it is appropriate for us to retain and decide the matter.' " (*Id.* at p. 418, 100 Cal.Rptr.3d 396.)

5 See fn. 3, *ante,* for the text of section 3505.4, subdivision (a).
Section 3505.5, subdivision (a), provides: "If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt."
Section 3505.7 provides: "After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law."

6 Section 3505.4, subdivision (d), provides in full: "In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria: [¶] (1) State and federal laws that are applicable to the employer. [¶] (2) Local rules, regulations, or ordinances. [¶] (3) Stipulations of the parties. [¶] (4) The interests and welfare of the public and the financial ability of the public agency. [¶] (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies. [¶] (6) The consumer price index for goods and services, commonly known as the cost of living. [¶] (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received. [¶] (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations."

7 "Interest arbitration involves an agreement between an employer and a union to submit disagreements about the proposed content of a new labor contract to an arbitrator or arbitration panel." (*City of Fresno v. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 96, 83 Cal.Rptr.2d 603.)

8 The Legislature has also applied the factfinding provisions of the HEERA to all types of impasses since at least 2007. (See, e.g., *California State University* (2007) FF–613 < http://www.perb.ca.gov//ffpdfs/FR0613.pdf> [as of May 2, 2007].)

9 Amici contend this presumption does not apply because there is no regulation or reported court or administrative decision squarely addressing the Board's practice. There is also no information in AB 646's legislative history demonstrating the Legislature's awareness of the practice. Essentially, Amici contend we cannot apply the presumption because there is no evidence the presumption applies. This contention misapprehends the nature of a presumption. A presumption is a deduction the law requires to be made from particular facts. (*Maganini v. Quinn* (1950) 99 Cal.App.2d 1, 6, 221 P.2d 241.) Unless deemed by the law to be conclusive, a presumption is rebutted by the existence of contrary evidence, not by the absence of supporting evidence. (*Ibid.*) Regardless, the long-standing nature of the Board's practice is sufficient evidence the presumption applies. (*El Dorado Oil Works v. McColgan* (1950) 34 Cal.2d 731, 739, 215 P.2d 4.)

10 The original section 3505.4 provided: "If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, *and impasse procedures, where applicable, have been exhausted,* a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, *but shall not implement a memorandum of understanding.* The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law." (Former § 3505.4; added by Stats.2000, ch. 316, § 1, italics added.)

11 Section 3505.1 currently provides: "If a tentative agreement is reached by the authorized representatives of the public agency and a recognized employee organization or recognized employee organizations, the governing body shall vote to accept or reject the tentative agreement within 30 days of the date it is first considered at a duly noticed public meeting. A decision by the governing body to reject the tentative agreement shall not bar the filing of a charge of unfair practice for failure to meet and confer in good faith. If the governing body adopts the tentative agreement, the parties shall jointly prepare a written memorandum of understanding." (Amended by Stats.2013, ch. 785, § 1.)

At the time the Legislature passed AB 646, section 3505.1 similarly provided: "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." (Added by Stats.1968, ch. 1390, § 7, p. 2728.)

12 See fn. 3, *ante,* for the language of section 3505.4, subdivision (a).

Section 3548.1, subdivision (a) provides in part: "If the mediator is unable to effect settlement of the controversy within 15 days after his appointment and the mediator declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a factfinding panel."

Section 3591 provides in part: "If the mediator is unable to effect settlement of the controversy within 15 days after his appointment and the mediator declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a factfinding panel."

13 Section 3548 provides in part: "Either a public school employer or the exclusive representative may declare that *an impasse* has been reached between the parties in negotiations *over matters within the scope of representation* and may request the board to appoint a mediator for the purpose of assisting them in reconciling their *differences* and resolving the controversy on terms which are mutually acceptable." (Italics added.)

Section 3590 similarly provides in part: "Either an employer or the exclusive representative may declare that *an impasse* has been reached between the parties in negotiations *over matters within the scope of representation* and may request the board to appoint a mediator for the purpose of assisting them in reconciling their *differences* and resolving the controversy on terms which are mutually acceptable." (Italics added.)

End of Document

Exhibit 12

***Santa Clara County Correctional Peace Officers' Association v. County of Santa Clara* (2014)**
224 Cal.App.4th 1016

224 Cal.App.4th 1016
Court of Appeal,
Sixth District, California.

SANTA CLARA COUNTY CORRECTIONAL PEACE OFFICERS' ASSOCIATION, INC., Plaintiff and Appellant,
v.
COUNTY OF SANTA CLARA, Defendant and Respondent.

H037418
|
Filed March 17, 2014
|
Review Denied July 9, 2014

Synopsis
Background: Correctional peace officers' union petitioned for writ of administrative mandate challenging county's compliance with Myers-Milias-Brown Act (MMBA) in reducing members' work hours. The Superior Court, Santa Clara County, No. 1–11–CV–205583, Carrie A. Zepeda–Madrid, J., denied petition after bench trial. Union appealed.

Holdings: The Court of Appeal, Grover, J., held that:

[1] reduction of members' work hours was not within "emergency" exception from MMBA; but

[2] memorandum of understanding (MOU) did not waive union's right to meet and confer on reduction of members' work hours; but

[3] MOU waived any right for union to declare impasse and compel mediation;

[4] scope of negotiations was limited to details of implementing the reduction in hours; and

[5] county satisfied its duty to bargain in good faith.

Affirmed.

****233** Santa Clara County Superior Court, No. 1–11–CV–205583, Carrie A. Zepeda–Madrid, Judge.

Attorneys and Law Firms

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Cheryl Stevens, Deputy County Counsel, County of Santa Clara, for Defendant/Respondent County of Santa Clara.

GROVER, J.

*1022 I. INTRODUCTION

At issue in this appeal is whether the County of Santa Clara (County) complied with its statutory and contractual obligations regarding meeting and conferring in good faith before reducing the work schedules for an unspecified number of correctional peace officers who are members of the Santa Clara County Correctional Peace Officers' Association, Inc. (Association). The officers work for the County's Department of Correction (DOC) in staffing the County's jails, though they remain sheriff's deputies.

The County and the Association entered into a written memorandum of understanding (sometimes MOU) effective on June 2, 2008, that created three different work schedules, working either five eight-hour days a week (the 5/8 Plan) or four 10-hour days a week (the 4/10 Plan) for a total of 80 hours biweekly, or working 12.25 hours a day four days one week and three days the next (the 12 Plan) for a total of 85.75 hours biweekly. In order to reduce the County's total budget for fiscal year 2012 (July 1, 2011, through June 30, 2012) while avoiding layoffs, the DOC proposed, among other things, a reduction of the 12 Plan to working mostly 12-hour shifts totaling 80 hours biweekly, not 85.75 hours. The County and the Association met twice in early June 2011 before the County's board of supervisors adopted a proposed budget on June 15, 2011, which included a modified 12 Plan. After the budget was adopted, the parties met again and the Association's members voted on the County's proposals.

***1023** On July 22, 2011, the Association filed a verified petition for writ of mandate, alleging that the County, in modifying the 12 Plan, had breached duties to meet and

confer and to bargain in good faith under the MOU, the Meyers-Milias-Brown Act (Govt.Code, §§ 3500–3511[1]; sometimes MMBA), and the County's code. After a court trial based on documents submitted by both sides, the court denied the Association's petition, finding that a vote by the Association's members established both that they preferred the County's modified plan and that the County had met and conferred in good faith.

**234 The parties renew their contentions on appeal. The County contends that the Association has failed to exhaust its contractual remedies. The Association disputes this and contends that the County set an arbitrary deadline and failed to complete its obligation to meet and confer in good faith, including participating in impasse resolution, before implementing the work schedule change. The County contends that because it reserved rights in the MOU to convert 12 Plan assignments to other plans, it fulfilled all of its statutory and contractual obligations. For the reasons stated below, we will affirm the judgment after concluding that the County complied with its obligations to meet and confer about this reduction in working hours.

A. *The Memorandum Of Understanding*

The County and the Association entered into a memorandum of understanding effective on June 2, 2008. The term of the MOU was through "May 29, 2011, and from year to year thereafter." (MOU, § 27.) The MOU specified the monthly pay scales for correctional officers in different classifications, their hours of work, and lengths of shifts, among other things.

Three alternative shifts are recognized as a normal workday: the eight-hour shift of the 5/8 Plan, the 10–hour shift of the 4/10 Plan, and the 12.25-hour shift of the 12 Plan described above. (MOU, § 7.1.) The MOU provided that a full workweek is 40 hours except as otherwise provided in the MOU or by law. (*Ibid.*) The 12 Plan, by calling for working 85.75 hours biweekly, was thus an exception to a 40-hour workweek. According to the Association's mandate petition, the 12 Plan has been in place for 30 years.

The MOU defined overtime in section 7.5 as any time worked on a single day in excess of the defined shift length, or any time worked in a biweekly pay period over 80 hours. Section 7.5 further provided that "[f]or the employees in the Twelve (12) Plan all hours worked from 80 to 85.75 hours per pay period shall be considered for PERS purposes as overtime paid at the straight time rate." (MOU, § 7.5 subd. (a).) In another section, the MOU *1024 provided that "[a]ll hours worked by such employees on the Twelve Plan (and their briefing time) shall be compensated at straight time, up to 12.25 hours per day and 85.75 hours per pay period, with all hours in excess thereof to be considered overtime." (MOU, § 7.1, subd. (a).)

Section 7.1, subdivision (a) also provided: "Employees assigned by the Chief of Correction to the Twelve Plan will continue to work on the Twelve (12) Plan during the term of this Memorandum."

Section 7.1, subdivision (b) (sometimes section 7.1(b)) provided: "The Appointing Authority reserves the right to convert assignments on the Twelve Plan to either a 5/8 or a 4/10 Plan, upon the giving of forty-five (45) calendar days' advance notice of such change to the Association, which shall be afforded the opportunity to meet and confer on such a proposed change prior to its implementation."

It is up to the "Appointing Authority," the County, to "set up a standard shift and days off assignment policy within each department," based first "on the administrative needs of the department, so as to have a certain minimum number of experienced and/or qualified or skilled personnel on a shift." (MOU, § 7.2.)

The MOU also included a grievance procedure that we discuss below.

B. *The Meetings and the Association Vote*

John Hirokawa was involved in meetings with the Association in 2011 as the undersheriff **235 and also acting chief of the DOC. He filed a declaration stating the following.[2] Facing a projected County budget deficit of $230 million, the DOC was asked to make budget cuts of $15 million while avoiding staff layoffs, if possible. Among the proposals was to alter the 12 Plan by eliminating the built-in 5.75 hours of biweekly overtime with a projected annual savings of $5,860,683. This modification entailed related changes of officers reporting directly to their posts instead of the briefing room, supervisors checking staff in and out, and officers sharing information during the shift change and by information technology.

On May 19, 2011, the acting chief notified the Association by certified letter of its "intent to change the 12-plan work schedule to a 5/8, 4/10 or modified 12-plan" (80-hour work schedule) to become effective on July 4, 2011. "These proposed changes in the above described assignments will not *1025 be implemented until such time as the parties shall have the opportunity to meet and

confer." The parties agree that July 4, 2011, was the start of a new pay period under a new County budget.

The acting chief later attended three meetings with representatives of the Association, counsel for both sides, and other interested parties, including the County's labor relations representative Ramsin Nasseri. At the first meeting on June 2, 2011, the acting chief provided the Association with several proposed work schedules, including versions of how the 12 Plan could be modified to result in working 80 hours biweekly. The Association responded by questioning the existence of a budget deficit and the chief's authority to modify the 12 Plan and complaining about the unfair impact on Association members. The Association rejected the explanation that the reduction in hours was a business necessity in order to meet the DOC's $15 million target.

At the second meeting on June 13, 2011, the Association questioned how the schedule changes would affect the members. Custody Administrative Captain David Sepulveda explained the operational details as best he could. Some questions could not be answered because the County was awaiting the Association's feedback. The Association complained about a 7 percent salary reduction and contended that the goal could be accomplished by retirements and layoffs. The acting chief said that retirements and layoffs would not yield enough savings. He encouraged the Association to attend the County's upcoming budget hearings. The Association did not offer an alternative plan to save $6.1 million.

A third meeting was scheduled for June 20, 2011. Meanwhile, on June 15, the County Board of Supervisors considered the DOC's recommendations and, after hearing from several Association representatives, unanimously voted to accept the County Executive's proposed budget, which included the modified 12 Plan.

According to the acting chief, at the meeting on June 20, 2011, the Association still disputed the existence of a budget deficit and failed to propose another method for saving $15 million. The chief advised the Association that every day of delay in implementing the plan was costing the County about $17,000. The County agreed to the Association's request to delay implementation until its members could vote on the County's proposals.

**236 A report on the members' vote on the County's proposals was originally promised on July 2, 2011, and was delivered by e-mail at the end of the workday on July 6, 2011. The vote was reported as a 200 to 15 rejection of the County's MOU proposal. As to the different 12 Plan schedules presented, *1026 236 members voted in favor of one eight-hour day per pay period with the rest 12-hour days, as opposed to 13 members voting for two 10-hour days per pay period and 10 voting for the 5/8 schedule. The e-mail disclaimed any consent to a reduction of the 85.75 biweekly schedule.

C. The Trial Court's Findings

After a court trial based on the documents submitted, the trial court made the following findings in denying the petition for writ of mandate. "1. Pursuant to the Memorandum of Understanding between the County of Santa Clara and the Correctional Peace Officers' Association ('MOU'), the Appointing Authority reserved the right to convert assignments on the Twelve Plan to either a 5/8 or a 4/10 Plan upon the giving of 45 calendar days advance notice.

"2. Although the County did not adopt the 5/8 or the 4/10 schedule the fact that the County adopted a modified 12 Plan that Petitioner's membership preferred established that the County met and conferred in good faith.

"3. Additionally, because Petitioner's members chose the modified 12 Plan over the other proposed schedules, the Court finds there was mutual agreement and, therefore the parties did not need to declare impasse and mediation was not required.

"The Court therefore concludes the County satisfied its obligations to meet and confer pursuant to section 7.1(b) of the MOU."

II. THE STANDARDS OF REVIEW

[1]This appeal presents several issues that require application of different standards of review. How to interpret a statute such as the MMBA presents questions of law that we review independently on appeal. (*DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, 256, 104 Cal.Rptr.3d 93; **237 *Mendocino County Employees Assn. v. County of Mendocino* (1992) 3 Cal.App.4th 1472, 1477, 5 Cal.Rptr.2d 353.) It is ultimately a judicial function to interpret a statute, but courts will defer to a statutory interpretation by an agency like the Public Employment Relations Board (PERB) that administers a statute, unless it is clearly erroneous. (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 586–587, 262 Cal.Rptr. 46, 778 P.2d 174.) The PERB has exclusive jurisdiction over alleged violations of the MMBA in most cases (§ 3509), but

peace officers are among those public employees who are exempt from its exclusive jurisdiction. (§ 3511; see *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077, fn. 1, 29 Cal.Rptr.3d 234, 112 P.3d 623.)

[2] ***1027** County codes and ordinances are subject to the same independent construction on appeal as statutes. (*People v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 113, 3 Cal.Rptr.3d 429.)

[3]The interpretation of an MOU also presents questions of law that we review independently on appeal when, as here, there was no conflicting extrinsic evidence presented as to its meaning. (Compare *Service Employees Internat. Union v. City of Los Angeles* (1996) 42 Cal.App.4th 1546, 1552–1553, 50 Cal.Rptr.2d 216 [undisputed evidence] and *Mendocino County Employees Assn. v. County of Mendocino, supra,* 3 Cal.App.4th 1472, 1477, 5 Cal.Rptr.2d 353 [same] with *Beverly Hills Firemen's Assn., Inc. v. City of Beverly Hills* (1981) 119 Cal.App.3d 620, 629–630, 174 Cal.Rptr. 178 [conflicting evidence].)

[4]However, whether a party actually engaged in meetings in good faith is generally a factual question, and the fact-finder's express or implicit determination will be upheld on appeal if supported by substantial evidence. (*Lipow v. Regents of University of California* (1975) 54 Cal.App.3d 215, 227, 126 Cal.Rptr. 515; *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25, 129 Cal.Rptr. 126 (*Placentia*).)

[5]" '[T]he applicable standards of appellate review of a judgment based on affidavits or declarations are the same as for a judgment following oral testimony: We must accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of credibility of the witnesses and the weight of the evidence. [Citation.]' " (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653, 35 Cal.Rptr.2d 800.)

III. DISCUSSION

A. *The Association Did Not Fail to Exhaust a Contractual Remedy*

[6]In the trial court, the County asserted that this action is barred because the Association failed to exhaust its contractual remedies and that a "party to a labor agreement that provides for binding grievance arbitration *must* exhaust contractual remedies in the absence of facts excusing exhaustion." The County renews this argument on appeal.

Section 23 of the MOU did establish a grievance procedure for resolving both "employee grievances" and "organizational grievances" through binding arbitration. However, excluded from the grievance procedure, as the Association points out, are "[i]tems within the scope of representation and subject to the ***1028** meet and confer process." (§ 23, subd. (a) 2g.) The Association had no obligation under the MOU to file a grievance regarding a negotiable topic that was subject to the meet and confer process. (Cf. *Long Beach Police Officer Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1003, 203 Cal.Rptr. 494.) As we will explain, the topic of a proposed reduction of working hours was a negotiable one.

In light of this conclusion, we need not consider the Association's alternate contentions that the grievance procedure has expired along with the MOU and that invoking the procedure would have been futile in light of the County's adoption of the modified 12 Plan.

B. *The Meyers-Milias-Brown Act*

"With the enactment of the George Brown Act (Stats. 1961, ch. 1964) in 1961, California became one of the first states to recognize the right of government employees to organize collectively and to confer with management as to the terms and conditions of their employment. Proceeding beyond that act the Meyers-Milias-Brown Act (Stats. 1968, ch. 1390) authorized labor and management representatives not only to confer but to enter into written agreements for presentation to the governing body of a municipal government or other local agency." (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 331, 124 Cal.Rptr. 513, 540 P.2d 609, fn. omitted.)

"The MMBA has two stated purposes: (1) to promote full communication between ****238** public employers and employees, and (2) to improve personnel management and employer-employee relations. (§ 3500.) To effect these goals the act gives local government employees the right to organize collectively and to be represented by employee organizations (§ 3502), and obligates employers to bargain with employee representatives about matters that fall within the 'scope of representation' (§§

3504.5, 3505). [¶] Specifically, section 3504.5 provides that public agencies must give employee organizations 'reasonable written notice' of any proposed 'ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation' [3]; section 3505 provides that representatives of public agencies and employee organizations 'shall have the mutual obligation personally to *meet and confer* ***1029** promptly upon request by either party ... and to endeavor to reach agreement on matters within the *scope of representation* prior to the adoption by the public agency of its final budget for the ensuing year.' (Italics added.)" (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 657, 224 Cal.Rptr. 688, 715 P.2d 648 (*Farrell*); cf. *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630, 47 Cal.Rptr.3d 69, 139 P.3d 532 (*Claremont*).)

"The recurrent phrase, 'scope of representation,' is defined in section 3504 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.' (Italics added.)" (*Farrell, supra,* 41 Cal.3d 651, 658, 224 Cal.Rptr. 688, 715 P.2d 648.)

"[T]he phrase 'wages, hours, and other terms and conditions of employment' was taken directly from the National Labor Relations Act (NLRA) (29 U.S.C. § 158(d))" and state courts have accordingly looked for guidance to federal decisions in interpreting this phrase (*Farrell, supra,* 41 Cal.3d 651, 658, 224 Cal.Rptr. 688, 715 P.2d 648), even though the NLRA (National Labor Relations Act; 29 U.S.C. § 151 et seq.) has left it to individual states to regulate labor relations between states and their political subdivisions and their employees (29 U.S.C. § 152, subd. (2); *Davenport v. Washington Educ. Assn.* (2007) 551 U.S. 177, 181, 127 S.Ct. 2372, 168 L.Ed.2d 71).

The phrase "*merits, necessity or organization of any service* or activity" has no counterpart in the NLRA. (*Farrell, supra,* 41 Cal.3d 651, 658, 224 Cal.Rptr. 688, 715 P.2d 648.) "This exclusionary language, which was added in 1968, was intended to 'forestall any expansion of the language of "wages, hours and working conditions" to include more general managerial policy decisions.' [Citation]; Stats. 1968, ch. 1390, § 4, p. 2727.) 'Federal and California decisions both recognize the right of employers to make unconstrained decisions when fundamental management or policy choices are involved.' ([*Farrell*], *supra,* at p. 663 [224 Cal.Rptr. 688, 715 P.2d 648]; [citations].)" (*Claremont, supra,* 39 Cal.4th 623, 631, 47 Cal.Rptr.3d 69, 139 P.3d 532.)

[7] [8] ****239** Deciding whether a topic is bargainable under the MMBA and subject to a meet and confer requirement involves "a three-part inquiry. First, we ask whether the management action has 'a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees.' ([*Farrell*], *supra,* 41 Cal.3d at p. 660 [224 Cal.Rptr. 688, 715 P.2d 648].) If not, there is no duty to meet and confer. (See § 3504; [citation].) Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then, as in [*Farrell*], the meet-and-confer requirement ***1030** applies. ([*Farrell*], *supra,* at p. 664 [224 Cal.Rptr. 688, 715 P.2d 648].) Third, if both factors are present—if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on the wages, hours, or working conditions of the employees—we apply a balancing test. The action 'is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.' ([*Farrell*], *supra,* at p. 660 [224 Cal.Rptr. 688, 715 P.2d 648].) In balancing the interests to determine whether parties must meet and confer over a certain matter (§ 3505), a court may also consider whether the 'transactional cost of the bargaining process outweighs its value.' [Citation.]" (*Claremont, supra,* 39 Cal.4th 623, 638, 47 Cal.Rptr.3d 69, 139 P.3d 532.) This balancing test derives from federal law. (*Farrell, supra,* at p. 663, 224 Cal.Rptr. 688, 715 P.2d 648; *International Assn. of Fire Fighters, Local 188, AFL–CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272–273, 120 Cal.Rptr.3d 117, 245 P.3d 845 (*Local 188*).)

C. *A Reduction in Working Hours Is Generally a Bargainable Topic*

These general principles aid in determining to what extent the County was required to meet and confer about its proposal to modify the 12 Plan. On appeal there is no real dispute that the County was obliged to meet and confer prior to reducing the working hours for certain represented employees from 85.75 hours to 80 hours biweekly. Case law has determined that at least some aspects of a reduction of working hours or a change in the scheduling of the hours are topics subject to collective bargaining. The MOU also recognized this obligation.

In *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d

608, 116 Cal.Rptr. 507, 526 P.2d 971 (*Vallejo*), the Supreme Court provided a framework for identifying the kinds of topics subject to bargaining by public employees. In that case, the court was called upon to interpret provisions of the Vallejo City Charter that were virtually identical to provisions in the MMBA. (*Id.* at p. 614, 116 Cal.Rptr. 507, 526 P.2d 971.) The charter provided in part that " '[i]t shall be the right of City employees individually or collectively to negotiate on matters of wages, hours, and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law ....' " (*Id.* at p. 613, fn. 2, 116 Cal.Rptr. 507, 526 P.2d 971.)

That appeal considered several proposals by the union, including two particularly relevant to our case. The union had proposed two work schedules for firefighters, "a maximum of 40 hours per week for fire fighters on 8-hour shifts and 56 hours per week for fire fighters on 24-hour shifts." (*Vallejo, supra,* at p. 617, 116 Cal.Rptr. 507, 526 P.2d 971.) The Supreme Court quickly rejected the city's argument that the schedules of hours were exempt from ****240** bargaining as pertaining to the organization of the fire service. (*Id.* at pp. 617–618, 116 Cal.Rptr. 507, 526 P.2d 971.)

***1031** The union also proposed a certain method for reducing personnel. The court commented that "[a] reduction of the entire fire fighting force based on the city's decision that as a matter of policy of fire prevention the force was too large would not be arbitrable in that it is an issue involving the organization of the service." (*Vallejo, supra,* 12 Cal.3d at p. 621, 116 Cal.Rptr. 507, 526 P.2d 971.) On the other hand, while an employer may unilaterally decide that layoffs are necessary, it must bargain about which employees and how many are affected and when layoffs will occur. (*Ibid.*) To the extent that the layoffs might affect the workload or safety of the remaining employees, it is also subject to bargaining. (*Id.* at p. 622, 116 Cal.Rptr. 507, 526 P.2d 971.)

In *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 129 Cal.Rptr. 893 (*Huntington Beach*), the city took the position that a change to a 40-hour workweek of five eight-hour days from four 10-hour days (the Ten-Plan) was nonnegotiable. It was excluded from negotiations by both a city resolution and the applicable memorandum of understanding. (*Id.* at pp. 495–496, 129 Cal.Rptr. 893.) The appellate court concluded in part that "[t]he city's EER Resolution purporting to render work schedule nonnegotiable [*sic*] is in conflict with the declared purpose of the MMB Act and the mandatory language of section 3505. It is therefore invalid." (*Id.* at p. 503, 129 Cal.Rptr. 893.)

The city in that appeal did not point to any part of the memorandum of understanding that made this change nonnegotiable. The appellate court nevertheless reviewed the agreement and concluded, "[a]lthough the agreement inferentially recognizes the ultimate authority of the chief to decide to what extent the Ten-Plan shall be operative in his department, it does not, either expressly or by implication, provide that changes in policy affecting the application of the plan shall not be subject to the meet and confer process." (*Huntington Beach, supra,* at p. 504, 129 Cal.Rptr. 893.) Implementing the change without meeting and conferring violated the MMBA. (*Ibid.*)

In *Independent Union of Pub. Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 195 Cal.Rptr. 206 (*Sacramento*), the county proposed to start the eight-hour shift for custodial workers at 1:00 p.m. instead of 5:00 p.m. (*Id.* at p. 486, 195 Cal.Rptr. 206.) The county conceded that the shift change affected the hours of employment, but contended that, in their memorandum of understanding, "it retained the right to unilaterally assign its employees to any shift without first meeting and conferring with" the union. (*Id.* at p. 487, 195 Cal.Rptr. 206.) The court stated: "Petitioner does not contest the County's *power* to assign employees, but contends the County must meet and confer before exercising this power. We agree. The power to 'assign' employees is not inconsistent with the meet and confer requirement. As long as the County meets and confers in good faith, it may assign its employees however it sees fit." (*Ibid.*)

***1032** The contractual authority on which the County relies to justify its modification of the 12 Plan, section 7.1(b) of the MOU, states: "The Appointing Authority reserves the right to convert assignments on the Twelve Plan to either a 5/8 or a 4/10 Plan, upon the giving of forty-five (45) calendar days' advance notice of such change to the Association, *which shall be afforded the opportunity to meet and confer on such a proposed change prior to its implementation.*" (Italics added.) By ****241** giving the Association the opportunity to meet and confer prior to implementation of a change of assignments, the County recognized its own obligation to meet and confer on this topic. We understand the County to maintain that it fulfilled its duty, not that it could implement the change without meeting and conferring.

D. *The Business Necessity Defense Has Not Been Established*

In the trial court, the County asserted in its opposition to

the mandate petition that "a compelling business necessity may also justify unilateral action." County repeats this assertion on appeal, although the trial court made no express finding about it.

[9]In the area of private employment, "[t]he NLRB has recognized the existence of a compelling business justification to excuse or justify the unilateral implementation of a change in wages or working conditions. (See *Winn–Dixie Stores* (1979) 243 NLRB No. 151, 101 L.R.R.M. (BNA) 1534.) However, economic considerations alone are not sufficient to justify a unilateral change. (*Airport Limousine Service, Inc.* (1977) 231 NLRB No. 149, 96 L.R.R.M. (BNA) 1177, 1179–1180.) Moreover, neither exigent circumstances nor a business necessity completely absolves an employer of its duty to notify and bargain with the union. Bargaining is required to the extent that the situation permits, although an impasse is not necessary. Whether the business necessity defense exists is an issue determined on a case-by-case basis. (*Joe Maggio, Inc. et al.* (1982) 8 ALRB No. 72.)" (*Cardinal Distributing Co. v. Agricultural Labor Relations Bd.* (1984) 159 Cal.App.3d 758, 772, 205 Cal.Rptr. 860.)

California appellate courts have not yet explicitly applied or adapted this business necessity defense to the context of public employment. The PERB has, however, applied this doctrine to public employment by the County. "At times, a compelling operational necessity can justify an employer acting unilaterally before completing its bargaining obligation. [Citation.] However, the employer must demonstrate 'an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action.' " (*County of Santa Clara* (2010) PERB Dec. No. 2114M p. 16 [2010 Cal. PERB Lexis 29]; see *County of Santa Clara* (2010) PERB Dec. No. 2120-M p. 16 [2010 Cal. PERB Lexis 35].)

[10] ***1033** As we have noted above (*ante,* fn. 3), public agencies are excused from providing reasonable notice of proposed changes "in cases of emergency" (§ 3504.5, subd. (a); see *id.*, subd. (b)), but are required to "provide notice and opportunity to meet at the earliest practicable time" after implementing the changes (*id.*, subd. (b)). *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 1 Cal.Rptr.2d 850 stated: "Just what shall constitute an emergency is left unexplained by the MMBA. This omission is of no moment, given that emergency has long been accepted in California as an unforeseen situation calling for immediate action." (*Id.* at p. 276, 1 Cal.Rptr.2d 850.) The appellate court in that case discussed several criteria for an emergency and recognized that an imminent and substantial threat to public health certainly qualified. (*Id.* at p. 277, 1 Cal.Rptr.2d 850.) In this case the County, by its own account, was able to meet three times prior to implementing the proposed change in work schedules. We agree with the Association that the evidence does not establish a financial emergency or business necessity that would temporarily suspend the obligation to meet and confer before implementing a change. We conclude the circumstances ****242** here were more in the nature of foreseeable budget cuts than a temporary emergency requiring an immediate response.

E. *Impasse Resolution*

1. The MMBA does not impose an impasse resolution procedure

The Association alternatively argues that "the County failed to meet and confer with" the Association and that the County "failed to complete the meet and confer process regarding the decision to adopt the Modified 12 Plan because it failed to allocate sufficient time to complete the process, did not reach an agreement with the [Association] to adopt the Modified 12 Plan and failed to exhaust required impasse procedures." Since the parties indisputably met, we will assume that the Association's real point is that the County did not complete the process.

The County responds in part that the MMBA did not require the parties to resolve all disagreements through impasse procedures. The County is correct.

Several California statutes applicable to different kinds of public employees contain mandatory procedures for identifying and resolving a bargaining impasse, usually requiring mediation. (E.g., § 3548 [public school employees], § 3590 [higher education employees; statutory language virtually identical to § 3548]; Pub. Util.Code, § 99568 [public transit employees]; Bus. & Prof.Code, § 19455, subd. (d)(8)(B) [racetrack backstretch workers].)

In contrast with those statutes, the applicable version of the MMBA did not mandate an impasse resolution procedure. This is what it says on the ***1034** topic. " '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 promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of

representation prior to the adoption by the public agency of its final budget for the ensuing year. *The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.*" (§ 3505, italics added.) This statute contemplates resolution of impasse by procedures that are imposed by other laws or by mutual agreement, not by the MMBA. The MMBA, unlike other statutes, provides no definition of "impasse." (E.g., §§ 3540.1, subd. (f), 3562, subd. (j).)

[11]Consistent with this permissive approach, section 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator. (*Placentia, supra,* 57 Cal.App.3d 9, 21, 129 Cal.Rptr. 126 ["In the event of a failure to reach agreement after good faith efforts over a reasonable time to do so, the parties may agree to place the disputed matters in the hands of a mediator, but are not required to do so."]; *Alameda County Employees' Assn. v. County of Alameda* (1973) 30 Cal.App.3d 518, 534, 106 Cal.Rptr. 441 ["there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."].)

[12]Former section 3505.4 (Stats. 2000, ch. 316, § 1, p. 2638) provided: "If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and *impasse procedures, where applicable, have been exhausted,* a public agency that is not required to proceed ****243** to interest arbitration[4] may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law." (Italics added.) Though this statute was repealed ***1035** and replaced as of January 1, 2012, the Association concedes that the former statute is the one applicable in this case.[5]

We recognize that the California Supreme Court has stated more than once that public agencies are required "to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse." (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537, 28 Cal.Rptr.2d 617, 869 P.2d 1142; see *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1083, 29 Cal.Rptr.3d 234, 112 P.3d 623; *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 670, 42 Cal.Rptr.3d 868, 133 P.3d 1028.) However, the statement was dictum in each case. Only the third case involved a factual impasse. The impasse situation in *San Francisco Fire Fighters Local 798 v. City and County of San Francisco, supra,* 38 Cal.4th 653, 42 Cal.Rptr.3d 868, 133 P.3d 1028 was governed by specific impasse procedures in the charter of the City and County of San Francisco. (*Id.* at p. 670, 42 Cal.Rptr.3d 868, 133 P.3d 1028.) Those procedures required the parties to bargain to impasse and then submit the matter to binding arbitration. (*Ibid.*) The California Supreme Court observed that "[t]he Charter thus provides a rule of impasse resolution that differs from that generally provided to local government employees through the Meyers-Milias-Brown Act. (Gov.Code, § 3500 et seq.)" (*Ibid.*)

[13] [14] [15]The applicable version of the MMBA did not require public agencies to reach agreement. "Even if the parties meet and confer, they are not required to reach an agreement because the employer has 'the ultimate power to refuse to agree on any particular issue. [Citation.]' ([*Farrell*], *supra,* 41 Cal.3d at p. 665 [224 Cal.Rptr. 688, 715 P.2d 648].) However, good faith under section 3505 'requires a ****244** genuine desire to reach agreement.' [Citation.]" (*Claremont, supra,* 39 Cal.4th 623, 630, 47 Cal.Rptr.3d 69, 139 P.3d 532.) "Agreement between the public agency and its employees is to be sought as the result of meetings and conferences held in good faith for the purpose of achieving agreement if possible; but agreement is not mandated. It follows that government is not required to cease operations because agreement has not been reached." (*Placentia, supra,* 57 Cal.App.3d 9, 21, 129 Cal.Rptr. 126.)

***1036 2. The Santa Clara County Code does provide for impasse resolution**

As the Association contends, the Santa Clara County Code provides for impasse resolution in the Employee Relations Ordinance. Division A25 of the code pertains to the personnel department. Chapter IV, article 6 of that division is entitled "Impasse Procedures."

Section A25-414 of that Article states: "(a) If the appropriate level of management and the recognized employee organization fail to reach agreement prior to June 1 of a fiscal year on a matter within the scope of representation affecting the budget and subject to approval by the Board of Supervisors and the parties together are unable to agree on a method of resolving the dispute, the dispute *shall* be submitted to mediation.

"(b) If the parties are unable to agree on the mediator, either party *may* request the service of the State Conciliation Service to provide a mediator. Costs of mediation shall be divided one-half to the County and one-half to the recognized employee organization or recognized employee organizations." (Italics added.)

The County asserts that this ordinance is permissive only.

[16]"Under 'well-settled principle[s] of statutory construction,' we 'ordinarily' construe the word 'may' as permissive and the word 'shall' as mandatory, 'particularly' when a single statute uses both terms. [Citation.] In other words, '[w]hen the Legislature has, as here, used both "shall" and "may" in close proximity in a particular context, we may fairly infer the Legislature intended mandatory and discretionary meanings, respectively.' " (*Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 542, 121 Cal.Rptr.3d 312, 247 P.3d 542.) However, consideration of the legislative history may establish that the Legislature intended "shall" to be permissive. (*Ibid.*) The County offers no legislative history to contradict the plain meanings of "shall" and "may" in the quoted ordinance.

The County also argues that this impasse procedure was never triggered, because it reserved the right in section 7.1(b) of the MOU "to unilaterally adjust the work assignments over the union's objection provided adequate notice and an opportunity to meet and confer are given." We will next address the significance of this subdivision.

F. *The County's Reserved Right*

In section 7.1(b) of the MOU, the County, as appointing authority, specifically reserved "the right to convert assignments on the Twelve Plan to either ***1037** a 5/8 or a 4/10 Plan, upon the giving of forty-five (45) calendar days' advance notice of such change to the Association, which shall be afforded the opportunity to meet and confer on such a proposed change prior to its implementation."

1. The Association did not waive its right to bargain regarding reduced working hours

The County urges that this subdivision of the MOU amounts to "a management ****245** reservation of rights clause that reserves for management the right to implement certain unilateral changes." This clause, the County argues, "is evidence that [the Association] waived its right to bargain the change in work schedules."

[17]*Farrell, supra,* 41 Cal.3d 651, 224 Cal.Rptr. 688, 715 P.2d 648 discussed the waiver defense at pages 667 and 668, 224 Cal.Rptr. 688, 715 P.2d 648. " ' "Courts examine the defense of waiver carefully in order to ensure the protection of a party's rights, especially when these rights are statutorily based." ' ([*Sacramento*], *supra,* 147 Cal.App.3d 482, 488 [195 Cal.Rptr. 206], quoting *Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1011 [175 Cal.Rptr. 105].) Federal courts use two basic tests when considering claims that a union has waived its right to bargain with an employer: some follow the rule that a waiver must be made in 'clear and unmistakable' language [citations], and others look beyond the language of the contract and consider the 'totality of the circumstances' to determine whether there was a waiver of rights [citation]. In California, the 'clear and unmistakable' language test has been preferred in cases involving public employees. (See, e.g., [*Sacramento*], *supra,* 147 Cal.App.3d at p. 488 [195 Cal.Rptr. 206]; *Oakland Unified School Dist. v. Public Employment Relations Bd., supra,* 120 Cal.App.3d at p. 1011 [175 Cal.Rptr. 105].)"

The County relies on *Sacramento, supra,* 147 Cal.App.3d 482, 195 Cal.Rptr. 206, even though the appellate court found no waiver in that case. In that case, as we have already discussed, a county conceded that a change of shift start times was generally subject to bargaining, but contended that the union "specifically waived its right to meet and confer on this matter in the MOU. The County relies on article III of the MOU, entitled 'county rights.' Subdivision (b) of that provision states '[t]he rights of the County include, ... the exclusive right to ... train, direct and *assign* its employees; ...' (Italics added.) The County urges that by this provision it retained the right to unilaterally assign its employees to any shift without first meeting and conferring with [the union]." (*Id.* at p. 487, 195 Cal.Rptr. 206.)

The *Sacramento* decision applied both tests and found no waiver. Looking at the totality of the circumstances, a history of unilateral reassignments ***1038** without a request to meet and confer did not establish a waiver, considering that history also showed that the union had agreed to two of the three shift changes that involved multiple employees. (*Sacramento, supra,* 147 Cal.App.3d 482, 488–489, 195 Cal.Rptr. 206.) The county argued that it requested the "county rights" provision many years earlier "to protect itself from the statutory bargaining requirements." (*Id.* at p. 489, 195 Cal.Rptr. 206.) The court characterized this as an undisclosed intention at the time and also when the union "signed a subsequent

agreement years later." (*Ibid.*) "Nor does the record show that either the practices or mutual intentions of the parties indicated the County's right to 'assign' employees was to be considered a waiver of [the union's] right to meet and confer on the matter." (*Ibid.*)

Farrell, supra, 41 Cal.3d 651, 224 Cal.Rptr. 688, 715 P.2d 648 similarly found no waiver by provisions in an MOU under either test of waiver. (*Id.* at p. 668, 224 Cal.Rptr. 688, 715 P.2d 648.)

[18]As section 7.1(b) of the MOU specifically recognized the Association's right to meet and confer before implementation of a plan to convert 12 Plan assignments to 5/8 or 4/10 Plan assignments, we do not regard the subdivision as a waiver of the same right. (Cf. ****246** *N.L.R.B. v. U.S. Postal Service* (D.C.Cir.1993) 8 F.3d 832, 836–837 (*U.S. Postal Service*) ["questions of 'waiver' normally do not come into play with respect to subjects already covered by a collective bargaining agreement."].)

2. The MOU specified the applicable time period to meet and confer

The Association complains that the "County failed to provide adequate time to complete the process because it set an arbitrary deadline for completing the meet and confer process."

We reiterate that section 3505 provides in 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 *promptly* upon request by either party and *continue for a reasonable period of time* in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. *The process should include adequate time for the resolution of impasses* where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent." (Italics added.)

[19] [20]The MMBA does not attempt to specify how long or how frequently parties must meet in order to establish prima facie good faith or when impasse may be declared. The parties to an MOU, however, are free to agree ***1039** in advance on a period of time that they consider reasonable to allow them to freely exchange information and proposals and endeavor to reach agreement. It appears that the parties did so as to this particular topic. Section 7.1(b) of the MOU states that the County could convert 12 Plan assignments to the 5/8 Plan or 4/10 Plan 45 days after giving written notice and providing the opportunity to meet and confer. The County scheduled implementation of its modification to coincide with its new fiscal year. We conclude that neither the specified 45-day period nor the date was an arbitrary deadline.

The specified time period of 45 days from notice to implementation also contains an unavoidable implication about the applicability of the impasse procedure contained in the County code. The County code provides for resolution of impasse by mediation if the parties are unable to agree on another method of resolving their dispute. Here, 45 days was sufficient time to conduct three meetings to discuss the County's proposal and to conduct a vote by Association members. But 45 days is an unrealistically short time to conduct several meetings at which the parties "exchange freely information, opinions, and proposals, and to endeavor to reach agreement" (§ 3505), and also to reach and declare an impasse, agree on a mediator, and participate in mediation. The MOU arguably did not allow an "adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance." (§ 3505.) It therefore appears that the parties did not intend the impasse resolution procedure to apply to this particular proposal by the County to convert 12 Plan assignments. Instead they specified the entire applicable process in the MOU, 45 days' notice of a County proposal to convert 12 Plan assignments, the opportunity to meet and confer within those 45 days, and implementation of the County's proposal 45 days after providing notice, regardless of whether the parties reach agreement or impasse on implementation in the interim. Though we have concluded that the Association ****247** did not waive the right to bargain about the implementation of converting the 12 Plan to other plans, we conclude that the Association did waive any right to postpone implementation beyond 45 days by declaring impasse and compelling mediation.

3. The reserved right to reassign all 12 Plan employees included the right to reduce the 12 Plan shifts

We recognize that the County sought to achieve budget savings through reduced work schedules rather than employee layoffs. Nonetheless, we find guidance regarding the County's obligation to meet and confer from cases involving layoffs.

The California Supreme Court has clarified its earlier ruling in *Vallejo* regarding the extent to which

contemplated layoffs of public employees are ***1040** negotiable. Looking at cases involving private employers, the court noted: "[F]ederal courts have held that bargaining is required when the layoffs result from an employer's decision to reassign bargaining unit work to independent contractors or to managers. [Citations.] On the other hand, federal courts do not require bargaining when layoffs result from profitability considerations that are independent of labor costs [citation], or from a management decision to shut down all or part of a business [citation]. When layoffs are motivated primarily by a desire to reduce labor cost, but are not the result of a decision to change the nature or scope of the enterprise, and do not involve reassigning bargaining unit work to non-bargaining-unit workers, federal courts require bargaining over the timing of the layoffs and the number and identity of the affected employees, but not necessarily over the layoff decision itself. [Citations.] The United States Supreme Court has said that a conflict resulting from an employer's desire to reduce labor costs is 'peculiarly suitable for resolution within the collective bargaining framework' under the NLRA. (*Fibreboard Paper Products Corp. v. National Labor Relations Board* (1964) 379 U.S. 203, 214 [85 S.Ct. 398, 13 L.Ed.2d 233].)" (*Local 188, supra,* 51 Cal.4th 259, 272, 120 Cal.Rptr.3d 117, 245 P.3d 845.)

[21]Adapting these private employment cases to public employment, the court explained that "the rule adopted in *Vallejo* is that under the MMBA a local public entity may unilaterally decide that financial necessity requires some employee layoffs, although the entity must bargain over the implementation of that decision and its effects on the remaining employees." (*Local 188, supra,* 51 Cal.4th 259, 276, 120 Cal.Rptr.3d 117, 245 P.3d 845; cf. *State Assn. of Real Property Agents v. State Personnel Bd.* (1978) 83 Cal.App.3d 206, 213, 147 Cal.Rptr. 786 ["federal cases have uniformly held that an employer faced with economic necessity has the right unilaterally to decide that some reduction in work forces must be made."].) "Under the MMBA, a local public entity that is faced with a decline in revenues or other financial adversity may unilaterally decide to lay off some of its employees to reduce its labor costs. In this situation, a public employer must, however, give its employees an opportunity to bargain over the implementation of the decision, including the number of employees to be laid off, and the timing of the layoffs, as well as the effects of the layoffs on the workload and safety of the remaining employees." (*Local 188, supra,* 51 Cal.4th at p. 277, 120 Cal.Rptr.3d 117, 245 P.3d 845.) The Supreme Court held that "when a city, faced with a budget deficit, decides that some firefighters must be laid off as a cost-saving measure, the city is not required to meet and confer with the firefighters' authorized employee representative before ****248** making that initial decision." (*Id.* at pp. 264–265, 120 Cal.Rptr.3d 117, 245 P.3d 845; cf. *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 656, 35 Cal.Rptr.2d 800 [the "decision to lay off employees because of lack of funds or lack of work" is "an exclusive management right."].)

[22]*Local 188* defines the scope of the exclusion in section 3504 from bargaining of the "merits, *necessity*, or organization of any service or ***1041** activity." (Italics added.) This "necessity" is not the kind of business necessity or financial emergency that merely postpones the obligation to meet and confer. Instead, it identifies the kind of decision that is exempt from collective bargaining altogether because it is inherently within managerial policy and prerogative.

In a different context, it has been established that the "integrated process of determining the budget of a county and adjusting the number of employees in each county office to conform to the overall spending plan is a legislative function which 'may not be controlled by the courts.' " (*County of Butte v. Superior Court* (1985) 176 Cal.App.3d 693, 698, 222 Cal.Rptr. 429.) "The power and obligation to enact a county's budget is vested by law in the board of supervisors. (Gov.Code, § 29088.) Furthermore, the board of supervisors is responsible for fixing the number of employees of each county office, their compensation, and other conditions of employment. (Cal. Const. art. XI, § 4, subd. (f), Gov. Code, § 25300.)" (*Ibid.*) This language, though not arising in the labor context, suggests what must be considered as management's prerogative.

[23]Applying the reasoning of *Local 188* to our case, how much the County can afford to spend on staffing its jails, in other words, the budget for the DOC, is inherently within fundamental managerial policy and prerogative, even without an explicit reservation of managerial rights. Deciding how to accomplish a budget target, namely, by layoffs, is also within management prerogative. If a county decides to preserve jobs and find ways other than layoffs to trim the budget of a department, that would also be within managerial prerogative.

We conclude that the County was not required by the MMBA or the MOU to meet and confer about the need to reduce the budget of the DOC or about the policy decision to avoid layoffs in making reductions. Retaining all existing employees while paying them less necessarily requires either reducing their hours or their compensation, both bargainable under the MMBA. Although under section 7.1(b) of the MOU the County was required to

meet and confer before exercising its right to convert 12 Plan employees to other plans, the scope of those negotiations was limited to details of *implementing* such a change.

The Association contends it never agreed to the County's decision to adopt the modified 12 Plan. This contention challenges the trial court's finding that "because [the Association's] members chose the modified 12 Plan over the other proposed schedules, ... there was mutual agreement and, therefore the parties did not need to declare impasse and mediation was not required." The Association argues that its e-mail report of the members' vote reflected a ***1042** preference for one type of implementation over another, but "does not show mutual agreement to the *decision*" to adopt the plan. The County counters that the e-mail was intentionally self-contradictory and that substantial evidence supports the trial court's interpretation. While we agree with the Association that the reported vote does not reflect its consent to the County's proposal to modify the 12 Plan, we disagree with the underlying ****249** premise that the Association's consent was required.

The County had reserved the right in the MOU to convert all 12 Plan employees to other listed plans upon 45 days' notice and the opportunity to meet and confer before implementation. In other words, the Association had already consented to a conversion on these terms. The Association had the right to meet and confer about how the conversion would be implemented, such as the timing of the conversion, but not about whether it would be implemented. The Association did not have the right to delay implementation beyond 45 days by declaring impasse and requesting mediation.

It is evident that the County contemplated in section 7.1(b) of the MOU that at some future time it might lose the financial ability to maintain a number of employees working 85.75 hours biweekly instead of 80 hours biweekly. The reservation of rights did not eliminate the County's obligation to meet and confer about reassigning all 12 Plan employees to shorter workweeks, but it was apparently adopted in contemplation of circumstances possibly requiring elimination of the 12 Plan.

[24]The trial court noted that the County did not actually exercise its right to convert all 12 Plan employees to other listed plans. The Association likewise emphasizes that "[s]ection 7.1(b) only permits a 5/8 or 4/10 Plan, not the Modified 12 Plan" and that "section 7.1(b) does not authorize 12-hour shifts." We agree that section 7.1(b) did not explicitly authorize the County to offer alternatives to converting 12 Plan employees to either the 4/10 or 5/8 Plans. However, it is a maxim of jurisprudence that "[t]he greater contains the less." (Civ.Code, § 3536.) As the County was able to assign all 12 Plan employees to 40-hour workweeks and 80 hours biweekly on one of two other plans, it is implicit that the County could offer 12 Plan employees other formulas for working 80 hours biweekly.

The appellate court in *Uforma/Shelby Business Forms, Inc. v. N.L.R.B.* (6th Cir.1997) 111 F.3d 1284, cited by neither side, applied similar reasoning. At issue in that case was whether a private employer "had the right to abolish the third shift, reschedule twelve employees to different shifts, and lay off five other employees without first providing notice and opportunity to bargain." (*Id.* at p. 1290.) The NLRB had found a violation of the employer's obligation to ***1043** meet and confer. The appellate court disagreed, looking at the rights reserved to management (petitioner) in the collective bargaining agreement.

"Although the language does not state that petitioner may 'eliminate a shift,' it reserves to petitioner the exclusive ability to schedule and assign work, determine the number of employees required for a job, and layoff or relieve employees from duties. These broad powers necessarily encompass the ability to reschedule and lay off the members of a given shift, regardless of whether petitioner is affecting one or one hundred employees. The reasoning of the ALJ exalts form over substance by suggesting that collective bargaining agreements must catalog every conceivable permutation of a decision to lay off, such as delineating with precision each position or work force percentage which an employer may reschedule or lay off." (*Uforma/Shelby Business Forms, Inc., supra,* 111 F.3d 1284, 1290.)

While the reserved management rights in our case were not as broad as those in *Uforma/Shelby Business Forms, Inc.,* they did contemplate the County converting 12 Plan employees to working 80 hours biweekly after allowing the Association to ****250** meet and confer about the implementation of this conversion. We conclude that the power to eliminate all 12 Plan assignments and the power to lay off employees for budgetary reasons must include the ability to modify 12 Plan assignments to conform to other work schedules recognized in the MOU. The County was acting within its reserved rights by preserving most of the 12 Plan schedule, rather than reassigning all or most 12 Plan employees to other plans. The County recognized an obligation to meet and confer before exercising this reserved right, and the record reflects that it complied with that obligation.

4. Bargaining in good faith

The County repeatedly asserts that the Association engaged in bad faith bargaining, apparently in response to its perception that the Association has accused the County of bad faith bargaining. The Association's briefs do not expressly accuse the County of bargaining in bad faith, but they complain that the County failed to complete its obligation to bargain in good faith and imposed an arbitrary deadline. We have already rejected those contentions, which we understand to be the Association's only implicit claims of bad faith by the County.

[25] [26]We do not agree with the trial court's finding that the Association's membership vote preferring one form of a modified 12 Plan over another established the County's good faith in bargaining. As we have explained, however, modifying the 12 Plan was within the County's reserved rights so ***1044** long as it met and conferred regarding the implementation. The record establishes that there were three meetings at which the Association was afforded an opportunity to discuss implementation.

[27] [28]"In general, good faith is a subjective attitude and requires a genuine desire to reach agreement [citations]. The parties must make a serious attempt to resolve differences and reach a common ground [citation]. The effort required is inconsistent with a 'predetermined resolve not to budge from an initial position.' [Citations.]" (*Placentia, supra,* 57 Cal.App.3d 9, 25–26, 129 Cal.Rptr. 126.) However, adamantly insisting on a position does not necessarily establish bad faith. (*Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797, 805–806, 213 Cal.Rptr. 491.)

To the extent the Association implies the County acted in bad faith, the implication is based on the premise that the County was required to engage in further meetings and then participate in mediation if an impasse was reached. As we have concluded that the County acted within the authority reserved in section 7.1(b) of the MOU, we reject the implication that the County's action was taken in bad faith.

IV. DISPOSITION

The judgment is affirmed.

WE CONCUR:

Rushing, P.J.

Elia, J.

All Citations

224 Cal.App.4th 1016, 169 Cal.Rptr.3d 228, 14 Cal. Daily Op. Serv. 2978, 2014 Daily Journal D.A.R. 3403

Footnotes

1 Unspecified section references are to the Government Code.

2 The Association has filed no counterdeclaration regarding what transpired at the meetings. Instead, on appeal it relies on parts of Hirokawa's declaration as well as its verified petition.

3 Section 3504.5 excuses public agencies from providing reasonable notice "in cases of emergency as provided in this section." (*Id.*, subd. (a).) Subdivision (b) provides: "In cases of emergency when the governing body or the designated boards and commissions determine that an ordinance, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or the boards and commissions shall provide notice and opportunity to meet at the earliest practicable time following the adoption of the ordinance, rule, resolution, or regulation."

4 The MMBA does not itself define "interest arbitration." This court has stated: " 'Resolution of disputed contract issues through a binding process is commonly referred to as "interest arbitration" in labor law.' [Citation.] ' "Interest arbitration, unlike grievance arbitration, focuses on what the terms of a new agreement should be, rather than the meaning of the terms of the old agreement." ' " (*City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 414, 100 Cal.Rptr.3d 396, quoting *Hess Collection Winery v. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 45 Cal.Rptr.3d 609.)

5 Former section 3505.4 was repealed and replaced amidst a number of amendments to the MMBA effective on January 1, 2012. Assembly Bill No. 646 (2011–2012 Reg. Sess.) repealed and replaced section 3505.4 and added sections 3505.5 and 3505.7. The nonexistence of mandatory impasse procedures in the MMBA is what prompted the author of Assembly Bill No. 646 to propose this new legislation. (Assem. Com. on Public Employees, Retirement and Social Security, Analysis of Assem. Bill No. 646 (2011–2012 Reg. Sess.) as amended Mar. 23, 2011, at <http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0601-0650/ab_646_cfa_20110503_ 104246_asm_comm.html> [as of Mar. 17, 2014].)

End of Document

Exhibit 13

Santa Clara County Counsel Attys. Assn. v. Woodside (1994)
7 Cal. 4th 525

7 Cal.4th 525, 869 P.2d 1142, 28 Cal.Rptr.2d 617, 145 L.R.R.M. (BNA) 2981
Supreme Court of California

SANTA CLARA COUNTY COUNSEL ATTORNEYS ASSOCIATION, Plaintiff, Cross-defendant and Respondent,
v.
STEVEN WOODSIDE, as County Counsel, etc., Defendant, Cross-complainant and Appellant;
COUNTY OF SANTA CLARA, Defendant and Appellant.

No. S031593.
Mar 31, 1994.

SUMMARY

After failing to obtain a mutually agreeable wage package with a county, an association representing the attorneys in the office of the county counsel notified the county that it intended to file a petition for a writ of mandate to enforce its members' bargaining rights. The county counsel, however, informed the attorneys that litigation on the salary issues could not be maintained unless the lawyers ceased employment or the county consented. The association then filed an action for declaratory and injunctive relief against the county counsel and the county, seeking a declaration that the proposed writ proceeding did not violate its members' duty of loyalty or other ethical obligations. The trial court determined that the association members were entitled to proceed with their petition and enjoined the county counsel from terminating the members from their employment if a suit was filed. (Superior Court of Santa Clara County, No. 697174, Martin C. Suits, Judge.*) The Court of Appeal, Sixth Dist., No. H008865, reversed.

The Supreme Court reversed the judgment of the Court of Appeal, with directions to affirm the judgment of the trial court. The court held that the attorneys' association had a right to bring a mandamus action against the county for breach of its duty under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) to bargain in good faith (Gov. Code, § 3505), without violating the attorneys' obligations under State Bar Rules Prof. Conduct, rules 3-300 (avoiding acquisition of interests adverse to client) and 3-310 (avoiding representation of adverse interests), or their common law ethical obligations to their employer-client. Moreover, the authorization of such lawsuits under the act does not violate the constitutional separation of powers between the Legislature and the Judiciary. The court further held that despite the general rule that a client may discharge an attorney at will (Code Civ. Proc., § 284), an attorney may not be terminated solely or chiefly because he or she has engaged in protected activity under the act. Lastly, the court held that the trial court correctly decided that, although the attorneys could not be discharged or disciplined for participating in the filing of the mandamus action, the county was free to rearrange assignments within the county counsel's office to ensure that it received legal representation in which it had full confidence. (Opinion by Mosk, J., with Lucas, C. J., Kennard, Arabian, Baxter and George, JJ., concurring. Separate dissenting opinion by Panelli, J.* *)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Labor § 37--Collective Bargaining--Public Agencies--Duty to Bargain.
The duty of public agencies under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations (Gov. Code, § 3505) is a duty to bargain with the objective of reaching binding agreements between agencies and employee organizations over the relevant terms and conditions of employment. The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse, and this duty continues in effect after the expiration of any employer-employee agreement.

(2)
Labor § 17--Labor Unions--Membership--Right to Join--Public Employees.
Unlike federal labor law, the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) (right to form local public employee organizations) includes supervisory,

management, and confidential employees within its scope. Contrary to federal practice, by virtue of the broad definition of "public employee" in Gov. Code, § 3501, subd. (d), which excludes only elected officials and those appointed by the Governor, the act extends organizational and representation rights to supervisory and managerial employees without regard to their position in the administrative hierarchy. Although Gov. Code, § 3507.5, permits a public agency to adopt rules for the designation of management and confidential employees, and for restricting such employees from representing any employee organization that represents other employees of the public agency, it does not prohibit such employees from forming, joining, or participating in an employee organization.

([3a], [3b], [3c])
Labor § 44--Collective Bargaining--Actions in State Courts--Right of Public Employee Association to Sue Public Agency for Violation of Duty to Bargain.
An association representing attorneys in a county counsel's office had a right to bring a mandamus action against the county under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) for breach of its duty to bargain in good faith (Gov. Code, § 3505), and there were no statutory or common law grounds for limiting that right. The Legislature intended the act to impose substantive duties, and confer substantive, enforceable rights, on public employers and employees, and it is irrelevant that the act contains no express right to sue. The Legislature, in order to create a right to sue under the act, need not have included language concerning the right to sue within the act itself. It was enough for the Legislature to endow the public employers and employees with substantive rights and duties that limited public employers' discretion, and then to allow employees to enforce their rights by means of traditional mandamus under Code Civ. Proc., § 1085.

([4a], [4b], [4c])
Mandamus and Prohibition § 21--Mandamus--To Public Agencies--Availability of Remedy as Affected by Public Policy.
Mandamus is available to compel a public agency to perform an act prescribed by law. (Code Civ. Proc., § 1085.) It is available to compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as "ministerial" or "legislative." Once the Legislature has created a duty in a public agency, a court may not limit, on public policy grounds, the availability of a writ of mandate to enforce that duty.

([5])
Mandamus and Prohibition § 5--Mandamus--Conditions Affecting Issuance.
What is required to obtain relief by a writ of mandamus is a showing by the petitioner of a clear, present, and usually ministerial duty on the part of the respondent, and a clear, present, and beneficial right in the petitioner to the performance of that duty.

([6a], [6b])
Attorneys at Law § 5--Right to Practice and Admission to Bar-- Power to Regulate--As Between Courts and Legislature.
The power to regulate the practice of law is among the inherent powers of the courts established by Cal. Const., art. VI, and the courts have the exclusive power to control the admission, discipline, and disbarment of persons entitled to practice before them, although the Legislature, under the police power, may exercise a reasonable degree of regulation and control over the profession and practice of law. Nonetheless, the Supreme Court has the inherent power to provide a higher standard of attorney-client conduct than the minimum standards prescribed by the Legislature, and any statute that would permit an attorney to act in a way that would seriously violate the integrity of the attorney-client relationship, so as to materially impair the functioning of the courts, would be constitutionally suspect. However, a statute affecting attorney-client relations will not be held to be unconstitutional on separation of powers grounds unless there is a direct and fundamental conflict between the operation of the statute, as it applies to attorneys, and attorneys' settled ethical obligations.

[See 1 **Witkin,** Cal. Procedure (3d ed. 1985) Attorneys, §§ 257, 258.]

([7])
Constitutional Law § 37--Distribution of Governmental Powers--Between Branches of Government--Doctrine of Separation of Powers--Violations of Doctrine--Standard for Assessment of Violation.
The standard for assessing whether the Legislature has overstepped its authority and thereby violated the separation of powers principle is summarized as follows: The Legislature may put reasonable restrictions on constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.

([8a], [8b], [8c])
Attorneys at Law § 13--Attorney-client Relationship--Rules of Professional Conduct--Suit Against Client--Avoiding Acquisition of Interests Adverse to Those of Client.
An association representing attorneys in a county counsel's office could bring a mandamus action against the county for breach of its duty under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) to bargain in good faith (Gov. Code, § 3505), without violating State Bar Rules Prof. Conduct, rule 3-300 disallowing the acquisition of interests adverse to client). The rule was intended to regulate business transactions between attorneys and clients and the acquisition by attorneys of pecuniary interests adverse to those of the clients. The association's lawsuit was not a business transaction, nor could the meaning of the term "acquire ... a pecuniary interest," as used in the rule, be stretched to encompass the filing of a petition for a writ of mandate, since that term is intended to signify the pursuit of some business or financial interest as conventionally understood, rather than an attempt to redress some legal wrong through the courts. Moreover, the rule does not require an attorney, for loyalty's sake, to forgo his or her statutory rights against a client to redress a legal injury.

[See 1 **Witkin,** Cal. Procedure (3d ed. 1985) Attorneys, § 368Q et seq.]

([9a], [9b], [9c])
Attorneys at Law § 13--Attorney-client Relationship--Rules of Professional Conduct--Suit Against Client--Avoiding Representation of Adverse Interests.
An association representing attorneys in a county counsel's office could bring a mandamus action against the county for breach of its duty under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) to bargain in good faith (Gov. Code, § 3505), without violating State Bar Rules Prof. Conduct, rule 3-310 (avoiding representation of adverse interests). By being a part of the association's lawsuit, the attorneys did not have a professional interest adverse to the county within the meaning of State Bar Rules Prof. Conduct, rule 3-310(B)(4) (attorney may not represent client, without disclosure, when attorney has professional interest in subject matter of representation). The rule does not address the existence of general antagonism between lawyer and client, but rather tangible conflicts between their interests in the subject matter of the representation, and the record supported the conclusion that no such conflict of interest was present. Rule 3-310 does not require an attorney, for loyalty's sake, to forgo his or her statutory rights against a client to redress a legal injury.

([10a], [10b], [10c])
Attorneys at Law § 12--Attorney-client Relationship--Dealings With Clients--Attorney's Common Law Duty of Loyalty and Other Ethical Obligations to Client--As Affecting Statutory Right of Attorneys Employed in Public Sector to Sue Client:Labor § 44--Collective Bargaining--Actions in State Courts.
Attorneys employed in the public sector, who exercise their statutory right to sue to enforce rights given them by the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) (right to form local public employee organizations), do not in such capacity violate their common law duty of loyalty or other ethical obligations to their employer-client. However, attorneys in such circumstances are held to the highest ethical obligations to continue to represent the client in the matters they have undertaken, and a violation of their duty to represent the client competently or faithfully, or of any of the State Bar Rules Prof. Conduct, will subject those attorneys to appropriate discipline, both by the employer and by the State Bar. In any event, the Legislature, in extending the act's means of conflict resolution to public employee attorneys in arguably managerial roles, did not put such a strain on the attorney-client relationship as to compel the conclusion that the authorization of such lawsuits violates the constitutional separation of powers between the Legislature and the Judiciary.

([11])
Attorneys at Law § 12--Attorney-client Relationship--Dealings With Clients--Attorney's Common Law Duty of Loyalty to Client--Applicability to Attorney in Public Sector.
It is an attorney's duty of loyalty to protect his or her client in every way, and it is a violation of that duty for the attorney to assume a position adverse or antagonistic to his or her client without the client's free and intelligent consent. By virtue of this rule, an attorney is precluded from assuming any relationship that would prevent him or her from devoting his or her entire energies to the client's interests. Moreover, the duty of loyalty for an attorney in the public sector does not differ appreciably from that of the attorney's counterpart in private practice.

([12])
Attorneys at Law § 12--Attorney-client Relationship--Dealings With Clients--Attorney's Common Law Duty of Loyalty to Client--As Affecting

Collective Bargaining Rights of Attorneys Employed in Public Sector:Labor § 37--Collective Bargaining.
Government attorneys who organize themselves into associations pursuant to statute and who proceed to bargain collectively with their employer-clients are not per se in violation of any duty of loyalty or any other ethical obligation. An attorney in pursuit of an employee association's goals oversteps ethical boundaries when he or she violates actual disciplinary rules pertaining to the attorney's duty to represent the client faithfully, competently, and confidentially, which duty is found principally in State Bar Rules Prof. Conduct, rule 3-110. Thus, in determining whether an action taken by an attorney or employee association violates the attorney's ethical obligations, the question is not whether the action creates antagonism between the attorney-employee and the client-employer, since such antagonism in the labor relations context is commonplace, but whether the attorney has permitted that antagonism to overstep the boundaries of the employer-employee bargaining relationship and has actually compromised client representation.

([13a], [13b])
Attorneys at Law § 16--Attorney-client Relationship--Termination--Power of Client to Discharge Attorney at Will--Exception for Exercise of Collective Bargaining Rights by Attorneys Employed in Public Sector:Labor § 37--Collective Bargaining.
The Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) (right to form local public employee organizations) in creates an exception to the general rule found in Code Civ. Proc., § 284, and in case law, that a client may discharge an attorney at will. That exception is a prohibition against terminating an attorney solely or chiefly because he or she has engaged in protected activity under the act. Moreover, attorneys who believe they have been discriminated against for protected activity may bring an antidiscrimination action in the manner available to other employees.

([14])
Attorneys at Law § 16--Attorney-client Relationship--Termination-- Power of Client to Discharge Attorney at Will.
Code Civ. Proc., § 284, confers on clients, beyond the context of litigation, the absolute power to discharge an attorney, with or without cause. The statute embodies the recognition that the interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and the client has the right to employ such attorney as will in his or her opinion best subserve his or her interest.

([15])
Labor § 17--Labor Unions--Membership--Right to Join--Public Employees--Discharge or Discrimination for Exercise of Right.
The Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) ensures a public employee the right to engage in a wide range of union-related activities without fear of sanction (Gov. Code, § 3506). Public employers may not discriminate against their employees on the basis of membership or participation in union activities, and this freedom from sanction includes the right not to be discharged for lawful union activity.

([16])
Attorneys at Law § 16--Attorney-client Relationship--Termination-- Power of Client to Discharge Attorney at Will--Exception for Exercise of Collective Bargaining Rights by Attorneys Employed in Public Sector--Right of Employer to Reorganize Its Office:Labor § 37--Collective Bargaining.
In an action for declaratory and injunctive relief, to determine the right of an association representing attorneys in a county counsel's office to bring a mandamus action against the county under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) for breach of its duty to bargain in good faith (Gov. Code, § 3505), the trial court correctly decided that, although an attorney could not be discharged or disciplined for participating in the filing of the petition for a writ of mandate, the attorneys involved had no right to be reinstated to their full employment responsibilities, from which they had been excluded once they announced their intention to sue. Although the county could not punish the attorneys for filing suit, there was no reason why the county should not have been accorded great flexibility in reorganizing the county counsel's office to respond to the lawsuit. By allowing the county this flexibility, the trial court properly balanced the county's need for obtaining representation in which it had full confidence with the attorneys' statutory employment rights.

COUNSEL
Remcho, Johansen & Purcell, Robin B. Johansen, Joseph Remcho, Karen A. Getman and Philip C. Monrad for Defendant, Cross-complainant and Appellant and Defendant and Appellant.
Daniel S. Hapke, Jr., Frederick J. Krebs, O'Melveny & Myers and George A. Riley as Amici Curiae on behalf of Defendant, Cross-complainant and Appellant and for Defendant and Appellant.
Pillsbury, Madison & Sutro, Kevin M. Fong, Edward P. Davis and J. Donald Best for Plaintiff, Cross-defendant and Respondent.
Daniel F. Moss, Ann Brick, Edward M. Chen, Matthew

A. Coles, Margaret C. Crosby and Alan L. Schlosser as Amici Curiae on behalf of Plaintiff, Cross-defendant and Respondent.

MOSK, J.

We are asked to decide whether the right of local government employees to sue a public agency for violations of the Meyers-Milias-Brown Act (MMBA, Gov. Code, § 3500 et seq.) extends to attorneys who are employed in the office of the Santa Clara County Counsel (County Counsel), or whether the duty of loyalty imposed upon these attorneys towards their client, the County of Santa Clara (County), precludes such a suit. We conclude that the MMBA authorizes the suit, and that the suit is not prohibited for any constitutional reason. Further, we conclude that the County is statutorily forbidden from discharging attorneys for exercising their right to sue under the MMBA, although the County is still free to rearrange assignments within the County Counsel's office in order to ensure that it receives legal representation in which it has full confidence. Because ***533** we find in favor of the Santa Clara County Attorneys Association on statutory grounds, we do not consider the argument that their right to sue is constitutionally protected.

I. *Factual Background*

Petitioner Santa Clara County Counsel Attorneys Association (Association) consists of approximately 20 out of 40 attorneys (Attorneys) in the County Counsel's office. The County Counsel's office, by statute (Gov. Code, § 26526) and by practice, acts as the primary legal adviser to the County Board of Supervisors. In addition to serving as counsel to the board, deputies in the County Counsel's office advise and represent various administrative departments of the county in matters ranging from land use law to social service benefits. The County Counsel's office is also charged with representing special districts within the county (*id.*, § 27645), representing the state at guardianship proceedings (*id.*, § 27646), and representing superior and municipal court judges (*id.*, § 27647).

In order to understand the relevant circumstances of this case, it is helpful to recount briefly the history of the Association.

In 1973, the Santa Clara County Criminal Attorneys Association, which included deputy district attorneys and deputy public defenders, filed a petition to form an attorney bargaining unit, pursuant to provisions of the MMBA. The County Board of Supervisors (the Board) placed the deputy County Counsel attorneys in the same bargaining unit as these attorneys. At the same time, the County removed the attorneys' status as classified employees who, under the MMBA, have certain restrictions placed on their associational rights. (See Gov. Code, § 3507.5.) However, the following year, the deputy County Counsel attorneys petitioned to be placed in a separate bargaining unit. The stated reason for the petition was that the attorneys, unlike the deputy district attorneys and public defenders, were in a "confidential attorney-client relationship with the Board of Supervisors and county management," and therefore "should not be included with attorneys and others not in such a relationship." The petition was granted, and the Association became a recognized employee association under the MMBA.

There is evidence in the record that in the late 1970's the Association attempted to change the status of its members, in effect proposing to disband them as a bargaining unit in exchange for a salary increase 5 percent greater than those of the deputy district attorneys and deputy public defenders. These latter attorneys objected and the proposal was never adopted.

In 1984, the Association joined the deputy public defenders and deputy district attorneys' unit in a lawsuit against the County. At issue was whether ***534** the County was setting the attorneys' salaries in accordance with the comparable wage provisions of County Charter section 709, and whether the County was violating the MMBA, specifically Government Code section 3505's requirement that a public employer "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment ...." The suit was subsequently settled.

This brings us to the events leading to the present lawsuit. In 1989, the most recent memorandum of understanding between the County and the Association expired. The Association refused to accept a wage package already approved by the deputy public defenders. Instead, the Association sought to meet and confer independently with the County and the Board to present its own comparative survey data, to support its position that its members deserved higher salaries than those offered by the County. On August 17, 1989, the Association requested that the Board schedule a hearing to set salaries pursuant to County Charter section 709. The Board did not comply with that request. On September 1, 1989, the Association proposed that the rate of pay for its members be set by binding arbitration. The County again did not respond. In November 1989, the County notified the Association that it intended to give the Attorneys the first phase of the

increase negotiated with other attorneys. The County offered to meet and confer with them on the implementation of this increase. On December 8, 1989, the Association proposed nonbinding fact-finding by a neutral third party or any other reasonable procedure that would assist the parties in resolving the comparable wage issue. Once again the County did not respond.

In December 1989, the Board enacted its 4 percent wage increase for the Attorneys. The Association at that point notified the County of its intent to file a petition for writ of mandate to enforce its rights under the MMBA and the County Charter. On December 21, 1989, Steven Woodside, the County Counsel, distributed a memorandum to all deputies in the office, setting forth his position with regard to the impending writ action. After a review of various California Rules of Professional Conduct as well as the American Bar Association model rules, Woodside concluded that "litigation against the County on these issues may not be maintained by lawyers employed by the County unless the lawyers cease employment in the County Counsel's Office or the County consents." Moreover, Woodside took certain steps to segregate Association members from confidential meetings and contacts with the Board.

On December 29, 1989, the Association requested that the County waive the conflict of interest or submit the controversy to a court without the filing ***535** of a formal action, pursuant to Code of Civil Procedure section 1138. After the County's rejection of this proposal, the Association filed this formal action for declaratory and injunctive relief. The Association alleged that the County had failed to meet and confer on wages, as it is obliged to do under the MMBA, and failed to adjust salaries in accordance with County Charter section 709. Subsequently, the County filed a cross-complaint seeking to enjoin the Association from filing a petition for writ of mandate or, in the alternative, seeking a declaration that prior to filing the petition, the Association be required to make a showing (1) that there is a likelihood of prevailing on the merits, and (2) that harm to the County would be minimal.

The Association asked the court to grant the following relief: (1) to declare that the members of the Association do not have to resign prior to filing a petition for writ of mandate against the County over the wage issue; (2) to declare that such a writ of mandate action does not create a conflict of interest or violate any ethical code which would subject the Attorneys to discipline; (3) for an injunction prohibiting the County from preventing the Attorneys from performing their customary duties, from disciplining or terminating the Attorneys, or from referring the Attorneys to the State Bar for discipline; and (4) to reinstate the Attorneys to their full employment responsibilities, including confidential meetings with the Board and other County policymaking officials. It is worthy of emphasis that the underlying merits of the petition for writ of mandate sought by the Association were not before the trial court, and are not before this court. The only issues argued in the court below were whether the Association's contemplated petition was lawful, and whether it could proceed without discipline from either the County or the State Bar. Those are the only questions we decide here.

The trial court found for the Association on most points. It enjoined the County from terminating the Attorneys for filing a writ of mandate action to resolve the salary dispute. It further declared that the members of the Association did not have to resign in order to file the suit, and that the filing of a petition for writ of mandate did not create any conflict of interest in violation of the Attorneys' ethical code. It declined to enjoin the County, however, from reassigning attorneys so as to exclude them from confidential meetings.

The County appealed. The trial court stayed its judgment pending appeal, but left in effect a preliminary injunction preventing the County from terminating any of the Attorneys for filing the suit. The Court of Appeal reversed, finding in essence that the Association's suit did indeed present a grave breach of the Attorneys' duty of loyalty to their clients. The Court of ***536** Appeal found, moreover, that the MMBA did not authorize the Attorneys to file the petition. We granted the Association's petition for review to resolve this important question of first impression.

II. *Discussion*

In support of the Court of Appeal's holding, the County advances two lines of argument against the Association's right to sue. The first of these is a statutory/common law argument based on a construction of the MMBA. The second is a constitutional argument based on the separation of powers between the legislative and judicial branches of government. The constitutional argument claims in substance that the MMBA as applied to these attorneys permits them to violate their settled ethical obligations, and that therefore the statute is in that respect unconstitutional. Each of these arguments will be considered in turn.

A. *Statutory Arguments*

The Association contends that the Court of Appeal erred when it held that the Attorneys had no right to sue under the MMBA. The County, on the other hand, argues that the MMBA contains no explicit right to sue. It contends that the remedies available to grievants under the MMBA are essentially common law actions created by the courts. The County further maintains that there are compelling public policy reasons for not extending the common law right to sue to attorneys who, as here, are involved in an attorney-client relationship with their employers. The primary public policy reason against allowing such suits is that they would cause an attorney to violate his or her duty of loyalty to the client.

We disagree with the fundamental premise of the County's argument. We construe the MMBA to provide a right to petition for writ of mandate to those employees who fall within its protections, including the Attorneys in the present case. Therefore this court has no discretion to deny that remedy on public policy grounds, however strong those grounds may be.

1. *Scope of Coverage Under the MMBA*

The MMBA was adopted in 1968, after several more modest attempts to regulate labor relations for local government employees. Its stated purpose is to provide "a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment ...." (Gov. Code, § 3500.) ([1]) Its principal means for doing so is by imposing on public agencies the obligation to "meet and confer in good faith regarding wages, ***537** hours, and other terms and conditions of employment with representatives of recognized employee organizations...." (*Id.*, § 3505.) The duty to meet and confer in good faith has been construed as a duty to bargain with the objective of reaching binding agreements between agencies and employee organizations over the relevant terms and conditions of employment. (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 336 [124 Cal.Rptr. 513, 540 P.2d 609].) The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse; this duty continues in effect after the expiration of any employer-employee agreement. (*San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 818-819 [207 Cal.Rptr. 876].)

The MMBA explicitly includes attorneys within the scope of its protections. Government Code section 3507.3 states that "Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization .... [¶] 'Professional employees' for the purposes of this section, 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." (Italics added.)

([2]) Moreover the MMBA, unlike federal labor law, includes supervisory, management and confidential employees within its scope. "Contrary to federal practice, by virtue of the broad definition of 'public employee' in section 3501, subdivision (d), which excludes only elected officials and those appointed by the Governor, MMBA extends organizational and representation rights to supervisory and managerial employees without regard to their position in the administrative hierarchy." (*Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338 [122 Cal.Rptr. 210].) Government Code section 3507.5 permits a public agency to adopt rules for the designation of management and confidential employees, and for "restricting such employees from representing any employee organization, which represents other employees of the public agency," but does not prohibit such employees from forming, joining or participating in an employee organization.

Thus, under federal labor law, the Attorneys in this case may well have been excluded from union representation because they would be classified as ***538** management employees who " ' "formulate and effectuate management policies by expressing and making operative the decisions of their employer. " ' " (*NLRB v. Yeshiva University* (1980) 444 U.S. 672, 682 [63 L.Ed.2d 115, 125, 100 S.Ct. 856].) The purpose for the managerial exclusion, as the Supreme Court explained, was to prevent a situation whereby employees would be tempted to "divide their loyalty between employer and union." (*Id.* at p. 688 [63 L.Ed.2d at p. 129].) The attorneys, or some of them, might have also been excluded under federal law as confidential employees who " 'assist and act in a confidential capacity to persons who exercise "managerial" functions in the field of labor relations.' " (*NLRB v. Hendricks Cty. Rural Electric Corp.* (1981) 454 U.S. 170, 180-181 [70 L.Ed.2d 323, 332, 102 S.Ct. 216].)

But under the MMBA neither exclusion is applicable. By choosing to explicitly include supervisorial, managerial, and confidential employees within the realm of the MMBA's protections, the Legislature implicitly decided that the benefits for public sector labor relations achieved by including managerial employees outweighed the

potential divided loyalty dilemmas raised.[1] We therefore note at the outset that any argument which contends that MMBA protections should not apply to certain managerial employees because of problems with divided loyalty must be viewed with skepticism, for that argument follows precisely the legislative road the MMBA declined to take.

2. *The Right to Sue Under the MMBA*

([3a]) The County's statutory argument is premised on what it considers the lack of an express right to sue under the MMBA. Its argument begins with our statement in *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 197 [193 Cal.Rptr. 518, 666 P.2d 960] (hereafter *City of Gridley*), that the MMBA "furnishes only a 'sketchy and frequently vague framework of employer-employee relations for California's local government agencies.' [Citation.] A product of political compromise, the provisions of the act are confusing, and, at times, contradictory." From there, the County points to the lack of any stated right to sue under the MMBA, and concludes that "the Legislature deliberately left important provisions of the Act to court interpretation, including any provisions for enforcement." ***539**

Such an argument fundamentally misconstrues the statutory protections afforded by the MMBA. As we stated in *City of Gridley*, *supra*, 34 Cal.3d at page 198: "Notwithstanding its otherwise 'sketchy' provisions, the act contains strong protection for the rights of public employees to join and participate in the activities of employee organizations, and for the rights of those organizations to represent employees' interests with public agencies." Thus, in spite of the fact that the language of the MMBA, read literally, can be construed to provide no more than "a rather general legislative blessing for collective bargaining at the local governmental level without clear delineation of policy or means for its implementation" (Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 761), we have consistently held that the Legislature intended in the MMBA to impose substantive duties, and confer substantive, enforceable rights, on public employers and employees. (See *City of Gridley*, *supra*, 34 Cal.3d at p. 202 [local government agencies may not adopt labor relations regulations in conflict with provision of the MMBA]; *Glendale City Employees Assn., Inc. v. City of Glendale, supra*, 15 Cal.3d 328, 337-338 [memorandum of understanding between public employer and employees negotiated under the MMBA is enforceable and binds the discretion of city council].)

That being the case, the County's assertion that the MMBA contains no *express* right to sue is irrelevant. The Legislature, in order to create a right to sue under the MMBA, need not have included language concerning the right to sue within the act itself. It was enough for the Legislature to endow the public employers and employees with substantive rights and duties which limited public employers' discretion, and then to allow employees to enforce their rights by means of traditional mandamus, under Code of Civil Procedure section 1085.

Code of Civil Procedure section 1085 declares that a writ may be issued "by any court ... to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station ...." ([4a]) The availability of writ relief to compel a public agency to perform an act prescribed by law has long been recognized. (See, e.g., *Berkeley Sch. Dist. v. City of Berkeley* (1956) 141 Cal.App.2d 841, 849 [297 P.2d 710] [mandamus appropriate against city auditor to compel release of fund to schools pursuant to city charter provision].)

([5]) What is required to obtain writ relief is a showing by a petitioner of "(1) A clear, present and usually ministerial duty on the part of the respondent ...; and (2) a clear, present and beneficial right in the petitioner to ***540** the performance of that duty ...." (*Baldwin-Lima-Hamilton Corp. v. Superior Court* (1962) 208 Cal.App.2d 803, 813-814 [25 Cal.Rptr. 798], citations omitted.) ([4b]) Mandamus is available to compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as "ministerial" or "legislative" Thus, we held that an ordinance passed by a city council imposing a certain salary adjustment, usually a legislative act, was an abuse of the city council's discretion because it violated a previously enacted agreement with an employee association, and was therefore subject to challenge via writ of mandate. (*Glendale City Employees' Assn., Inc. v. City of Glendale*, *supra*, 15 Cal.3d 328, 343-345.)

([3b]) The MMBA, at Government Code section 3505, created a clear and present duty on the part of the County to meet and confer with the Association in good faith on the fixing of the Association members' salary and other conditions of employment, and created in Association members the corresponding beneficial right to meet and confer. (See, e.g., *Holliday v. City of Modesto* (1991) 229 Cal.App.3d 528, 540 [280 Cal.Rptr. 206]; *Social Services Union v. Board of Supervisors* (1990) 222 Cal.App.3d 279, 285 [271 Cal.Rptr. 494]; *American Federation of*

State etc. Employees v. City of Santa Clara (1984) 160 Cal.App.3d 1006, 1009-1010 [207 Cal.Rptr. 57].) If, as the Association alleges, there has been a violation of that duty, then a writ of mandate will be available to remedy the violation.

([4c]) The County cites no authority for the proposition that, once the Legislature has created a duty in a public agency, a court may limit, on public policy grounds, the availability of a writ of mandate to enforce that duty. It appears elementary that courts may not frustrate the creation of a statutory duty by refusing to enforce it through the normal judicial means. What public policy reasons there are against enforcement of a statutory duty are reasons against the creation of the duty *ab initio*, and should be addressed to the Legislature.

On the contrary, when the Legislature creates a public duty but wishes to limit the use of a writ of mandate to enforce it, it has done so affirmatively. Thus, in other public employment legislation, where the Legislature has created the Public Employment Relations Board as the principal means of enforcing the statutory duties and rights of employers and employees, it has under certain limited instances circumscribed writ relief. In these various labor relations statutes, the availability of a writ of mandate to review a Public Employment Relations Board determination of a bargaining unit's composition is limited to two circumstances: (1) instances in which the ***541** board, upon petition, agrees that the case is one of special importance, or (2) cases in which a party raises the issue of the bargaining unit's composition as a defense to an unfair labor practice charge. (See Gov. Code, §§ 3520, subd. (a), 3542, subd. (a), 3564, subd. (a).) Thus, the Legislature knew how to circumscribe the availability of writ review, and did so for labor relations statutes that rely primarily on administrative, nonjudicial enforcement. No such administrative enforcement exists in the MMBA, and no such limitation of writ review can be found in the statute.

([3c]) The case law in this state is indeed unanimous that a writ of mandate lies for an employee association to challenge a public employer's breach of its duty under the MMBA. (See *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 810 [165 Cal.Rptr. 908]; see also *San Francisco Fire Fighters Local 798 v. Board of Supervisors* (1992) 3 Cal.App.4th 1482 [5 Cal.Rptr.2d 176]; *Social Services Union v. Board of Supervisors*, *supra*, 222 Cal.App.3d 279; *American Federation of State etc. Employees v. City of Santa Clara*, *supra*, 160 Cal.App.3d 1006; *Public Employees of Riverside County, Inc. v. County of Riverside* (1977) 75 Cal.App.3d 882 [142 Cal.Rptr. 521].) The County cites no contrary authority.[2]

Nor do we find persuasive the County's attempt to analogize limitations on the right to sue with limitations on the right of public employees to strike. In support of the proposition that "the extent of a public employee's enforcement rights under the MMBA depends very much on the type of work he or she performs," the County cites *City of Santa Ana v. Santa Ana Police Benevolent Assn.* (1989) 207 Cal.App.3d 1568 [255 Cal.Rptr. 688], in which it was held that police were prohibited from engaging in a strike or slowdown. Therefore, the County reasons, just as there are circumstances in which one traditional method of enforcing employee rights-the right to strike-may be limited, so the right to sue may be limited in some circumstances when the suit would gravely interfere with the functioning of county government.

Under closer scrutiny, however, the analogy falls apart. In *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564 ***542** [214 Cal.Rptr. 424, 699 P.2d 835], we abrogated the common law doctrine that prohibited public employee strikes. In doing so, we acknowledged that the MMBA was silent on the question of public employee strikes, leaving the matter "shrouded in ambiguity." (*Id.* at p. 573.) We found the traditional common law rule without basis in modern labor law, particularly in light of the MMBA and other public employment relations statutes, and in effect created a new common law rule: "[S]trikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public." (*Id.* at p. 586.) In the case of *City of Santa Ana v. Santa Ana Police Benevolent Assn.*, *supra*, 207 Cal.App.3d at pages 1572-1573, the court merely applied this new common law rule and found that a police strike or sickout did pose a danger to public health and safety.

The availability of the writ of mandate remedy in this case, on the other hand, is statutory, and is unambiguous. Unlike the right of public employees to strike, their right of access to courts has not been seriously questioned. As a statutory right, it is for the Legislature to delineate. There is therefore no room for a common law limitation on the right to writ relief.

We conclude that the MMBA inherently provides the Association with a right to bring a mandamus action against the County for breach of its duty to bargain in good faith, and that there are no statutory or common law grounds for limiting that right.

B. *Constitutional Separation of Powers Arguments*

The conclusion that the MMBA gives the Association the statutory right to sue does not end our inquiry. The County argues, and the Court of Appeal implicitly held, that even if the MMBA does grant the Association the right to sue, that right is nonetheless superseded by the attorney's duty of loyalty, as delineated in several Rules of Professional Conduct, and in general common law principles. The County asserts that to the extent a statute authorizes a violation of the Rules of Professional Conduct, or other professional obligation, it violates the constitutional separation of powers inherent in article VI of the California Constitution, which implicitly vests the power to govern the legal profession in the judiciary. The Association, on the other hand, claims that the Court of Appeal erred in holding the suit barred by the Attorney's duty of loyalty.

In order to assess the merit of the parties' constitutional arguments, a brief review of the separation of powers doctrine under article VI of the California Constitution is needed. ([6a]) In California, "the power to regulate the ***543** practice of law ... has long been recognized to be among the inherent powers of the article VI courts." (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336 [178 Cal.Rptr. 801, 636 P.2d 1139].) Such power of regulation has meant that the courts are vested with the exclusive power to control the "admission, discipline and disbarment of persons entitled to practice before them ...." (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300 [19 Cal.Rptr. 153, 368 P.2d 697, 94 A.L.R.2d 1310].) Thus, in *Hustedt*, we held that former Labor Code section 4407, which invested in (non-article VI) workers' compensation judges the right to suspend attorneys from practicing before them, was unconstitutional because it trespassed on the powers of the judiciary inherent in article VI to regulate attorney discipline.

Other cases in which we used California Constitution, article VI separation of powers doctrine to declare a statute or a portion of it unconstitutional are few and far between. In *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724 [147 Cal.Rptr. 631, 581 P.2d 636], we held that former Code of Civil Procedure section 90, giving non-attorney representatives of corporations the right to appear in municipal court, unconstitutionally infringed on the judiciary's exclusive right to grant admission to the practice of law. In *In re Lavine* (1935) 2 Cal.2d 324, 329 [41 P.2d 161], this court held unconstitutional a statute that automatically reinstated to the bar attorneys who were convicted felons, once they received a full gubernatorial pardon. The statute encroached upon "the inherent power of this court to admit attorneys to the practice of the law and [was] tantamount to the vacating of a judicial order by legislative mandate." (*Ibid.*) These cases, as with *Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d 329, entail statutes that impinge on the court's traditional power to control admission, discipline and disbarment of attorneys.

On the other hand, "this court has respected the exercise by the Legislature under the police power, of 'a reasonable degree of regulation and control over the profession and practice of law ...' in this state." (*Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d at p. 337.) ([7]) "The standard for assessing whether the Legislature has overstepped its authority and thereby violated the separation of powers principle has been summarized as follows. ' The legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.' " (*Id.* at p. 338, citing *Brydonjack v. State Bar* (1929) 208 Cal. 439, 444 [281 P. 1018, 66 A.L.R. 1507].)

([6b]) In the field of attorney-client conduct, we recognize that the judiciary and the Legislature are in some sense partners in regulation. Side by ***544** side with the Rules of Professional Conduct approved by this court are numerous statutes which regulate the profession and protect consumers of legal services. The State Bar Act (Bus. & Prof. Code, § 6000 et seq.) regulates various aspects of the attorney-client relationship, including contingency fee contracts (*id.*, § 6146), unlawful solicitation (*id.*, § 6150 et seq.), willful delay of client's suit with a view to the attorney's own gain (*id.*, § 6128), and purchase of a legal claim (*id.*, § 6129).

We also note that the Legislature, in enacting the MMBA, was acting well within its police powers to regulate employer-employee relations. (See generally, *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 186 et seq. [172 Cal.Rptr. 487, 624 P.2d 1215].) The Legislature has established statutory regimes for vast numbers of employees not covered by federal labor legislation, including agricultural workers, public education employees, and state workers, as well as local government employees.

We have never held a statute of general application, which does not affect the traditional areas of attorney admission, disbarment and discipline, unconstitutional. Nonetheless, we recognize that in the field of attorney-client conduct, as in these other areas, this court has the inherent power to provide a higher standard of attorney-client conduct than the minimum standards

prescribed by the Legislature. (See *Emslie v. State Bar* (1974) 11 Cal.3d 210, 225 [113 Cal.Rptr. 175, 520 P.2d 991]; *In re Lavine*, *supra*, 2 Cal.2d at p. 328.) We also recognize that any statute which would permit an attorney to act in such a way as to seriously violate the integrity of the attorney-client relationship, so as to "materially impair" the functioning of the courts (*Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d at p. 339), would be constitutionally suspect.

But a ruling that a statute affecting attorney-client relations is unconstitutional on separation of powers grounds will not be lightly made. Those raising such a claim must at least show that a direct and fundamental conflict exists between the operation of the statute in question, as it applies to attorneys, and attorneys' settled ethical obligations, as embodied in this state's Rules of Professional Conduct or some well-established common law rule. As will appear below, the County fails to make that showing in the present case.

1. *Violation of the Rules of Professional Conduct*

([8a]),([9a]) In determining whether a statute regulating attorney conduct violates the separation of powers, we begin with whether the statute in question would permit or require an attorney to contravene one of the Rules ***545** of Professional Conduct. The County claims that a petition for a writ of mandate brought by the Association would cause the Attorneys to run afoul of rules 3-300 and 3-310 of the Rules of Professional Conduct (hereafter, all references to rules are to the Rules of Professional Conduct of the State Bar). We do not agree. As the Court of Appeal in this case conceded, neither rule is directly applicable.

([8b]) Rule 3-300 does not allow an attorney to "knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client," without undergoing an extensive protocol for gaining the client's consent. The County contends that a lawsuit against the client would be tantamount to "acquiring" a "pecuniary interest" adverse to the client. The language of the rule and the intent behind it do not support that interpretation.

Rule 3-300 was intended to regulate two types of activity: business transactions between attorneys and clients and the acquisition by attorneys of pecuniary interests adverse to clients. (See State Bar, Request that the Supreme Court of Cal. Approve Amendments to the Rules of Professional Conduct of the State Bar of Cal., & Memorandum Supporting Documents in Explanation (1987) at p. 33.) Clearly, the present lawsuit is not a business transaction. Nor can we stretch the meaning of the term "acquire ... a pecuniary interest" to encompass the filing of a petition for writ of mandate.

Although some petitions filed to enforce the MMBA could be labeled, in a certain sense, "pecuniary," in that their object is monetary gain, others have as their aim the attainment of injunctive or declaratory relief related to conditions of employment without any immediate economic payoff. (See, e.g., *Independent Union of Pub. Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 487 [195 Cal.Rptr. 206].) Indeed, the very use of the word "acquire," which cannot sensibly be applied to the filing of a lawsuit or a petition for writ of mandate, demonstrates that such actions are not intended to be included within the scope of rule 3-300. As the few cases concerned with applying rule 3-300's "pecuniary interest" (as opposed to "business transaction") provision illustrate, the term "acquire a ... pecuniary interest" is intended to signify the pursuit of some business or financial interest as conventionally understood, rather than an attempt to redress some legal wrong through the courts. (See, e.g., *Brockway v. State Bar* (1991) 53 Cal.3d 51, 63-65 [278 Cal.Rptr. 836, 806 P.2d 308] [attorney violated predecessor rule by taking ownership interest in client's property in excess of attorney fees].) Thus, the filing of the present petition is not addressed by rule 3-300. ***546**

([9b]) Nor is rule 3-310 directly implicated. Rule 3-310 proscribes attorney conflicts of interest in various contexts. The rule is concerned not merely with conflict in representation of current or former clients, but also, in rule 3-310(B), with conflicts between an attorney's own financial and personal interests and those of his or her client. The County contends that rule 3-310(B)(4), in particular, is applicable to the present case. That rule precludes attorneys from representing a client, without disclosure,[3] when "the member has or had a legal, business, financial, or professional interest in the subject matter of the representation." The County argues that the attorneys have a professional interest adverse to the County by being a part of the Association's lawsuit. We do not agree that this lawsuit falls within the scope of rule 3-310(B)(4).

The language of rule 3-310(B)(4), adopted by this court in the 1991 amendments to the Rules of Professional Conduct, applies only to conflicts that arise over "the subject matter of the representation" that the attorney undertakes for the client, and not to conflicts the attorney and client may have outside this subject matter. The primary purpose of this prophylactic rule is to prevent situations in which an attorney might compromise his or her representation of the client in order to advance the

attorney's own financial or personal interests.

In this case, the lawsuit by the Association does not, in general, present a conflict with the client on matters in which the Attorneys represent the County. Stated concretely, when deputy County Counsel attorneys represent the County in a nuisance abatement action, or advise the County in a landuse matter, they will face no temptation to compromise their representation of the County in order to further their own interests. The outcome of most of the matters for which the Attorneys have undertaken representation will not affect, nor be affected by, the outcome of the Association's lawsuit. The lawsuit will not disable the Attorneys from objectively considering, recommending, or carrying out an appropriate course of action in their representation of the County. An attorney/employee may experience ill will towards the client/employer, and vice versa, as is sometimes the case when employer/ ***547** employee relations deteriorate. Rule 3-310(B)(4), however, addresses not the existence of general antagonism between lawyer and client, but tangible conflicts between the lawyer's and client's interests in the subject matter of the representation.[4] The record below supports the trial court's implicit conclusion that no such conflict of interest is present within the meaning of rule 3-310(B)(4).[5]

([8c]),([9c]) Implied in the position of the County that rules 3-300 and 3-310 are violated by the Attorneys is an *a fortiori* argument. The County appears to contend that, if the duty of loyalty that an attorney owes a client requires the attorney to refrain from engaging in a business transaction with a client without informed consent, or in representing clients with conflicting interests without disclosure, then it must surely prohibit an attorney from suing a current client. This argument ignores the distinct policy considerations inherent in the different types of conflict. It is one thing to require an attorney, for the sake of client loyalty, to forgo a business opportunity or a potential client. It is another thing to require an attorney, for loyalty's sake, to forgo his or her statutory rights against a client to redress a legal injury. While such a sacrifice may indeed be required in some circumstances, that requirement is not to be found in the specific proscriptions set forth in rules 3-300 or 3-310.[6] Rather, it is to be located in a general, common law duty of ***548** loyalty beyond the scope of these two rules. It is this general duty that we next consider.

2. *The Common Law Duty of Loyalty and the Prohibition on the Right to Sue*

([10a]) Although the question of an attorney's suit against a present client is not explicitly covered in the Rules of Professional Conduct, or by any statute, arguably it may be prohibited by the general duty of loyalty recognized at common law. It is clear that the duties to which an attorney in this state are subject are not exhaustively delineated by the Rules of Professional Conduct, and that these rules are not intended to supersede common law obligations. (See rule 1-100, and accompanying discussion.)

([11]) This court's statement of the attorney's duty of loyalty to the client over 60 years ago is still generally valid: "It is ... an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent .... By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests." (*Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788].) We have also decided that the duty of loyalty for an attorney in the public sector does not differ appreciably from that of the attorney's counterpart in private practice. (See *People* ex rel. *Deukmejian v. Brown* (1981) 29 Cal.3d 150, 157 [172 Cal.Rptr. 478, 624 P.2d 1206] [Attorney General's role as " 'guardian of the public interest' " does not exempt him from conflict of interest rules applicable to other attorneys].)

([10b]) No reported appellate cases in this state have considered the extent to which an attorney's duty of loyalty to a client prohibits the attorney ***549** from suing the client. It may well be that the lack of case law is due to the obviousness of the prohibition. As one court has stated: "The almost complete absence of authority governing the situation where, as in the present case, the lawyer is still representing the client whom he sues clearly indicates to us that the common understanding and the common conscience of the bar is in accord with our holding that such a suit constitutes a reprehensible breach of loyalty and a violation of the preamble to the Canons of Professional Ethics." (*Grievance Com. of Bar of Hartford County v. Rottner* (1964) 152 Conn. 59 [203 A.2d 82, 85].)

The attorney's duty of loyalty to the client has led the Los Angeles County Bar Association to conclude that an attorney in a fee dispute with a client must withdraw from representing a client prior to filing suit against a client. (Los Angeles County Bar Ethics Opns., opn. No. 212 (1953).) Indeed, courts in some jurisdictions have concluded that attorneys may not sue their ex-clients in some circumstances, such as for retaliatory discharge, where the lawsuit would disrupt the confidentiality of the attorney-client relationship. (See *Balla v. Gambro, Inc.*

(1991) 145 Ill.2d 492 [164 Ill.Dec. 892, 584 N.E.2d 104, 16 A.L.R.5th 1000] [former in-house counsel may not sue for retaliatory discharge]; but see *Parker v. M & T Chemicals, Inc.* (1989) 236 N.J.Super. 451 [566 A.2d 215] [retaliatory discharge suit permitted].)

But we do not decide here generally the extent to which the duty of loyalty precludes an attorney's lawsuit against a current client. Rather, we seek to determine whether an attorney's lawsuit to enforce rights granted pursuant to a statutory scheme of public employer-employee bargaining is fundamentally incompatible with the essentials of the duty of loyalty. In order to answer this question, we must decide another, more fundamental, issue: to what extent is the collective bargaining relationship between an attorney/employee and a client/employer itself compatible with the attorney's duty of loyalty?

3. *Duty of Loyalty and Collective Bargaining*

([12]) At the heart of the conflict between attorney rights and responsibilities posed by this case is the conflict between the attorney-client relationship on the one hand, and the collective bargaining relationship between employer and (organized) employees on the other. Until relatively recently, the legal profession looked askance at attorneys joining unions or other employee associations. In 1966, the American Bar Association Committee on Ethics and Professional Responsibility (hereinafter the ABA Committee) opined that a United States government attorney could not, consistent with ***550** ethical responsibilities, join a union. (2 ABA Informal Ethics Opns., opn. No. 917 (Jan. 25, 1966) p. 65.) As the committee explained, the attorney owes "undivided loyalty" to the government agency for which he or she works, and by becoming a member of a labor union the attorney assumes obligations "which may at times be incompatible with his obligation to his client." (*Id.* at p. 66.)[7]

One year later, however, the ABA Committee essentially reversed its position. In informal opinion No. 986, the ABA Committee acknowledged that "Generally speaking, the idea of lawyers belonging to or joining together in labor unions is basically contrary to the spirit of the Canons of Ethics" because of the conflict with the duty owed the client. (2 ABA Informal Ethics Opns., opn. No. 986 (July 3, 1967) p. 144.) However, the ABA Committee recognized that the general principle was no longer universally applicable.

"[I]t is realized that the number of lawyers who represent single employer clients, for example governmental agencies and corporations, has increased substantially in recent years and will undoubtedly continue to increase in the future. The relationship of a lawyer who is employed by a corporation or by a governmental agency to his client in terms of compensation is different from that of the lawyer who represents in his daily practice ... a number of different clients.... Such lawyers have one client only, do not charge fees for their individual work and their compensation generally is not related to particular individual assignments they perform, but is rather related to the overall services which they perform. This differentiates them from those lawyers employed in a general practice of law where they perform services for a number of different clients.

"It is our opinion, therefore, that lawyers who are paid a salary and who are employed by a single client employer may join an organization limited *solely* to other lawyer employees of the same employer for the purpose of negotiating wages, hours, and working conditions with the employer client so long as the lawyer continues to perform for his employer client professional services as directed by his employer in accordance with the provisions of the Canons of Ethics. Such a lawyer would not have the right to strike, to withhold services for any reasons, to divulge confidences or engage in any other activities as a member of such a union which would violate any Canon" (2 ABA Informal Ethics Opns., opn. No. 986, *supra*, p. 45; accord, ***551** Cal. Compendium on Prof. Responsibility, L.A. County Bar Assn. Formal Opn. No. 337 (June 14, 1973) p. 35.)

In 1975, the ABA Committee again revisited the ethical questions related to an attorney's union activities. In informal opinion No. 1325, the ABA Committee considered the propriety of strikes by attorneys who are employed by a single employer in public or private practice. The ABA Committee began by recalling its neutral position on the question of attorney membership in employee associations consisting only of attorneys. That position had since been codified in the American Bar Association's Model Code of Professional Responsibility, EC 5-13, which now states in part that "Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences."

As informal opinion No. 1325 explains, while joining an employee organization violates no specific American Bar Association disciplinary rule, there is the potential of violating several rules, such as "DR 6-101 (A)(3), proscribing neglect of a legal matter entrusted to a lawyer, DR 7-101 (A)(2), forbidding a lawyer to intentionally fail

to carry out a contract for employment with a client, and DR 7-101 (A)(3), prohibiting a lawyer to intentionally prejudice or damage his client during the course of the professional relationship." (ABA Recent Ethics Opns., informal opn. No. 1325 (Mar. 31, 1975) p. 2.) The ABA Committee thereupon adopted what may be called a pragmatic approach to the question of strikes and other collective bargaining matters. If the attorney's strike leads to the neglect or intentional sabotage of the employer/client's affairs, then the attorney would have violated his or her professional obligations as embodied in the disciplinary rules cited above, and would be subject to discipline. However, "in some situations participation in a strike might be no more disruptive of the performance of legal work than taking a two week's vacation might be." (*Ibid.*)

Although we do not necessarily endorse the ABA Committee's position on the permissibility of strikes for government attorneys, we find its approach to the question of employee organization among these attorneys to be essentially correct. First, we do not find that government attorneys who organize themselves into associations pursuant to statute and who proceed to bargain collectively with their employer/clients are *per se* in violation of any duty of loyalty or any other ethical obligation. The growing phenomenon of the lawyer/employee requires a realistic accommodation between an attorney's professional obligations and the rights he or she may have as an employee. ***552**

Moreover, we follow the ABA Committee's approach to determining when an attorney, in pursuit of an employee association's goals, oversteps ethical boundaries. That occurs when the attorney violates actual disciplinary rules, most particularly rules pertaining to the attorney's duty to represent the client faithfully, competently, and confidentially. In California, those duties are found principally in Rule 3-110, which prohibits a member from "intentionally, recklessly or repeatedly fail[ing] to perform legal services with competence." An attorney, in pursuing rights of self-representation, may not use delaying tactics in handling existing litigation or other matters of representation for the purpose of gaining advantage in a dispute over salary and fringe benefits. (See Cal. Compendium on Prof. Responsibility, pt. II, State Bar Formal Opn. No. 1979-51.) Indeed, an attorney who "[w]illfully delays [a] client's suit with a view to his [or her] own gain" is guilty of a misdemeanor. (Bus. & Prof. Code, § 6128, subd. (b); see *Silver v. State Bar* (1974) 13 Cal.3d 134, 141 [117 Cal.Rptr. 821, 528 P.2d 1157].)

In other words, in determining whether an action taken by an attorney or employee association violates the attorney's ethical obligations, we look not to whether the action creates antagonism between the attorney/employee and the client/employer, since such antagonism in the labor relations context is unfortunately commonplace; rather, we seek to ascertain whether an attorney has permitted that antagonism to overstep the boundaries of the employer/employee bargaining relationship and has actually compromised client representation.

([10c]) The County concedes that the Association and its members do have rights under the MMBA, but claims that these do not include authority to sue when their rights are violated. To fend off the argument that these collective bargaining guaranties would be meaningless without a judicial remedy, the County argues the Association has alternative effective means for enforcing the rights of its members, most notably by virtue of the fact that the attorneys have "unparalleled access" to county officials, "which they can use to [exert] pressure on the County to reach an agreement regarding wages."

Whether or not sound, that argument is beside the point. The ability of the Attorneys to influence the Board by informal means is one that predates, and exists independently of, the formal rights granted them under the MMBA. If the Attorneys are deprived of any formal means to enforce their rights, then these "rights" are no more meaningful than they were prior to the passage of the MMBA. Indeed, if the County's logic were followed, the Attorneys could be discharged for simply joining an employee association under the ***553** MMBA, and would have no ability to sue, despite the County's clear violation of statute, and no recourse other than the informal lobbying of the Board.

Therefore, the denial of the Attorneys' right to sue for MMBA violations would represent not a compromise between collective bargaining rights and professional obligations, as the County contends, but a de facto judicial nullification of those rights. The only realistic accommodation between the enforcement of statutory guaranties under the MMBA and the enforcement of the Attorneys' professional obligations in this situation is to permit a petition for writ of mandate, as would be permitted to other public employees, while at the same time holding the Attorneys to a professional standard that ensures that their *actual* representation of their client/employer is not compromised.

We therefore hold that attorneys employed in the public sector, who exercise their statutory right to sue to enforce rights given them by the MMBA, do not in such capacity violate their ethical obligations to their employer/client.[8]

In so holding, we emphasize that attorneys in such circumstances are held to the highest ethical obligations to continue to represent the client in the matters they have undertaken, and that a violation of their duty to represent the client competently or faithfully, or of any other rule of conduct, will subject those attorneys to the appropriate discipline, both by the employer and by the State Bar.[9]

In announcing this rule, we are not unmindful of the fact that attorneys suing their clients, in any circumstance, put a strain on the attorney/client ***554** relationship, and may tend to diminish the client's confidence in their attorneys' loyalty. But we must also acknowledge, as is obvious in the record of the present case, that the hostility between an attorney/employee and the client/employer predated and to some extent gave rise to the lawsuit. The MMBA is intended not to exacerbate conflict between employers and employees, but to provide the peaceful and ordered means for resolving those conflicts by promoting "full communication between public employers and their employees." (Gov. Code, § 3500.) The Legislature may have decided that the benefits to public employee/employer relations of including attorneys within the MMBA's protections outweighed potential burdens on the attorney/client relationship. In any event, we cannot say that the Legislature, in extending these means of conflict resolution to public employee attorneys in arguably managerial roles, put such a strain on the attorney/client relationship as to compel the conclusion that the authorization of such lawsuits violates the constitutional separation of powers between the Legislature and the Judiciary.[10]

C. *The Right of the Client to Discharge the Attorney*

([13a]) Finally, we must address a point not raised explicitly by the County, but one nonetheless before us because of the nature of the relief ***555** requested:[11] whether the client has the right to discharge an attorney in whom it purportedly has lost faith. This question is analytically distinct from the question of attorney loyalty to the client; it considers whether, despite an attorney's actual loyalty, job performance, or observance of the Rules of Professional Conduct, a public employer should nonetheless have the right to discharge the attorney because it no longer has complete confidence in the attorney's capacity to serve loyally.

([14]) Code of Civil Procedure section 284 provides in part that an "attorney in an action or special proceeding may be changed at any time before or after judgment or final determination as follows: ... (2) Upon the order of the court, upon the application of either client or attorney, after notice from one to the other." We have construed this code section to confer upon clients, beyond the context of litigation, the "[absolute] power to discharge an attorney, with or without cause ...." (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 790 [100 Cal.Rptr. 385, 494 P.2d 9].) That statute embodies the recognition that " 'the interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and he has the right to employ such attorney as will in his opinion best subserve his interest.' " (*Ibid.*, quoting *Gage v. Atwater* (1902) 136 Cal. 170, 172 [68 P. 581].)

([15]) There is no question that the MMBA prohibits employers from discharging employees who exercise lawful employee rights of representation. Government Code section 3506 states that "[p]ublic agencies ... shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502 [the public employees' right to 'form, join, and participate in the activities of employee organizations of their own choosing']." The MMBA ensures a public employee the right to "engage in a wide range of union-related activities without fear of sanction ...." (*Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 388 [113 Cal.Rptr. 461, 521 P.2d 453].) Public employers may not discriminate against their employees on the basis of membership or participation in union activities. ***556** (See *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 [182 Cal.Rptr. 461]; *Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797, 806. 807 [213 Cal.Rptr. 491].)

This freedom from sanction obviously includes the right not to be discharged for lawful union activity. The right to participate in employee self-organization and collective bargaining would be meaningless if an employee could be discharged simply for engaging in such lawful activity. (See *Portland Williamette Co. v. N.L.R.B.* (9th Cir. 1976) 534 F.2d 1331, 1334 [discharge of employee engaged in union activity "inherently destructive" of union activity and therefore presumed to be discriminatory].) And as we have already concluded, in part II.A.2. of this opinion, *ante*, a suit by an employee association to enforce its rights under the MMBA is a form of lawful, protected activity. Under normal circumstances, therefore, the filing of such a suit may not lead to the discriminatory discharge or discipline of an employee. ([13b]) The question before us, then, is how that right to be free from discriminatory discharge for lawfully participating in activities sanctioned by the MMBA may be reconciled with the rule of Code of Civil Procedure section 284 that an attorney may be discharged by a client for any reason and for no reason.

In determining the manner in which partially conflicting statutes are to be construed, we look first to the intent of the Legislature. (*Woods v. Young* (1991) 53 Cal.3d 315, 323 [279 Cal.Rptr. 613, 807 P.2d 455].) As a rule, a later, more specific, statute will prevail over an earlier, more general one. (*Id.* at p. 324.) In this case, the general rule permitting a client to discharge her attorney has been modified by the subsequent explicit inclusion of certain attorneys within the scope of a statutory labor relations scheme which inherently limits the right of public employers to terminate their employees at will. We do not believe the Legislature intended to explicitly confer these rights to organize and bargain collectively on attorneys employed by cities and counties, without also intending that these attorneys be protected from discharge for pursuit of these rights.

Moreover, even if the rule of a client's right to discharge an attorney is one that predates, and has validity independent of, its enactment into statute, the legislative modification of the rule does not raise constitutional separation of powers issues.[12] The Legislature could legitimately decide that this rule-based on the principle that the client's interest in receiving satisfactory ***557** representation is superior to the attorney's interest in continued employment-should be altered in those limited class of cases in which the attorney is the client's employee and is discharged primarily not for providing inadequate representation as an attorney, but for the assertion of his statutory rights as an employee. The obligation of attorneys to follow the Rules of Professional Conduct and State Bar Act, as well as the client's ability to discharge an attorney for reasons other than participation in activity sanctioned by the MMBA, provides sufficient safeguards to protect the integrity of the attorney-client relationship.

We therefore hold that the MMBA creates an exception to the general rule found in Code of Civil Procedure section 284 and case law, that a client may discharge an attorney at will. That exception is a prohibition on terminating an attorney solely or chiefly because he or she has engaged in protected activity under the MMBA. As discussed in part II.A.2. of this opinion, *ante*, a suit by an employee organization to enforce such collective bargaining rights is an example of such protected activity, and may not be punished by the attorney's discipline or discharge. Attorneys who believe they have been discriminated against for protected activity may bring an antidiscrimination action in the manner available to other employees. (See *Public Employees Assn. v. Board of Supervisors*, *supra*, 167 Cal.App.3d 797, 807; *Fun Striders, Inc. v. N.L.R.B.* (9th Cir. 1981) 686 F.2d 659, 661-662.)

([16]) In so holding, we note here that the trial court, though deciding that an attorney cannot be discharged or disciplined for participating in the filing of this petition, declined to grant the Association's request to reinstate the Attorneys to their full employment responsibilities, e.g., to entitle them to attend confidential meetings from which they were excluded by the County Counsel once they announced their intention to sue. The trial court decided this matter correctly. Although the County may not punish the Attorneys for suit over an MMBA matter, there is no reason why the County should not be accorded great flexibility in reorganizing the County Counsel's office to respond to the lawsuit. This may include, as the trial court below suggested, the reassignment of Association members to matters of representation outside the field of labor relations. Nothing in the MMBA prohibits the Board and its members from asserting their rights, as clients, to refuse representation from the Association attorneys on any given matter, and to make use of non-Association attorneys or outside counsel in sensitive matters, so long as such reassignment is done nonpunitively. By allowing the County this flexibility, the trial court properly balanced the County's need for obtaining representation in which it has full confidence with the Attorneys' statutory employment rights. ***558**

III. *Disposition*

The judgment of the Court of Appeal is reversed, with directions to affirm the judgment of the trial court.

Lucas, C. J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

PANELLI, J., *

Dissenting.-The majority concludes that, at least in this case, an attorney's interest in suing a present client takes precedence over the client's right to discharge an attorney who no longer enjoys the client's full trust and confidence. I do not agree.

My primary objection is not to the majority's interpretation of statutes and disciplinary rules but, rather, to its failure to see the problem from the client's perspective. This failure is evident in the majority's belief

that there can be "general antagonism between lawyer and client" due to litigation between them without "actually compromis[ing] client representation." (Maj. opn., *ante*, at pp. 547, 552.) Experienced attorneys may have no difficulty meeting as friends after facing each other as adversaries in court. But the same is not to be expected of clients, who justifiably feel that they are entitled to their advocates' unquestioned loyalty. "When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued ... by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed, and the profession is exposed to the charge that it is interested only in money." (*Grievance Com. of Bar of Hartford County v. Rottner* (1964) 152 Conn. 59 [203 A.2d 82, 84].)

Because clients do expect loyalty, I find no reason to doubt the sincerity of the members of the board of supervisors who testified that being sued by their own attorneys has "greatly affected" their "level of trust and confidence" in the latter. The majority, I submit, tacitly concedes that the supervisors' fears are reasonable by holding that the supervisors, "to respond to the lawsuit," may reorganize the county counsel's office and reassign members of the Association to matters outside the field of labor relations. (Maj. opn., *ante*, p. 557.) What is the point of such a reorganization unless the supervisors have actually lost confidence in their attorneys' ability to represent the county effectively, at least in the area of labor relations, on ***559** account of their attorneys' decision to accuse the county in open court of violating the labor relations laws?

The majority, in concluding that these attorneys may sue their clients, places far too much weight on the absence of a specific disciplinary rule to the contrary. If anything can be inferred from the absence of such a rule it is not that this court, or the bar, implicitly endorses such conduct. Instead, the more reasonable inference is that in most cases no rule is necessary. From my experience, any lawyer in private practice so bold as to sue his client can expect to be fired on the spot. As one court put it, "[t]he almost complete absence of authority governing the situation ... indicates to us that the common understanding and the common conscience of the bar is in accord with [the view] that such a suit constitutes a reprehensible breach of loyalty ...." (*Grievance Com. of Bar of Hartford County v. Rottner, supra*, 152 Conn. 59 [203 A.2d at p. 85].)

In the rare cases in which an attorney has become the client's adversary in litigation, the resulting appearance of impropriety has been found too serious to countenance. Thus, we have enjoined the Attorney General from suing the Governor, his client, on the ground that he was bound by the same ethical principles that prevent other attorneys from representing adverse interests. (*People* ex rel. *Deukmejian v. Brown* (1981) 29 Cal.3d 150, 155-160 [172 Cal.Rptr. 478, 624 P.2d 1206].) Similarly, other courts have held that a criminal defendant who was sued by his attorney for fees while in jail awaiting sentencing was entitled to have his conviction reversed on account of ineffective assistance without proving that the lawsuit actually affected his counsel's performance (*Clark v. State* (1992) 108 Nev. 324 [831 P.2d 1374, 1377]), and that an in-house attorney who represented a corporation on employment matters was properly terminated for filing a discrimination suit against the corporation (*Jones v. Flagship Intern.* (5th Cir. 1986) 793 F.2d 714, 726, cert. den. (1987) 479 U.S. 1065 [93 L.Ed.2d 1001, 107 S.Ct. 952]).

The county's brief nicely illustrates how the appearance of impropriety arises in such cases and why it is so serious: "the County will be greatly disadvantaged in defending itself against the Association's proposed lawsuit. The Association members have been privy to the most confidential internal communications within the County government for years. As plaintiffs, they will have an awareness of their defendants' strategies, resources and legal opinions that would be protected from any other plaintiff by the attorney-client privilege. This insider's familiarity will give the Association an invaluable advantage in making legal argument, but particularly in pursuing settlement. The County will be put in the untenable position of having to rely on outside counsel that knows less about the Supervisors and the inner workings of the County client than does the party suing it." ***560**

In this way, when governmental and other in-house lawyers sue their clients, the former relationship of trust and confidence becomes an unfair tactical and informational advantage that the client may well view as a serious betrayal. This, in my view, is something that this court should prevent and has the power to prevent. We have always accepted the ultimate responsibility of regulating the practice of law and claimed the prerogative of doing so as one of "the inherent powers of the article VI courts." (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336 & fn. 5 [178 Cal.Rptr. 801, 636 P.2d 1139]; see also *The People v. Turner* (1850) 1 Cal. 143, 150.) Indeed, we have held to be unconstitutional statutes that purported to usurp that

prerogative. (*Hustedt v. Workers' Comp. Appeals Bd., supra*, 30 Cal.3d at p. 336; *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 728-729 [147 Cal.Rptr. 631, 581 P.2d 636]; *In re Lavine* (1935) 2 Cal.2d 324, 329 [41 P.2d 161].)

It is unfortunate that today the majority takes a step backwards by concluding that the general statute authorizing courts to issue the writ of mandamus (Code Civ. Proc., § 1085) somehow supersedes our inherent power to regulate the bar, unlike the other statutes that have come into conflict with that power. The majority asserts that the petition for mandate, "[a]s a statutory right, ... is for the Legislature to delineate" and that "[t]here is therefore no room for a common law limitation on the right to writ relief." (Maj. opn., *ante*, at p. 542.) But the majority's reasoning is faulty. This court's power to regulate the practice of law is grounded in article VI of the state Constitution rather than the common law. (*Hustedt v. Workers' Comp. Appeals Bd., supra*, 30 Cal.3d at p. 336 & fn. 5.) When the Constitution conflicts with a statute, the former must control.

Finally, I doubt whether the majority's holding will be good for governmental and other in-house attorneys. In recent years the status of in-house attorneys has improved as governments and businesses have increasingly relied upon them in their drive to save legal costs. This is good for society, because attorneys with intimate knowledge of and constant access to their clients are in an excellent position to advise responsible behavior and compliance with the law. However, in-house attorneys enjoy this trust and confidence in large measure because they have been held to the same high ethical standards as all other attorneys. If, through decisions such as this, the perception arises that in-house attorneys are not being held to the same ethical standards, their professional standing and usefulness to their clients and society will diminish to the detriment of attorney and client alike.

I would affirm the judgment of the Court of Appeal.

Respondent's petition for a rehearing was denied May 19, 1994. ***561**

Footnotes

* Judge of the Justice Court for the Avenal Judicial District sitting under assignment by the Chairperson of the Judicial Council.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

1 We note that the inclusion of managerial employees within the MMBA has been maintained in spite of opposition from public employers and in spite of legislative committee recommendations. (See Sen. Select Com. on Local Public Safety Employment Practices Rep., To Meet and Confer: A Study of Public Employee Labor Relations (1972) p. 31.)

2 A petition under Code of Civil Procedure section 1085 may not be the sole judicial means available to redress MMBA violations. When an employee association seeks to challenge a city charter amendment which unilaterally alters wages or working conditions in violation of the MMBA, it has been held the exclusive remedy to challenge the Charter Amendment would be to file an action in quo warranto. (*International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687 [220 Cal.Rptr. 256].) Without deciding whether the result of that case is correct, we note that no case suggests that violation of a right based in the MMBA is without *some* judicial remedy.

3 The County is quite correct that the disclosure required by rule 3-310(B) implies the right of the client to dismiss the attorney if it finds the disclosed conflict sufficiently problematic. Thus, the Association's suggestion that its members have not violated rule 3-310(B)(4) because they have openly sued the County, and have therefore "disclosed" their conflict, is beside the point. If, in fact, the Attorneys' suit fell within the scope of the actions proscribed by rule 3-310(B)(4), they would have the duty not only to disclose, but also to resign if requested by the client, which the Attorneys failed to do in this case. Therefore, the fact that the Attorneys' suit was known to the client does not of itself absolve the Attorneys from violation of rule 3-310(B)(4).

4 Although there is no rule 3-310 conflict present here, if the attorney did, out of malice, or to extract concessions from the County, deliberately mishandle a matter of representation, the attorney would be subject to discipline under rule 3-110, as well as possible misdemeanor charges under Business and Professions Code section 6128. See part II.B.3 of this opinion, *post*.

5 The County quotes the discussion of rule 3-310(B)(4), which cites, as one example of a proscribed professional interest in the subject matter of representation, "a member's membership in a professional organization which is

entering into lease negotiations with the member's client." (State Bar, Request That the Supreme Court of Cal. Approve Amendments to the Rules of Professional Conduct of the State Bar of Cal., & Memorandum and Supporting Documents in Explanation (1991) at p. 15.) We understand this example to mean that the attorney would be obliged to disclose membership in a professional organization negotiating a lease with the client, if the lease negotiations in some manner related to the subject matter of his representation of the client. If the attorney represented the client in an antitrust matter, and belonged to the San Francisco Bar Association which was negotiating a lease with the client, he would be under no obligation to disclose this membership because it would not constitute a "professional interest in the *subject matter of representation*." (Rule 3-310(B)(4), italics added.) If, however, the attorney was connected with the lease negotiations, membership in the professional organization would be sufficient to require disclosure, even though the attorney may not stand to gain financially from the outcome of the negotiations.

6 The Court of Appeal below relied for its holding in large part on rule 3-310(C). Case law has interpreted this rule, and its predecessors, to prohibit attorneys, without consent, from representing not only clients with conflicting interests in particular matters of representation, but also to prohibit attorneys from accepting employment adverse to a client even though the employment is unrelated to the representation of the current client. (See *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1056-1057 [8 Cal.Rptr.2d 228] [firm representing party A in wrongful termination action may not represent party B in unrelated suit against party A]; *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6 [136 Cal.Rptr. 373] [firm violated predecessor rule to rule 3-310(C) by representing a client in a personal injury action, and the client's wife in a divorce action].) The rationale for these rulings was the maintenance of the attorney's "duty of undivided loyalty," without which " 'public confidence in the legal profession and the judicial process' is undermined." (*Truck Ins. Exchange v. Fireman's Fund Ins. Co.*, *supra*, 6 Cal.App.4th at p. 1057.)
Yet even this interpretation of rule 3-310(C) does not make the rule apply to the present situation. A rule that an attorney must refrain from redressing a legal wrong done to him or her by a client requires a different, and greater, kind of self-abnegation than that compelled by rule 3-310(C)'s stricture that an attorney must refrain from representing a potential client for the sake of current client loyalty. Again, although the former sacrifice may be required by the general duty of loyalty to the client, it is not necessitated by rule 3-310(C).

7 As stated in the Rules of Professional Conduct, ethics opinions of other jurisdictions may be consulted to determine appropriate professional conduct. (Rule 1-100(A); see also Cal. Compendium on Prof. Responsibility, pt. II, State Bar Formal Opn. No. 1983-71.)

8 We do not, by this holding, approve the general proposition that an attorney suit against a present client is ethically permissible. When the attorney is an independent contractor, and when no statute protects an attorney's employment rights, it may well be the case that the attorney's general duty of loyalty dictates that the attorney not sue the present client and that such a suit may subject the attorney to discipline-a question not before us here.

9 In arguing that the Attorneys were ethically obligated to refrain from suing the County, the County cites a number of cases from other jurisdictions involving retaliatory terminations of in-house counsel. In some of these cases, the attorneys were not permitted to sue their former clients. (See *Balla v. Gambro, Inc.*, *supra*, 584 N.E.2d 104; *Willy v. Coastal Corp.* (S.D.Tex. 1986) 647 F.Supp. 116, revd. in part on other grounds (5th Cir. 1988) 855 F.2d 1160, affd. on other grounds _____ U.S. _____ [117 L.Ed.2d 280, 112 S.Ct. 1076]; *Jones v. Flagship Intern.* (5th Cir. 1986) 793 F.2d 714, cert. den. (1987) 479 U.S. 1065 [93 L.Ed.2d 1001, 107 S.Ct. 952].) Each of these cases is readily distinguishable from the present case. *Balla v. Gambro* was decided, in large part, on the basis that prosecution of the lawsuit would likely make use of information obtained in confidence, and would therefore have a chilling effect on the confidential nature of the attorney-client relationship. (*Balla v. Gambro, Inc.*, *supra*, 584 N.E.2d at pp. 109-110). In *Jones*, a direct conflict existed between the attorney's claim and the subject matter of her representation. (*Jones v. Flagship Intern.*, *supra*, 793 F.2d at p. 728 [attorney representing corporation on Equal Employment Opportunity Commission (EEOC) matters herself brings EEOC claim].) *Willy* involved a common law retaliatory discharge claim which the court, for public policy reasons, declined to extend to in-house counsel. (*Willy v. Coastal Corp.*, *supra*, 647 F.Supp. at p. 118.)
In this case the record reveals that the contemplated writ of mandate action, concerned with the duty to meet and confer, will not lead to the revelation or use of confidential information. Nor is a *Jones* situation implicated in this case. The Attorneys represent the County in numerous areas outside the labor relations field, and the County has the flexibility to reassign counsel in the few matters where a more direct conflict exists between the attorney's subject matter of representation and the present lawsuit. (See pt. II.C. of this opinion, *post*.) Finally, the suit is brought under a statutory, not a common law theory, and this court may not limit a statutory remedy on public policy grounds (see pt. II.A.2. of this opinion, *ante*).

10 The petition for writ of mandate that the Association contemplates filing is based on the claims that the County failed to meet and confer under the MMBA, and that it violated the prevailing wage provisions of the County Charter, section 709. These claims are interrelated. Indeed, part of its MMBA failure of good faith claim is that the County attempted to

impose a wage adjustment by ignoring its own charter provision. We need not decide, therefore, whether the County's charter provision alone, without the MMBA claim, would provide the basis of a suit by the Attorneys against the County. It remains for the court below to resolve, in adjudicating the petition for writ of mandate, the extent of the County's obligation to further negotiate with the Association or its obligations to pay a certain wage under the County's charter provisions. (See, e.g., *Glendale City Employees' Assn., Inc. v. City of Glendale*, *supra*, 15 Cal.3d 328, 345 [lower court may mandate the granting of specific wage increases if public agency has already committed itself to a particular wage formula].)

11 As explained on page 535 of this opinion, *ante*, the Association asked the court to enjoin the County from discharging any of its members after the filing of the petition for writ of mandate. The request was made in response to County Counsel Woodside's opinion that the Association members were required to resign before filing a petition for writ of mandate against the County. The trial court granted this injunctive relief, both preliminarily and permanently. Therefore, the question whether the County could terminate the Attorneys for participation in the lawsuit is one which was before the trial court, and is before this court. That the County did not explicitly raise that issue in its brief to this court may be due to the fact, as expressed by the County's attorney at oral argument, that it does not in fact intend to discharge the Attorneys if the Association prosecutes a suit against it. Nonetheless, the question is ripe for consideration, and is integral to the disposition of the case.

12 Indeed, in the office of county counsel itself, the Legislature has chosen for various public policy reasons to modify the usual attorney-client at will relationship, and has provided that the county counsel will serve a four-year term removable only for "good cause." (Gov. Code, § 27641.)

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

End of Document

Exhibit 14

City and County of San Francisco (2006)
PERB Dec. No. 1890-M, p. 8

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS LOCAL 39, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-355-M PERB Decision No. 1890-M March 12, 2007

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Stationary Engineers Local 39; Gina M. Roccanova, Deputy City Attorney, for City & County of San Francisco.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

SHEK, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Stationary Engineers Local 39 (Local 39) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the City & County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by engaging in bad faith bargaining. Local 39 alleged that this conduct constituted an unfair practice under the MMBA in violation of PERB Regulation 32603(a), (b), (c), (f) and (g).[2] Local 39 also alleged that this conduct violated Section 16.216 of the City's Employee Relations Ordinance (ERO). Additionally, Local 39 alleged that Section A8.409-4 of the City's Charter (Charter) was unreasonable on its face and as applied to the extent that it permitted the City to begin impasse procedures before an impasse had been reached.

[1]MMBA is codified at Government Code Section 3500, et seq. Unless otherwise noted, all statutory references are to the Government Code.

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

The Board has reviewed the entire record in this case, including but not limited to Local 39's unfair practice charge, the City's position statement, the amended unfair practice charge, the warning and dismissal letters, Local 39's appeal, and the City's response thereto. Based upon this review, we affirm the dismissal, subject to the discussion below.

BACKGROUND

Local 39's April 11, 2006, unfair practice charge alleged that Section A8.409-4 of the Charter was unreasonable to the extent that it allowed the City to declare impasse before there was a real impasse, and that the City engaged in surface bargaining and had no intention of bilaterally reaching an agreement with Local 39.

When Local 39 filed this unfair practice charge, there was a collective bargaining agreement (CBA) in effect between the parties that extended through June 30, 2006. Local 39 alleged that the City did not bargain in good faith during negotiations for a successor CBA because it intended to rely upon the mediation/arbitration procedures in the Charter[3] to resolve the basic economic issues to be negotiated.

Under the Charter, after engaging in good faith bargaining, either the authorized representative of the City or Local 39 may declare an impasse with regard to unresolved disputes over wages, hours, benefits or other terms and conditions of employment. Upon the declaration of an impasse, the unresolved disputes shall be submitted to a three-member mediation/arbitration board (board) for resolution. (Charter sec. A8.409-4(a).) The board has discretion to resolve disputes by mediation and/or arbitration, and may hold hearings and receive evidence from the parties. (Charter sec. A8.409-4(c).) The Charter provides that if no

[3]Besides the Charter provisions, Local 39 alleges a violation of Section 16.216 of the City's ERO, which provides for mediation procedures that differ from those in the Charter. However, the charge does not further explain how this section was violated. Additionally, the appeal does not raise this issue. Matters not raised on appeal are waived. (PERB Reg. 32300(c).)

agreement is reached prior to the conclusion of the arbitration hearings, the board shall direct each of the parties to submit, within such time limit as the board may establish, a last offer of settlement on each of the remaining issues in dispute. It provides that the board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most conforms to traditionally enumerated factors in determining wages, hours, benefits or other terms and conditions of employment. (Charter sec. A8.409-4(d).) The Charter states that the board shall reach a final decision no later than 60 days before the date the Mayor is required to submit a budget to the board of supervisors, except by mutual agreement of the parties. (Charter sec. A8.409-4(e).)

Charter section A8.409-4(b) requires that the parties involved in bargaining select and appoint one person to the board not later than January 20 of any year in which bargaining on a CBA takes place. It provides that the third member of the board shall be selected by agreement between the City and the recognized employee organization, and shall serve as the neutral chairperson of the board.

In January 2006, before negotiations began, the City demanded that Local 39 select its representative to the board pursuant to Charter section A8.409-4(b). On February 6, 2006, however, Local 39 advised the City that it did not believe that Charter section A8.409-4 was mandatory and declined to select a representative to the board. Throughout the contract negotiations that followed, Local 39's attorney continued to dispute the obligation to select a representative to the board. Local 39 alleged that it was not required to select a representative to the board because the parties were not at impasse.

On April 5, 2006, the City filed a petition to compel arbitration and a petition for writ of mandate in the San Francisco Superior Court, while negotiations were underway. On May 8, 2006, the superior court denied the City's petitions to compel arbitration and for writ of

mandate, holding that PERB had jurisdiction over the City's attempt to compel Local 39 to participate in arbitration under the collective bargaining provisions of the Charter.[4]

The parties engaged in twelve (12) negotiation sessions for a successor agreement between February 2 and April 7, 2006. During the first bargaining session on February 2, 2006, the City allegedly maintained its right to withdraw from negotiations because Local 39 was not participating in the mandatory impasse arbitration procedures. That same day, Local 39 offered an initial basic wage proposal that called for specified salary increases. In response, the City stated that it needed time to make calculations before it could meet again.

During the next several negotiating sessions, the parties discussed various terms and conditions of employment, but not basic wage proposals. On February 15, 2006, the City presented a cost analysis relating to Local 39's economic proposals. On February 16, 2006, the parties discussed the rates paid to Stationary Engineers in the private sector, and discussed the City's cost analysis. Local 39 alleged that the City's lead negotiator cut short the February 16 bargaining session by announcing in the morning that she would not be available after lunch.

Local 39 also alleged that the City arrived late or called caucuses immediately or almost immediately at the start of six bargaining sessions; that the City sometimes attended

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[4]On July 7, 2006, the City appealed the Superior Court's May 8, 2006 decision to the Court of Appeal, in Case No. A1 14815, which is currently pending.

Additionally, on May 10, 2006, the City filed an unfair practice charge, Case No. SF-CO-129-M, against Local 39 alleging a violation of PERB Regulation 32604(d) (employee organization unfair practices under MMBA) based on Local 39's refusal to name a neutral and refusal to participate in the mediation/arbitration process contained in the local rules. PERB issued a complaint in that case on May 12, 2006. PERB Administrative Law Judge Donn Ginoza held hearings in that case on January 11 and 12, 2007, and the matter is currently pending.

bargaining sessions without being prepared with written proposals; and that the City negotiator did not have authority to bargain.

According to Local 39, on or about March 23, 2006, the City made its first (and only) basic wage proposal. Subsequently, the parties exchanged package proposals.

After at least three additional bargaining sessions, on April 7, 2006, the City's representative stated that the parties appeared to be at impasse due to a "substantial gap on the economic issues." Local 39's negotiators protested that it "had every intention on bargaining to obtain a contract rather than have a contract imposed by third parties," and had "room to move," but that the City appeared to be not bargaining in good faith. However, at this point, the City stated that it would not resume bargaining until Local 39 agreed to use the impasse procedure.

Prior to the City's declaration of impasse, the parties had arrived at substantive tentative agreements for at least eight different subjects.[5]

On April 11, 2006, Local 39 filed its unfair practice charge. On May 9, 2006, the City Director of Employee Relations, Mikki Callahan, called Local 39 and proposed the "crafts deal," which was offered to other crafts unions, as a means of settling the contract dispute with Local 39. Local 39 did not accept this offer.

The Board agent issued a warning letter on May 26, 2006, and a dismissal letter on August 24, 2006, finding that Local 39 had failed to allege a prima facie case of surface bargaining.

[5]Local 39 alleged that the parties reached substantive tentative agreements in the following eight areas: dive pay (payment for performing underwater dives); apprentice training fund; vacation scheduling; grievance procedure; holidays; timely payment of compensation; jury duty; and in lieu holiday pay. In contrast, the City alleged that the parties reached tentative agreements in 17 different areas.

Local 39 appealed the dismissal on September 8, 2006. The appeal focuses upon the legal issue of whether the Charter unlawfully conflicts with the MMBA. It alleges that the process established in the Charter is a "contract of adhesion."[6] It alleges that "Charter section A8.409-4 is drafted in a way as to insulate the [City] from any Union proposal which it unilaterally deems to be objectionable."[7] It states, "To the extent that the [Charter] authorizes one party to declare an impasse regardless of whether or not the parties are truly at an impasse or whether the party which declares impasse has bargained in bad faith, the Charter is inconsistent with [the MMBA]." The appeal also alleges that the Board agent erred in finding that there was no prima facie case of surface bargaining. On September 28, 2006, the City filed a response to the appeal denying the allegations.

DISCUSSION

This case presents two primary issues: (1) whether Local 39 has demonstrated that Section A8.409-4 of the Charter is unreasonable; and (2) whether Local 39 has alleged a prima facie case of surface bargaining by the City. To determine whether a charge alleges a prima facie case, the Board must assume that the essential facts alleged in the charge are true. (San Juan Unified School District (1977) EERB[8] Decision No. 12.)

Whether Charter Section A8.409-4 Violates the MMBA

The MMBA authorizes local agencies to adopt "reasonable rules and regulations," governing collective bargaining matters, including "[a]dditional procedures for the resolution of

[6]We do not address the issue of whether the Charter was a contract of adhesion, because that allegation is outside of PERB's jurisdiction.

[7]We do not further address this allegation because the charge and appeal contain no supporting facts.

[8]Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

disputes involving wages, hours and other terms and conditions of employment." (MMBA sec. 3507(a)(5).)[9] The Board has the authority to review whether local agency rules are reasonable. (Gridley; City of San Rafael (2004) PERB Decision No. 1698-M.)

"Where a legislative action by a local governmental agency is attacked as unreasonable, the burden of proof is on the attacking party. Such regulations are presumed to be reasonable in the absence of proof to the contrary." (San Bernardino County Sheriff's Etc. Assn. v. Board of Supervisors (1992) 7 Cal.App.4th 602, 613 [8 Cal.Rptr.2d 658], citing Organization of Deputy Sheriffs v. County of San Mateo (1975) 48 Cal.App.3d 331, 338 [122 Cal.Rptr. 210].) However, a local governmental agency may not adopt rules and regulations that "would frustrate the declared policies and purposes of the [MMBA sec. 3500, et seq.]." (Huntington Beach Police Officers' Assn. v. City of Huntington Beach (1976) 58 Cal.App.3d 492, 502 [129 Cal.Rptr. 893].)

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[9]In enacting the MMBA, the Legislature intended "to set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations." The Legislature

> did not intend thereby to preempt the field of public employer-employee relations except where public agencies do not provide reasonable 'methods of administering employer-employee relations through . .. uniform and orderly methods of communication between employees and the public agencies by which they are employed.'
> (Los Angeles County Firefighters Local 1014 v. City of Monrovia (1972) 24 Cal.App.3d 289, 295 [101 Cal.Rptr. 78], emphasis added.)

This is consistent with the preamble of the MMBA, which contains the following language:

> Nothing contained herein shall be deemed to supersede the ... 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 ....
> (MMBA sec. 3500, cited in International Brotherhood of Electrical Workers v. City of Gridley (1983) 34 Cal. 3d 191, 197-198, fn. 4 [193 Cal.Rtpr. 518] (Gridley).)

The MMBA specifically authorizes local agencies to adopt their own impasse procedures, although adoption of such procedures is not mandatory. Section 3505 of the MMBA states that the meet and confer "process should include adequate time for the resolution of impasses" only "where local rules include impasse procedures." Additionally, Section 3505.4 of the MMBA references "impasse procedures, where applicable." Thus, local agencies have discretion to craft their own impasse resolution procedures.

The MMBA does not delineate what local agency impasse rules must contain. The MMBA states simply that negotiations must continue for a "reasonable period of time." Section 3505 of the MMBA states, in part, that the public agency and a recognized employee organization:

> shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

Additionally, Section 3505.2 of the MMBA provides that if the parties fail to reach agreement "after a reasonable period of time," the parties may "agree upon the appointment of a mediator mutually agreeable to the parties."

The relevant provision of the Charter, section A8.409-4(a), states that disputes pertaining to wages, hours, benefits or other terms and conditions of employment "which remain unresolved after good faith bargaining" shall be submitted to the mediation/arbitration board "upon the declaration of an impasse either by the authorized representative of the city and county of San Francisco or by the authorized representative of the recognized employee organization involved in the dispute." The board has the discretion to resolve disputes by

mediation and/or arbitration, and may hold hearings and receive evidence from the parties. If no agreement is reached prior to the conclusion of the arbitration hearings, the board shall direct each of the parties to submit a last offer of settlement on each of the remaining issues in dispute. The board must then vote to adopt a last offer of settlement for each issue, based upon the traditionally enumerated factors in determining wages, hours, benefits or other terms and conditions of employment.

Under the principles discussed above, we find that Charter section A8.409-4(a) is reasonable on its face. The MMBA specifically allows local agencies the discretion to adopt their own impasse rules. The rules in this case restrict the use of the impasse procedure to situations where disputed issues remain unresolved after good faith bargaining. Moreover, the Charter provisions at issue appear to effectuate the MMBA's purpose of promoting "full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment." (Sec. 3500(a).) Additionally, the language of the Charter requiring good faith bargaining appears to be consistent with the MMBA requirement that negotiations "continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement." Therefore, the Board finds that Local 39 has failed to allege a prima face case that the City's Charter section A8.409-4 is unreasonable on its face under the MMBA.

Local 39 also alleges that Charter section A8.409-4 was unreasonable as applied in this situation, i.e., that the City declared "impasse" prematurely. As discussed in the following section, however, we find that based on the facts alleged, the City engaged in good faith bargaining. Local 39 alleged that the parties met over twelve separate bargaining sessions, exchanged information and proposals, and reached tentative agreements on at least eight

different subjects. Additionally, the parties exchanged basic wage proposals and held substantive discussions about those proposals. The City finally declared impasse when it allegedly believed there to be a substantial gap on the economic issues. Under these circumstances, we find that Local 39 has failed to allege a prima facie case that Charter section A8.409-4 was unreasonable as applied.

Whether Local 39 Has Established a Prima Facie Case of Surface Bargaining by the City

The unfair practice charge in this case alleged that the employer violated MMBA section 3505 and PERB Regulation 32603(c) by engaging in bad faith or "surface" bargaining. Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App.3d 9, 25 [92 LRRM 3373] (Placentia Fire Fighters).) PERB has held that the essence of surface bargaining is that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275; Placentia Fire Fighters.)

The Board has affirmed dismissals of surface bargaining charges when the facts indicate that the parties have not been impeded from negotiating due to alleged multiple indicia of bad faith behavior. For example, in City of Fresno (2006) PERB Decision No. 1841-M, the Board upheld dismissal of a surface bargaining charge where the city adamantly refused to consider increasing salaries for the Local 39 contract (because other city contracts include most

favored nation clauses, and because workers compensation costs and health care costs were high). The Board agent found that "[t]he facts seem to suggest that the city had a rational basis for their position." (Citing NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829, 2830].) In that case, the city cancelled two successive days of negotiation without explanation. At one bargaining session, city negotiators were without authority beyond the economic offers already made, and the city's lead negotiator was absent at a bargaining session. (The city explained that the outside negotiator's contract had expired and needed to be renewed.) The Board agent found that there was insufficient evidence of surface bargaining because both parties have offered several unique proposals. In that case, until the declaration of impasse, the parties were not delayed from negotiating because of the cited behavior by the city.

Similarly, in Ventura County Community College District (1998) PERB Decision No. 1264, the Board upheld a dismissal of a surface bargaining charge despite allegations of bad faith, where the charge failed to provide specific facts to establish that the district's behavior was indicative of an intent to frustrate the bargaining process.

The Board has likewise affirmed the dismissal of a surface bargaining charge where the factual allegations did not state that the employer was attempting to "torpedo" a proposed agreement or otherwise undermine the negotiations process (State of California (Department of Education) (1996) PERB Decision No. 1160-S); and where periodic unproductive negotiation sessions did not rise to the level of bad faith (County of Riverside (2004) PERB Decision No. 1715-M, at p. 8).

Under these authorities, the dismissal of Local 39's unfair practice charge was proper. Despite Local 39's allegations of the City's tardiness and dilatory tactics, the parties appeared to make progress in their negotiations. The City's behavior did not have the effect of frustrating

the negotiations. Local 39 has not alleged sufficient facts that the City negotiator lacked authority to bargain, or that the City's response to request for information was so inadequate that it frustrated the bargaining process. Local 39 has not demonstrated that the alleged delays in the bargaining process were sufficient to "torpedo" the negotiations process.

Instead, the record indicates that the parties conducted substantive discussions, exchanged proposals and information, asked and responded to questions, and that the City was willing to schedule negotiating sessions. The parties reached tentative agreements on at least eight different issues. Additionally, the City attempted to follow the impasse resolution procedures in the Charter, which are reasonable based on the above discussion. Furthermore, based on the alleged facts and circumstances, the City's lawsuit to compel arbitration did not frustrate the bargaining process, and thus does not constitute bad faith.

For these reasons, the Board finds that the unfair practice charge fails to state a prima facie case that under the MMBA, the City's Charter section A8.409-4 is unreasonable on its face or as applied, and that the City engaged in surface bargaining. Thus, the Board affirms the Board agent's dismissal of the charge.

ORDER

The unfair practice charge in Case No. SF-CE-355-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neuwald joined in this Decision.

Exhibit 15

City of Clovis (2009)
PERB Dec. No. 2074-M, p.5, fn.5

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OPERATING ENGINEERS LOCAL 3, Charging Party, v. CITY OF CLOVIS, Respondent.	Case No. SA-CE-513-M PERB Decision No. 2074-M October 30, 2009

Appearance: Lozano Smith by David M. Moreno, Attorney, for City of Clovis.

Before Dowdin Calvillo, Acting Chair; Neuwald and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City of Clovis (City) to the proposed decision of an administrative law judge (ALJ). The ALJ found that the City violated the Meyers-Milias-Brown Act (MMBA)[1] when it failed to resume negotiations with Operating Engineers Local 3 (also referred to as Clovis Public Works Employees' Affiliation or CPWEA) after impasse was broken, and failed to implement the City's last, best, and final offer after it was accepted by CPWEA. The proposed decision ordered the City to implement a three percent salary increase effective July 1, 2007.

The Board has thoroughly reviewed the proposed decision and the record in light of the City's exceptions and the relevant law.[2] Based on this review, the Board finds that CPWEA

[1] MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[2] The City's request for oral argument is denied. The Board has historically denied requests for oral argument where an adequate record has been prepared, the parties had ample opportunity to present briefs, and the issues before the Board are sufficiently clear to make oral

failed to establish that the City violated MMBA sections 3503, 3505, 3506 and 3509(b), and PERB Regulation 32603(a), (b) and (c).[3] Therefore, for the reasons stated herein, we reverse the proposed decision and dismiss the complaint.

FINDINGS OF FACT

CPWEA is the exclusive representative of a unit of City employees who work in the Public Works Department. CPWEA and the City are parties to a memorandum of understanding (MOU) effective July 1, 2005 through June 30, 2008. The MOU includes a provision that on or about March 2007, the parties would re-open negotiations regarding wages for July 2007 through June 2008, the third year of the MOU.

The parties began negotiations on the wage re-opener in May 2007. After multiple bargaining sessions the parties were unsuccessful in reaching agreement. On July 13, 2007, the City proffered its last, best, and final offer of a three percent salary increase, effective July 1, 2007. On July 17, 2007, CPWEA rejected the offer and declared impasse.

Following unsuccessful mediation sessions, the parties met to resume negotiations on September 21, 2007. The City proposed a three percent salary increase effective July 1, 2007, or in the alternative, a three percent salary increase effective October 1, 2007 plus a one-time payment of $400. CPWEA countered with a proposal for a four percent wage increase. The City rejected this proposal and informed CPWEA that the three percent salary increase effective July 1, 2007 constituted its last, best, and final offer.

On September 28, 2007, CPWEA chief negotiator Doug Gorman (Gorman) sent a letter to the City's chief negotiator, Jeff Cardell (Cardell), stating that the City's proposal had been

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argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.)

[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

voted down by the union membership and the union again declared impasse. The letter also informed the City that CPWEA intended to file an unfair practice charge alleging that the City had engaged in surface bargaining.

On October 9, 2007, the City Manager sent a memorandum to employees represented by CPWEA regarding the status of negotiations, stating in part:

> Given the current fiscal conditions of the City, the declining economy in general, and considering the competitiveness of the existing wage scales for this unit in the marketplace, I believe that the City's offer of a 3.0% wage increase retroactive to July 1, 2007, for all employees in this unit, was a very good offer.
>
> CPWEA's labor representative informed the City's labor negotiators that the unit members who voted on the City's most recent wage proposal voted not to accept it. In view of the fact that CPWEA representatives/membership has rejected various versions of the City's wage offer several times, and considering that CPWEA representatives have declared on two (2) occasions that the negotiation process is at impasse, the City has decided to conclude its efforts to reach agreement on this issue.

On October 24, 2007, CPWEA filed an unfair practice charge alleging that the City had engaged in bad faith bargaining with respect to the wage re-opener.

After receiving the City Manager's October 9, 2007 memorandum, Gorman assumed the City would implement its last, best, and final offer of a three percent salary increase. Gorman was aware that the City had imposed final offers on other bargaining units. However, by late January 2008, Gorman realized the City had not implemented the three percent wage increase.

On February 1, 2008, after discussions with union membership, Gorman left a voicemail message advising Cardell that CPWEA would dismiss the pending unfair practice charge if the City would implement the three percent salary increase contained in its last, best, and final offer.

In response, on February 7, 2008, Cardell sent a letter to Gorman that stated, in part:

> Thank you for your telephone call of February 1, 2008, regarding resolution of the Unfair Labor Practice Charge (ULPC) filed by [CPWEA]. As I understand your proposed resolution, in recognition of improved labor relations made in the Public Utilities Department, CPWEA is willing to dismiss the ULPC in exchange for implementing the City's "last best and final offer" of three (3) percent effective July 1, 2007, which was offered by the City during the last meet and confer process.
>
> The City appreciates CPWEA's interest in resolving the ULPC. The City also desires to resolve this issue; however, we must decline the offer as stated above in view of the fact that CPWEA previously rejected the City's wage offer and declared the negotiations process to be at impasse. The City considers the negotiations concerning wages for the third year of the 2005-2008 MOU to be concluded. Additionally, the City considers the assertions made by CPWEA in the ULPC to be without merit, and therefore, not subject to the type of "trade off" you have proposed.

Cardell concluded the letter by stating that the City looked forward to opening negotiations on a successor MOU in the near future.

CPWEA did not respond to the City's February 7, 2008, letter.

On March 11, 2008, CPWEA amended its charge to allege that the City's February 7, 2008 letter was an unlawful rescission of the last, best, and final offer, and a further indicator of surface bargaining.

On March 27, 2008, the PERB General Counsel issued a complaint that alleged that by failing to implement its last, best, and final offer of a three percent wage increase for the third year of the MOU, the City had committed an unfair practice.[4]

[4] CPWEA withdrew all other allegations, leaving only the allegation regarding the refusal to implement the last, best, and final offer.

DISCUSSION

MMBA section 3505 provides that local government agencies and recognized employee organizations "shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment."

The parties in this matter engaged in negotiation efforts on the wage re-opener from May 2007, through September 28, 2007, when CPWEA rejected the City's last, best, and final offer of a three percent salary increase, and declared impasse. The proposed decision held that Gorman's subsequent voicemail message effectuated a valid acceptance of the City's offer, which automatically created a binding, enforceable agreement between the parties. In its appeal, the City contends that the evidence does not support finding that CPWEA accepted the City's offer.

The Board agrees with the City and concludes the record does not establish that CPWEA made a valid acceptance of the City's last, best, and final offer.[5]

At the hearing on this matter, the entirety of Gorman's testimony on this issue is as follows:

> Q . . . when you made the phone conversation to Jeff Cardell, was it your intent to accept the last, best and final offer?
>
> A Yes, it was.

The record is void of any direct testimony by Gorman (or any other CPWEA witness) as to the actual content of the voicemail message. The remainder of the CPWEA "testimony" on this issue is made by CPWEA's attorney, primarily during opening arguments, and thus cannot be considered evidence in support of CPWEA's charge.

[5] Pursuant to MMBA section 3505.4, once an impasse has been properly reached between the parties, a public agency "may implement its last, best, and final offer." This provision is permissive, not mandatory. Therefore, while the parties are properly at impasse, the City is not obligated to implement its last, best, and final offer.

The bulk of the direct witness testimony as to the content of the voicemail message comes from Cardell, who testified as follows:

> Q Can you explain the nature of that contact?
>
> A Mr. Gorman gave me a telephone call and made a proposal that in exchange for dismissal of the unfair labor practice charge that we should go ahead and implement the 3 percent offer retroactive to July 1st. And it was with the spirit of, or the recognition that the reason for the call was that things were going well at the Public Utilities Department and let's try to put this behind us and let's, so let's try to make this go away by we'll dismiss this if a, [sic] if the 3 percent is provided back to July 1st.

Cardell further testified that he understood Gorman's proposal to be nothing more than a settlement offer of the unfair practice charge. The only other evidence of the content of Gorman's voicemail message is reflected in Cardell's February 7, 2008 letter. In the letter, Cardell summarized his understanding of the purpose of the call and CPWEA's proposal to settle the charge. The City declined CPWEA's settlement offer via the February 7, 2008 letter, explaining why it did not believe the offer to be an appropriate resolution to the unfair practice charge.

Gorman's testimony, simply responding "yes" to the CPWEA attorney's characterization of Gorman's subjective intent in making the telephone call to Cardell, is wholly insufficient to demonstrate the actual content of the voice message. Therefore, in the absence of evidence on the record to demonstrate that Gorman's telephone message was anything more than an attempt to open settlement negotiations with respect to the unfair practice charge, as reported by Cardell, we simply cannot make the leap to find that the

telephone message was a specific, and unconditional, acceptance of the City's last, best, and final offer, that created an agreement between the parties.[6]

Moreover, MMBA section 3505.1, provides that:

> 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.

Consequently, even if Gorman's voicemail message represented a valid acceptance of the City's last, best, and final offer, the proposed decision's finding that it created a binding and enforceable agreement is in error. As the City correctly asserted in its appeal, Section 3505.1 requires that the agreement be reduced to writing and ratified by the City before it will become binding on the parties. Numerous cases have discussed and approved this interpretation. In *Long Beach City Employees Association, Inc. v. City of Long Beach* (1977) 73 Cal.App.3d 273, the court denied a petition to compel the city to adopt a memorandum of understanding, and soundly rejected the union's argument that it was bad faith for the city council to refuse to ratify the agreement. The Court explained that the MMBA,

> . . . expressly provides that the memorandum 'shall not be binding' but shall be presented to the *governing body* of the agency or its statutory representative for *determination*, thus reflecting the *legislative decision that the ultimate determinations are to be made by the governing body itself.*

(*Long Beach,* p. 278, citing *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22.)[7]

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[6] The absence of evidence that CPWEA made any attempt to respond to the City's February 7, 2008 letter to clarify its intent to accept the last, best, and final offer, as opposed to making a settlement offer on the unfair practice charge, further supports our finding herein.

[7] Also citing *Glendale City Employees' Assn., Inc.* v. *City of Glendale* (1975) 15 Cal.3d 328, and *Crowley v. City and County of San Francisco* (1977) 64 Cal.App.3d 450.

In the case at hand, the record is void of any evidence that an agreement was reduced to writing and ratified by the City. Therefore, a finding that a binding agreement was created which mandates implementation of the three percent salary increase is contrary to law.[8]

Unalleged Violation

The City also excepts to the ALJ's conclusion that Gorman's voicemail message amounted to changed circumstances that broke the impasse between the parties, such that the City's failure to resume bargaining was a violation of the duty to bargain in good faith.[9]

We conclude that no findings can be made as to the allegation that the City violated its duty to bargain in good faith when it failed to resume negotiations as a result of a significant concession by CPWEA because it was not alleged in the complaint. The Board may only review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (*Fresno County Superior Court* (2008) PERB

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[8] The proposed decision cites *Local 512, Warehouse & Office Workers' Union v. NLRB* (9th Cir. 1986) 795 F.2d 705, in support of the finding that acceptance of the City's last, best and final offer by CPWEA creates a binding, enforceable agreement. However, this case is distinguished, because the private sector parties in *Local 512* were not covered by a statutory scheme that mandated ratification of the parties' agreement. Furthermore, although the parties in *Local 512* were subject to a stipulation that any agreement reached would be binding only if ratified by the employees and approved by the employer, the court made a specific finding that these conditions had been satisfied.

[9] In *Modesto City Schools* (1983) PERB Decision No. 291, the Board held that "impasse suspends the bargaining obligation only until 'changed circumstances' indicate an agreement may be possible." Changed circumstances include concessions "which have a significant impact on the bargaining equation." (*Ibid.*) The duty to bargain in good faith is thus revived. Where concessions are made by one party, they must be given consideration by the other, and a good faith effort must be made to determine the potential for agreement. (*Ibid.*)

Decision No. 1942-C.) The unalleged violation also must have occurred within the applicable statute of limitations period. (*Ibid.*)

These criteria have not been met in this case. As stated previously, the complaint alleged only that the City violated its duty to bargain in good faith by failing to implement its last, best, and final offer. The claim that Gorman's voicemail message constituted a "changed circumstance" that revived the City's duty to bargain was not alleged in CPWEA's charge, was not alleged in the complaint, was not introduced at hearing, and was not raised by CPWEA until its post hearing brief. The City was not provided notice, or adequate opportunity to fully litigate the issue, and did not have the opportunity to examine and cross-examine witnesses on this issue. Therefore, we cannot consider whether the City's February 7, 2008, letter constituted an unlawful failure to resume bargaining in response to changed circumstances, in violation of the MMBA.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE-513-M are hereby DISMISSED.

Acting Chair Dowdin Calvillo and Member Neuwald joined in this Decision.

Exhibit 16

***County of Contra Costa* (2014)**
PERB Order No. Ad-410-M, p.33

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF CONTRA COSTA, Employer, and AFSCME LOCAL 2700, Exclusive Representative.	Case No. SF-IM-126-M Administrative Appeal PERB Order No. Ad-410-M April 16, 2014

Appearances: Meyers, Nave, Riback, Silver & Wilson by Edward L. Kreisberg and Jesse J. Lad, Attorneys, for County of Contra Costa; Beeson, Tayer & Bodine by Adrian J. Barnes, Attorney, for AFSCME Local 2700.

Before Martinez, Chair; Huguenin, Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the County of Contra Costa (County) from an administrative determination (attached) by the Office of the General Counsel pursuant to PERB Regulation 32802.[1] In that determination, the Office of the General Counsel approved AFSCME Local 2700's (AFSCME) request that the parties' bargaining differences be submitted to a factfinding panel. The parties' bargaining dispute involved a single unresolved issue that remained after they had reached agreement on all other issues related to the creation of a new classification, legal clerk. The remaining dispute concerned the level of salary to be paid to the new classification.

[1] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The Office of the General Counsel determined that the factfinding procedures prescribed in the Meyers-Milias-Brown Act (MMBA) section 3505.4[2] and its implementing regulation, PERB Regulation 32802(a)(2),[3] were applicable to this dispute and directed the parties to select their respective panel member. From this determination the County appeals, pursuant to PERB Regulation 32360.

For reasons discussed herein, we affirm the Office of the General Counsel's determination and hold that the factfinding procedures added to the MMBA by Assembly Bill No. 646 (Statutes 2011, ch. 680) (AB 646), passed in 2011, and codified at MMBA

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[2] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code unless otherwise noted. MMBA section 3505.4 establishes a non-binding factfinding procedure for resolving post-impasse bargaining disputes that may be invoked by the representative employee organization after mediation efforts, if available, have failed to produce a settlement.

[3] PERB Regulation 32802 provides, in pertinent part:

> (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
>
> (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator . . .
>
> (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.
>
> (b) A request for factfinding must be filed with the appropriate regional office; . . .
>
> (c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirement of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

sections 3505.4 through 3505.7, apply to any bargaining impasse over negotiable terms and conditions of employment, and not only to impasses over new or successor memoranda of understanding (MOU).

PROCEDURAL HISTORY

After having negotiated over the creation of a legal clerk classification and reached agreement on all issues except for the rate of pay for employees in the classification, the parties declared impasse in early September 2013. On September 25, 2013, AFSCME filed a request for factfinding with the Office of the General Counsel pursuant to MMBA section 3505.4.

The County opposed AFSCME's request and urged the Office of the General Counsel to deny it, asserting that the request was insufficient to meet the statutory requirements for factfinding. The County provided extensive written argument that factfinding was applicable only to bargaining disputes arising after negotiation for an MOU, and not to single issue bargaining disputes. AFSCME filed a timely response, disputing the County's arguments and asserting that if the Legislature intended to limit factfinding under the MMBA, it would have clearly said so, rather than using more comprehensive words, such as "dispute" and "differences" in referring to what is subject to factfinding.

On October 2, 2013, the Office of the General Counsel informed the parties by e-mail that AFSCME's request was approved. This determination was memorialized on October 4, 2013, in the form of an administrative determination.

After being granted extensions of time, the County filed a timely appeal of the administrative determination on October 28, 2013, and AFSCME filed a timely response on November 21, 2013.

ADMINISTRATIVE DETERMINATION

In explaining its reasons for approving AFSCME's request, the Office of the General Counsel first noted that the bargaining obligation under the MMBA extends to all matters relating to wages, hours, and other terms and conditions of employment, and that this duty requires the employer to refrain from making unilateral changes until the parties have bargained to an agreement or impasse and complied with any applicable post-impasse resolution procedures. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1083-1084.) AB 646 imposed new obligations on employers, but also provided a "more orderly and expeditious process for resolving impasse disputes, with enhanced certainty as to when—i.e., upon completion of the statutorily mandated factfinding procedures—they could impose" their last, best and final offer (LBFO). (Admin. Determination, p. 6.)

The administrative determination noted that although the MMBA does not define the term "impasse," PERB has held that the definition of impasse under the Educational Employment Relations Act (EERA)[4] is the appropriate standard under the MMBA as well. The definition of "impasse" does not limit the types of "disputes" or "differences" to just those arising during negotiations for a new or successor collective bargaining agreement (CBA) or MOU.

Additionally, the administrative determination noted that decisions of the courts, PERB and National Labor Relations Board have made clear that collective bargaining is a continuing process that is not restricted to one comprehensive agreement or one single period of bargaining. (*Conley v. Gibson* (1957) 355 U.S. 41, 46). The parties' bargaining obligation encompasses meeting and conferring with respect to wages, hours, and other terms and

[4] EERA is codified at Government Code section 3540 et seq.

conditions of employment, as well as proposed changes in negotiable terms and conditions of employment that may arise during the term of an MOU.

Turning next to the language in the MMBA, the Office of the General Counsel concluded that when construed as a whole, the MMBA does not limit the applicability of its factfinding provisions solely to disputes arising during negotiations for an MOU. MMBA section 3505.4 uses the term "differences" and "dispute," without limitation to disputes arising during negotiations over the MOU. Likewise, in MMBA section 3505.5, which authorizes the factfinding panel to make findings of fact and recommend terms of settlement, there is no language limiting the parties' "dispute" to one arising during negotiations for an MOU or to any other type of negotiations. The Office of the General Counsel noted that if the Legislature intended to limit the types of disputes that could be submitted to factfinding, it could have explicitly done so.

The Office of the General Counsel concluded that from a policy perspective, the County's position would undermine the intent of AB 646, which was to "prevent public agencies from rushing through the motions of the meet-and-confer process to unilaterally impose the agency's goals and agenda." (Admin. Determination, p. 9.) If factfinding applies only to disputes arising during negotiations over an MOU, employers could essentially avoid factfinding by splintering negotiations over terms and conditions of employment into single, mid-term bargaining sessions.

Finally, the Office of the General Counsel noted that PERB has applied the statutory impasse procedures under EERA and the Higher Education Employer-Employee Relations Act (HEERA)[5] to single-subject and effects bargaining disputes, citing *Moreno Valley Unified School District* (1982) PERB Decision No. 206, *Redwoods Community College District* (1996)

[5] HEERA is codified at Government Code section 3560 et seq.

PERB Decision No. 1141 (*Redwoods CCD*), and *California State University* (1990) PERB Decision No. 799-H. As PERB has properly interpreted and applied the impasse procedures under EERA and HEERA to disputes arising during negotiations other than just those for an MOU, PERB's similar interpretation regarding impasse procedures under the MMBA is also proper.

The Office of the General Counsel summarily rejected the County's assertion that AB 646 violates the California Constitution. Factfinding, unlike binding arbitration for resolution of impasses, is an advisory procedure and therefore does not interfere with the County's constitutional authority to set wages. Nor does AB 646 delegate to a private party any of the County's powers. It therefore does not violate the state constitution.

COUNTY'S APPEAL

The County interposes both procedural and substantive objections to the administrative determination. As an initial matter, it claims that PERB lacks jurisdiction to consider the issue in this case–whether AB 646 applies to a single issue bargaining dispute–because the matter should be determined only through an unfair practice proceeding, rather than by appeal of an "advisory" opinion of the Office of the General Counsel. According to the County, MMBA section 3509, which grants PERB jurisdiction over enforcement of the MMBA, "explicitly provides that alleged violations of the MMBA shall be processed as unfair labor practice charges." (County's Appeal, p. 6.) Therefore, reasons the County, PERB may not bypass the unfair practice process and issue an advisory opinion "regarding whether or not a local public agency has failed to comply with what a union might choose to allege is a required impasse resolution procedure." (*Ibid.*) Depriving the County of an unfair practice hearing deprives it of due process, the argument continues.

The County asserts, "the only factfinding action that PERB is empowered to take pursuant to Section 3505.4(a) is to appoint a panel chair for a factfinding panel." PERB does not have the authority to make a legal determination on the merits of an employer's failure to comply with the factfinding requirements of AB 646 outside of the unfair practice process. (County's Appeal, p. 8.) In response to a factfinding request, PERB is limited to determining whether the request was timely, or whether the request included a statement that the parties were unable to reach a settlement, according to the County. The Board would be free to adjudicate the larger issue–whether factfinding applies to all bargaining disputes–were AFSCME to file an unfair practice charge, which would be subject to a full administrative hearing and ultimate appeal to the Board itself. (County's Appeal, p. 14.)

Next, the County asserts that PERB is bound by a recent decision in *County of Riverside v. Public Employment Relations Board,* (2013) Case No. RIC 1305661 (*County of Riverside*), issued by the superior court in Riverside County. In that case, the court agreed with the employer and found that in passing AB 646, the Legislature intended factfinding under the MMBA to be available only to address bargaining disputes over a new or successor MOU. The superior court enjoined PERB from appointing a factfinding panel in any bargaining dispute arising under the MMBA other than in MOU negotiations, and further required PERB to dismiss any pending factfinding requests involving disputes over single issue bargaining or the negotiations over the effects of a management decision.

In the County's view, the administrative determination, issued a few weeks after the superior court's decision in the *County of Riverside* case, violated the court's order, and PERB should now vacate the determination. The County also asserts that the doctrines of collateral estoppel and res judicata bar PERB from re-litigating the issues that were determined by the

superior court. Thus, PERB is precluded from "holding that the County must go to factfinding on the instant dispute." (County's Appeal, p. 12.)

In its third procedural argument, the County contends that PERB's neutrality has been compromised because the Office of the General Counsel issued the administrative determination while concurrently representing PERB as a defendant in the *County of Riverside* superior court litigation involving the same issue that is the subject of this appeal. According to the County, "basic notions of due process and appearances of neutrality preclude the same person or office from both advocating a position with a neutral decision-making Board and at the same time turning around and serving as the Board's legal advisor on the identical issue." (County's Appeal, p. 13.)

Regarding the merits of this controversy, the County asserts that the legislative history and statutory interpretation of AB 646 "lead to the conclusion that AB 646 factfinding procedures apply only to negotiations for a new MOU." (County's Appeal, p. 14.) Because the factfinding provisions of MMBA sections 3505.4 through 3505.7 immediately follow the MMBA sections that relate to MOU negotiations, factfinding therefore can only apply to MOU negotiations, according to the County.

In the County's view, MMBA section 3505.7 provides further proof that factfinding applies only to MOU negotiations. That section allows the public agency to implement its LBFO after completing impasse resolution procedures, but it may not implement an MOU. MMBA section 3505.7 also provides that after the imposition of the LBFO, the employee organization retains its right to meet and confer on all matters within the scope of representation annually before adoption of the agency's budget. According to the County, this annual right to negotiate applies only in the context of successor MOUs.

Further argued by the County, a factfinding panel must take into consideration the eight factors enumerated in MMBA section 3505.4(d), which refer to components of an MOU and only make sense "in the context of collective bargaining." (County's Appeal, p. 18.) For example, the factfinding panel is directed to consider and weigh the financial ability of the public agency; comparability of wage, hour and other conditions of employment between the relevant bargaining unit employees and other similarly situated employees of comparable public agencies; cost-of-living information; and overall employee compensation. According to the County, these factors "are only relevant when evaluating the interplay of economic and other proposals made in negotiations for a comprehensive successor collective bargaining agreement." (County's Appeal, p. 18.)

Next, the County argues that AB 646's exemption from factfinding for those jurisdictions that already use binding arbitration to resolve bargaining impasses (MMBA, § 3505.5(e)), provides further support for its position. According to the County, this exemption exists because binding arbitration provides a procedure for resolving MOU disputes. AB 646's goal of providing a "mandatory and uniform impasse procedure" would not be served if factfinding procedures were to apply to issues other than MOU negotiations, according to the County.

The County also objects to the administrative determination's reliance on PERB decisions under EERA, noting that there are significant differences between EERA and the MMBA. In particular, the County seeks to distinguish *Redwoods CCD, supra,* PERB Decision No. 1141, a case arising under EERA, because, according to the County, the legislative intent of AB 646 was to enhance the effectiveness of the collective bargaining process, whereas the purpose of EERA's factfinding provisions was to avoid strikes.

Finally, the County reiterates its claim that AB 646 unconstitutionally interferes with the County's right to manage its finances and determine compensation for its employees.

DISCUSSION

We first address the County's claim that the Board itself is without jurisdiction to consider the merits of this case, and then address other procedural objections raised by the County. We then turn to the merits of the case, first considering the purpose of factfinding in other statutes administered by PERB that include factfinding, and then explaining the differences between those statutes and the MMBA. Ultimately, this case requires us to discern the Legislature's intent in passing AB 646, thereby introducing factfinding into the MMBA as a procedure for resolving bargaining impasses. Did the Legislature intend to simply import and replicate the factfinding process and procedures from EERA and HEERA into the MMBA, or did it intend, as the County urges, to provide a much more limited procedure that applies only when the parties are at impasse in their negotiations over a new or successor comprehensive agreement? As we explain further, we conclude that in passing AB 646, the Legislature intended to import to the MMBA the factfinding processes of EERA and HEERA. Factfinding is a final step in the bargaining process. It is intended to facilitate agreement between the parties on any and all negotiable terms and conditions of employment, and is therefore not to be artificially restricted only to disputes arising during negotiations over a comprehensive MOU for a set duration.

I. PROCEDURAL ISSUES

A. Jurisdiction

After having urged the Office of the General Counsel to consider its arguments on the merits, i.e., that the factfinding procedures of the MMBA do not apply to single-issue bargaining disputes or any other disputes outside negotiations for a new or successor MOU, the

County now claims that the Board itself does not have authority to consider these arguments. We disagree. Both statutory and regulatory authority describe PERB's role in administering the provisions of AB 646.

Factfinding under the MMBA is triggered when a recognized employee organization files a request that the parties' "differences" be submitted to a factfinding panel. (MMBA, § 3505.4(a).) The request must be filed with the appropriate regional office of PERB, accompanied by proof of service and a statement that the parties have been unable to effect a settlement, and the request must be filed within certain time frames described in PERB Regulation 32802.[6]

Within five working days from when the request is filed, a PERB Board agent must notify the parties whether the request satisfies the requirements described above. If the request is not timely, no further action shall be taken by PERB. However, "if the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days." (PERB Reg. 32802(c).) Implicitly contained within the authority to determine whether the request is sufficient is the jurisdiction to assess whether the request is properly before the Board, i.e., whether the conditions precedent to a valid request for factfinding exist. Just as courts have jurisdiction to determine the scope of their jurisdiction, PERB necessarily has jurisdiction to determine whether the provisions of MMBA section 3505.4 apply to a particular factfinding request. (*SN Sands Corp. v. City and County of San Francisco* (2008) 167 Cal.App.4th 185, 192; *United States v. Superior Court* (1941) 19 Cal.2d 189, 195.)

[6] PERB is authorized to adopt regulations and to issue decisions implementing and interpreting the MMBA. (MMBA, § 3509(a); EERA, § 3541.3.)

After consideration of the County's and AFSCME's arguments on the merits, the Office of the General Counsel concluded that the factfinding procedures set forth in MMBA section 3505.4 et seq., are applicable to this dispute, and that the other requirements of PERB Regulation 32802 have been met.

An appeal may be taken (and therefore considered by the Board itself) from an administrative decision made by a Board agent (PERB Regs. 32350 and 32360.) The administrative determination issued by the Office of the General Counsel in this case is an administrative decision within the meaning of PERB Regulation 32350(b), which requires that it contain a statement of the issues, fact, law and rationale used in reaching the determination. This administrative determination is not a refusal to issue a complaint, a dismissal of an unfair practice charge, or a proposed decision following a formal hearing, all of which are excluded from the definition of "administrative decision" under PERB Regulation 32350(a). The County's appeal of the administrative determination is therefore properly before the Board itself pursuant to PERB Regulation 32360.[7]

The County is incorrect in its claim that PERB may only consider the issue in this case in the context of an unfair practice determination. It states: "The question of whether the County has violated any MMBA factfinding requirements should be determined through the unfair practice process, and PERB's Board only has jurisdiction to consider this issue via an appeal of an Administrative Law Judge's (ALJ) decision on an unfair labor practice concerning this issue." (County's Appeal, p. 5.) The flaw in this argument is that the County has not been accused of violating any MMBA factfinding requirements. The Office of the General Counsel

[7] PERB Regulation 32380 lists administrative decisions that are not appealable. Prior to October 1, 2013, the list included determinations regarding factfinding requests made pursuant to PERB Regulation 32802.

did not determine that the County had violated any part of the MMBA. It simply ordered the parties to select its panel member, and from that order, the County appeals.[8]

The County also argues that the administrative determination is an "advisory legal decision" because it "bypasses" the unfair practice process. As explained above, the administrative determination is not an "advisory" opinion. It resolved a controversy that was squarely placed before the Office of the General Counsel when the County claimed that factfinding did not apply to the bargaining dispute over which AFSCME requested factfinding.

B. Effect of Superior Court Decision in the *County of Riverside* Case

PERB appealed the court's decision in *County of Riverside*, which has the effect of staying the effectiveness of the superior court's decision until the case is finally determined by the appellate courts.[9] (Code Civil Proc., § 916; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189-190; *Private Investors v. Homestake Mining Co.* (1936) 11 Cal.App.2d 488 [writ of mandate stayed on appeal].) Thus, PERB is presently not bound by the superior court's order.

The County also asserts that the doctrines of res judicata and collateral estoppel bar PERB "through its General Counsel's Office now or in subsequent litigation from re-litigating issues that were already determined in prior court actions." (County Appeal, pp. 11-12.) How this applies to the Board's administrative determination of the County's appeal (as opposed to a re-litigation of a previously determined claim) we need not unravel, for it is well-settled in

[8] It is entirely possible that the same legal question we are presented with in this case could come before the Board as an unfair practice case if an employer were to unilaterally implements its LBFO without having participated in factfinding when it was allegedly obligated to do so. However, unfair practice litigation is not the only manner in which PERB is authorized to administer the MMBA. (MMBA, § 3509; EERA, § 3541.3.)

[9] The County's petition to the court of appeal for the fourth district for a writ of supersede as seeking to lift the automatic stay of the superior court's order was summarily denied on January 14, 2014.

California that neither res judicata nor collateral estoppel apply until and unless the judgment is final. (*Boblitt v. Boblitt* (2010) 190 Cal.App.4th 603, 606; 7 Witkin Calif. Procedure, 5th ed. (2008) Judgment, § 364.) Because an appeal of the superior court's decision is pending, there is no final decision in the *County of Riverside* litigation yet.

C. Conflict of Interest Between the Board Itself and the Office of the General Counsel

The County claims that the Board itself cannot be neutral in this controversy because the Office of the General Counsel took a position in the *County of Riverside* litigation that is adverse to the County's position in this case and issued the administrative determination at issue here, which coincides with the Office of the General Counsel's defense in the *County of Riverside* litigation. This argument ignores the statutory role of the Office of the General Counsel and misapprehends how the Office of the General Counsel and the Board itself function.

MMBA section 3509(a), which moved enforcement of the MMBA from the courts to PERB, provides that "[t]he powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter." Included in the powers and duties enumerated in EERA section 3541.3 is the power to adopt rules and regulations to carry out the provisions and effectuate the purposes and policies of the MMBA and other statutes PERB administers, and to take "any other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of" the statutes it administers. (EERA, § 3541.3(g) and (n).) Like most public agencies, PERB operates through its employees who are delegated the authority to carry out the statutory functions of the agency.[10] (EERA, § 3543.1(k).)

[10] PERB regulations make the distinction between "the Board itself," meaning the appointed members and "the Board," which means either the appointed Board or any Board agent. (PERB Regs. 32020 and 32030.)

The General Counsel, appointed pursuant to EERA section 3541(f), has broad responsibility to "assist the board in the performance of its functions." In addition, the General Counsel is specifically authorized to represent PERB in "any litigation or other matter pending in a court of law to which the board is a party or in which it is otherwise interested." (EERA, § 3541(g).) When PERB is sued over an administrative decision made in the course of administering MMBA section 3505.4, it is completely within PERB's authority and duty to defend itself in that litigation, through its General Counsel.

The Office of the General Counsel has other duties in addition to representing the agency in litigation. The General Counsel supervises PERB's regional attorneys who investigate and process unfair practice charges to determine whether they should be dismissed or whether PERB should issue a complaint based on the charge. Regional attorneys also investigate and process petitions for representation, decertification, and unit modifications, and a variety of other issues concerning the identity of the exclusive representative. PERB Regulation 32793 authorizes PERB to determine if parties who request the appointment of a mediator pursuant to EERA or HEERA are truly at impasse. These determinations are made by the Board's agents, the regional attorneys in the Office of the General Counsel. And PERB Regulation 32802, which sets forth the procedure for initiating the factfinding process under the MMBA, requires the factfinding request to be filed with the appropriate regional office, where a member of the Office of the General Counsel staff will determine if the request satisfies the requirements of the regulation.

The Board itself serves mainly as an appellate body, deciding appeals taken from proposed decisions after a formal hearing before an administrative law judge (ALJ), dismissals of unfair practice charges, administrative determinations, as in this case, and rulings on motions and interlocutory orders. The County is incorrect in its assertion that the General

Counsel advises PERB in this endeavor. It is the legal advisor, appointed by the Governor for each Member of the Board, that provides legal guidance to Board Members regarding cases under the Board's consideration, not the General Counsel. (EERA, § 3541(h).) Thus, the web of conflict between the Office of the General Counsel and the Board itself presumed by the County simply does not exist.[11]

Because the Office of the General Counsel has no role in advising the Board itself in its appellate function regarding cases pending before the Board, there is nothing improper about the Office of the General Counsel representing PERB in the Riverside County litigation seeking to halt PERB's administration of MMBA section 3505.4. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731.) See also, *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 10 (*San Diego*), where the state Supreme Court rejected a similar argument, i.e., that PERB could not direct its general counsel to seek injunctive relief against an unfair practice without compromising the Board's neutrality in the subsequent consideration of the merits of the unfair practice case. The Court noted in

[11] The fallacy of the County's argument is further underscored by the role of the Office of the General Counsel in unfair practice charge processing. Pursuant to PERB Regulation 32620, a regional attorney in the Office of the General Counsel investigates unfair practice charges and either issues a complaint or dismisses the charge if it fails to state a prima facie case. Dismissals are appealable to the Board itself. (PERB Reg. 32635.) If the County's claim regarding a conflict of interest were correct, the Board would not be able to exercise its appellate function to review dismissals of unfair practice charges. Yet, EERA section 3541.5 explicitly vests in the Board the duty to devise and promulgate procedures for deciding unfair practice cases. Since the inception of the agency, PERB has delegated to the Office of the General Counsel the authority to investigate unfair practice charges initially, subject to the Board's appellate review.

We also note that the County's conflict of interest argument is belied by its invitation and assertion that this matter only be adjudicated as an unfair practice case. The Board itself would be in the exact position it is now in deciding the unfair practice appeal, which originates when the Office of the General Counsel dismisses a charge, or when, after a complaint issues, an ALJ hears the case and issues a proposed decision.

San Diego, that EERA section 3541.3(i) gives PERB prosecutorial power, e.g., to investigate unfair practice charges and alleged violations of EERA and to take any action as the Board deems necessary to effectuate the policies of EERA. The fact that EERA section 3541(f) provides for a General Counsel who is to "assist the board in the performance of its functions under this chapter" indicated to the Court that the Board could delegate its prosecutorial functions to its General Counsel. While we are not here concerned with an unfair practice, the principle remains the same. There is nothing improper about the General Counsel defending PERB in litigation, even if the same issues are subsequently presented to the Board itself by appeals of administrative determinations. Indeed, the statute prescribes this. EERA section 3543.1(g) specifically authorizes PERB's General Counsel to represent the Board in "any litigation or other matter pending in a court of law to which the board is a party . . . ."

II. AB 646: MMBA AND THE ROLE OF FACTFINDING IN CALIFORNIA LABOR RELATIONS

A. Background

The MMBA, passed in 1968, was the first true collective bargaining law passed in California for public employees.[12] Its purpose, articulated in MMBA section 3500, is to "promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment." An additional purpose is to improve employer-employee relations within various public agencies by "providing a uniform basis for recognizing the right of employees to join organizations of their own choice and be represented by those organizations

[12] Earlier statutes such as the George M. Brown Act (Stats. 1961, ch. 1964, § 1) and the Winton Act (Stats. 1965, ch. 2041, § 2) did not provide for collective bargaining as commonly conceived because they did not require the employer to recognize a single exclusive representative of employees, and did not place on either the employer or employees a duty to negotiate in good faith. (See *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 176.) Nor did either of these statues provide for written, binding agreements after the conclusion of meeting and conferring.

in their employment relationships with public agencies." Prior to the passage of AB 646 in 2011, the MMBA had no provision for factfinding, and mediation was either voluntary or dictated by local rule or regulation.

Although the statutes enacted after the MMBA (notably EERA and HEERA) prescribed more elaborate procedures for resolving bargaining impasses, including factfinding, the MMBA recognized the utility of impasse resolution procedures even before the passage of AB 646. MMBA section 3505, defining "meet and confer in good faith" states, in relevant part:

> The process [of meeting and conferring in good faith] should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

1. Factfinding Under EERA and HEERA

In 1975, the Legislature passed Senate Bill No. 160, (Stats. 1975, ch. 961) (SB 160), creating the Educational Employment Relations Board (later re-named the Public Employment Relations Board) and enacting EERA. The purposes of EERA are very similar to those of the MMBA: "to promote the improvement of personnel management and employer-employee relations within the public school systems . . . by providing a uniform basis for recognizing the right of . . . employees to join organizations of their own choice, to be represented by the organizations in their . . . employment relationships with public school employers." (EERA, § 3540.)[13]

[13] HEERA, the other statute under PERB's jurisdiction that contains a factfinding process, states its purpose slightly differently, exhibiting deference to academic freedom, the constitutional status of the Regents of the University of California, etc. HEERA section 3560(a) declares the state's fundamental interest in the development of harmonious and cooperative labor relations between higher education employers and their employees. Subsection (e) of 3560 further states that it is the intent of HEERA to accomplish its purpose by providing a uniform basis for recognizing the

From its initial draft and throughout amendments made to the bill, SB 160 contained the impasse procedures provisions that now appear in EERA section 3548.[14] Under those provisions, either a public school employer or the exclusive bargaining representative may declare that "an impasse has been reached . . . in negotiations over matters within the scope of representation and may request the board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable." The Board appoints a mediator if it determines that an impasse exists. (EERA, § 3548.)

If the mediator is unable to effect a settlement of the dispute, and declares that factfinding is "appropriate to the resolution of the impasse," either party may request that their differences be submitted to a factfinding panel. (EERA, § 3548.1.) Each party designates its appointee to the panel and PERB selects a chairperson.

The factfinding panel then conducts an investigation and may hold a hearing, or "take any other steps as it may deem appropriate." EERA section 3548.2(b) directs the factfinders to "consider, weigh, and be guided by all the following criteria:"

> (1) State and federal laws that are applicable to the employer.
>
> (2) Stipulations of the parties.
>
> (3) The interests and welfare of the public and the financial ability of the public school employer.
>
> (4) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding

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right of employees to designate representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select an exclusive representative for the purpose of meeting and conferring.

[14] In fact, earlier unsuccessful bills to enact collective bargaining for all public sector employees contained similar provisions for factfinding after mediation. See SB 400 (Moscone), which was vetoed in 1974.

proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable communities.

(5) The consumer price index for goods and services, commonly known as the cost of living.

(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.

(7) Any other facts, not confined to those specified in paragraphs (1) through (6), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

The purpose of these impasse resolution procedures was to provide an orderly method for assisting the parties in reaching agreement over bargaining disputes. Factfinding was seen as an alternative to binding arbitration for impasse resolution, which is not provided for in EERA. In addition, "The impasse procedures almost certainly were included in EERA for the purpose of heading off strikes. [Citation omitted.] Since they assume deferment of a strike at least until their completion, strikes before then can properly be found to be a refusal to participate in the impasse procedures in good faith and thus an unfair practice under section 3543.6, subdivision (d)." (*San Diego, supra,* 24 Cal.3d 1, 8-9.)[15] In short, impasse resolution procedures under EERA were conceived as an instrument for bringing labor peace by assisting parties in reaching agreement in negotiations.

[15] PERB cases decided after *San Diego, supra,* 24 Cal.3d 1 established that a strike occurring before the completion of impasse procedures, including factfinding, creates a rebuttable presumption that the striking employee organization violates its duty to bargain in good faith or to participate in the impasse resolution procedures in good faith. (*Fresno Unified School District* (1982) PERB Decision No. 208; *Sacramento City Unified School District* (1987) PERB Order No. IR-49.)

HEERA contains impasse procedures very similar to those in EERA. (HEERA, § 3590 et seq.) Either party may declare "that an impasse has been reached between the parties in negotiations over matters within the scope of representation." (HEERA, § 3590.) If the Board determines that an impasse exists, it appoints a mediator who shall attempt "to persuade the parties to resolve their differences and effect a mutually acceptable memorandum of understanding." (HEERA, § 3590.) If the mediator is unable to effect settlement "of the controversy" and declares that factfinding is appropriate, either party may request that their differences be submitted to a three-person factfinding panel, consisting of one member appointed by each party and the chairperson appointed by the Board.

The factfinding panel meets with the parties and considers their respective positions and makes additional inquiries and investigations as it deems appropriate. If the dispute is not settled within 30 days, the factfinding panel makes findings of fact and recommends "terms of settlement," which are advisory. Unlike under EERA and the MMBA, the HEERA factfinding panel is not instructed to consider any particular factors in making its recommendations for settlement.

2. The Scope of Impasse Resolution Procedures Under EERA and HEERA

EERA section 3548 provides that either party may invoke impasse resolution procedures by declaring that "an impasse has been reached . . . in negotiations over the matters within the scope of representation." HEERA contains the same language at HEERA section 3590. Under both statutes, after PERB determines that an impasse exists, a mediator is appointed to assist the parties in "resolving the controversy," and to attempt to "effect a

mutually acceptable agreement."[16] If the mediator is unsuccessful in settling "the controversy," the parties' "differences" are submitted to a factfinding panel. (EERA, § 3548.1; HEERA, § 3591.) If the "dispute" is not settled through the factfinding investigation, the panel shall recommend "terms of settlement." (EERA, § 3548.3; HEERA, § 3593(a).)

Thus, the plain language of EERA and HEERA extends factfinding to negotiations over all matters within the scope of representation. By using such terms as "differences," "controversy" and "dispute," the Legislature avoided limiting EERA's and HEERA's impasse resolution procedures only to negotiations over new or successor collective bargaining agreements. On the contrary, the language used in other parts of EERA and HEERA points in the opposite direction. "Impasse" "means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating" where future meetings would be futile. (EERA, § 3540.1(f), emphasis added.)[17] "Impasse" is not confined to intractable disputes over only a particular type of agreement, such as a single CBA or successor MOU.

EERA also defines "Meeting and negotiating" expansively. It means "meeting, conferring, negotiating and discussing . . . in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached . . . ." (EERA, § 3540.1(h).)[18] Agreement on

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[16] HEERA is phrased slightly differently. The mediator is to "persuade the parties to resolve their differences and effect a mutually acceptable memorandum of understanding." (HEERA, § 3590.)

[17] HEERA defines "Impasse" as "a point in meeting and conferring at which [the parties'] differences in position are such that further meetings would be futile." (HEERA, § 3562(j).)

[18] HEERA's definition of "Meet and confer" more closely replicates that of the MMBA. Under HEERA the parties have a mutual obligation "to meet at reasonable times and to confer in good faith with respect to matters within the scope of

matters within the scope of representation include not only complete CBAs, but settlements of disputes over a myriad of terms and conditions of employment, because the duty to bargain is not limited only to negotiations that result in written CBAs.

It is beyond dispute that the duty to bargain is an ongoing obligation on the part of both parties that does not necessarily end once a CBA is finalized. (*National Labor Relations Bd. v. Jacobs Mfg. Co.* (2d. Cir. 1952) 196 F. 2d 680 [duty to bargain continues during the term of a CBA, unless the duty is discharged or waived].) PERB has followed this rule. (*Placentia Unified School District* (1986) PERB Decision No. 595; *State of California (Department of Forestry and Fire Protection)* (1993) PERB Decision No. 999-S.)

The duty to bargain in good faith applies to any matter within the scope of representation and is not confined to negotiations that result in a comprehensive MOU for a certain duration. Thus, an employer must refrain from making unilateral changes in negotiable terms and conditions of employment unless and until it has bargained in good faith with the exclusive representative. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51; *San Mateo County Community College District* (1979) PERB Decision No. 94.) This prohibition against unilateral changes extends through the completion of any impasse procedures. (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 32-33 (*Modesto*); *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900; *Moreno Valley Unified School District* (1982) PERB Decision No. 206 (*Moreno Valley*).)

The duty to bargain also includes the duty to negotiate over the implementation and foreseeable effects of managerial decisions not otherwise subject to the process of collective bargaining, such as layoffs, staffing levels, employee background checks, additional

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representation and to endeavor to reach agreement on matters within the scope of representation. This process shall include adequate time for the resolution of impasses. If agreement is reached . . . [the parties] shall jointly prepare a written memorandum of understanding . . . ." (HEERA, § 3562(m).)

educational programs, etc. (*International Assn. of Fire Fighters, Local 188 v. Public Employment Relations Bd. (City of Richmond)* (2011) 51 Cal.4th 259, 277 (*International Assn. of Fire Fighters*); *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223; *County of Santa Clara* (2013) PERB Decision No. 2321-M; *Sutter County In-Home Supportive Services Public Authority* (2007) PERB Decision No. 1900-M; *Trustees of the California State University* (2012) PERB Decision No. 2287-H; *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623 (*Claremont*).) Likewise, parties have an obligation to bargain over particular subjects contained in a written agreement when they have mutually agreed to re-open negotiations on those subjects during the term of that agreement, commonly concerning wages and benefits, and over any mandatory subject not covered in the CBA or not waived by a zipper clause or management rights clause.

Under EERA, the end product of such negotiations is a "written document incorporating any agreements reached," if either party requests a written document. (EERA, § 3540.1(h).) HEERA requires the parties to "jointly prepare a written memorandum of understanding" after reaching agreement on matters within the scope of representation. (HEERA, § 3562(m).) Under the MMBA, an MOU is the end product of meeting and conferring on matters within the scope of representation if a tentative agreement is adopted by the governing body of the public agency. (MMBA, § 3505.1.) In other words, an "MOU" signifies a written agreement on any matter within the scope of representation. It can address a single subject, the effects of a decision within the managerial prerogative, mid-term negotiations, or side letters of agreement, etc. MOUs are the manifestation of the parties' agreement on any negotiable subject. Contrary to the County's implication, the term "MOU" is not limited to a document that results from negotiations for a comprehensive agreement of a set duration. All negotiations are negotiations "for an MOU."

As shown, the duty to bargain in good faith extends well beyond the duty to bargain for a comprehensive MOU for a set duration, and that duty includes good faith participation in the impasse resolution procedures. Given that there is no language in EERA or HEERA that limits impasse resolution procedures only to negotiations for a comprehensive contract, it follows that factfinding, at least under EERA and HEERA, applies to all bargaining disputes concerning matters within the scope of representation.

PERB has held as much throughout its administration of EERA section 3548 et seq., and under HEERA section 3590. In *Moreno Valley, supra,* PERB Decision No. 206, pp. 4-5, the Board explained:

> The assumption of unilateral control over the employment relationship prior to exhaustion of the impasse procedures frustrates the EERA's purpose of achieving mutual agreement in exactly the same ways that such conduct frustrates that purpose when it occurs at an earlier point. [Citation omitted.] The impasse procedures of EERA contemplate a continuation of the bilateral negotiations process . . . . For the reasons set forth in San Mateo Community College District [(1979) PERB Decision No. 94], we find that following a declaration of impasse, a unilateral change regarding a subject within the scope of negotiations prior to exhaustion of the impasse procedure is, absent a valid affirmative defense, per se an unfair practice.

The Board's decision in *Moreno Valley, supra,* PERB Decision No. 206 was affirmed by the court of appeal in *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191 (*Moreno v. PERB*). The court explained: "Since 'impasse' under EERA's statutory scheme denotes a continuation of the labor management dispute resolution process, . . . we think the Board reasonably determined that the considerations warranting per se treatment of unilateral changes at the negotiation stage also warranted per se treatment of such changes prior to the exhaustion of the statutory impasse procedure." (*Moreno v. PERB*, p. 200.) The court also affirmed PERB's holding that the District was

obligated to exhaust impasse resolution procedures prior to eliminating certain positions, a decision over which the employer had to negotiate only the effects thereof. Thus, factfinding under EERA applies to a wide variety of bargaining disputes, including issues presented by effects bargaining.

Redwoods CCD, supra, PERB Decision No. 1141, also evidences PERB's consistent interpretation that EERA's factfinding procedures apply without limitation to bargaining disputes, whether arising in the context of negotiations over a comprehensive agreement or otherwise. In that case, the parties' CBA regarding work hours permitted the employer to seek voluntary adjustments of work schedules. If there was no voluntary agreement on such adjustments, the CBA provided for negotiations between the employer and employee organization. If negotiations proved futile, the CBA provided for private mediation, and if that was not successful, "the dispute shall not be submitted to a fact-finding panel under the provisions of the Educational Employment Relations Act." (*Redwoods CCD,* ALJ Proposed Dec., p. 6). The parties negotiated over the employer's proposal to rotate security officers' shifts but did not reach agreement. Private mediation was also unsuccessful, and the employer implemented its proposed change. The employee organization filed an unfair practice charge alleging that the employer had failed to participate in the impasse procedure in good faith in violation of EERA section 3543.5(e). The issue before PERB was whether the parties could legally waive the impasse resolution procedure established by EERA. The Board held that factfinding may not be waived because it was intended as a public benefit. Implicit in this holding is that factfinding was found to apply to a single-subject dispute—shift rotation.

The County objects to the Office of the General Counsel's reliance on *Redwoods CCD, supra,* PERB Decision No. 1141, to support its administrative determination, but we find the case relevant to demonstrate how PERB interprets the factfinding process under EERA.

A review of factfinding reports issued by panels appointed to resolve EERA and HEERA bargaining disputes reveals that PERB has consistently appointed mediators and factfinding panels pursuant to EERA section 3548 and HEERA section 3590 to assist the parties in resolving a variety of disputes, not merely those involving the negotiations of new or successor collective bargaining agreements. These include the effects of layoffs (*Natomas Unified School District* (2012) FF-663; *Stockton Unified School District* (2012) FF-661), and single issue disputes such as health and welfare benefits (*Santa Monica Community College District* (2011) FF-653; *Wasco Union High School District* (2011) FF-644), work-year calendar (*San Miguel Joint Union School District* (2011) FF-650), application of a salary formula (*California State University* (2010) FF-634-H), binding arbitration (*Chico Unified School District* (2008) FF-623), and fee waiver (*California State University* (2007) FF-613). Factfinding panels have also been appointed to resolve bargaining disputes arising in re-opener negotiations (*Palmdale School District* (2013) FF-691; *Ramona Unified School District* (2013) FF-688; *Alameda Unified School District* (2012) FF-665; *Red Bluff Union Elementary School District* (2011) FF-658; *California State University* (2011) FF-654; *Lodi Unified School District* (2010) FF-645; *San Carlos School District* (2010) FF-638; *Hayward Unified School District* (2007) FF-612; *University of California* (2008) FF-624).[19]

[19] The reports of factfinding panels appointed pursuant to EERA and HEERA are available at PERB's website, www.perb.ca.gov. The reports are part of PERB's official files, of which we take administrative notice. (*Antelope Valley Community College District* (1979) PERB Decision No. 97, p. 23; *Palo Verde Unified School District* (1988) PERB Decision No. 689, p. 4.) The vast majority of factfinding reports concern impasses reached by parties who were negotiating for successor agreements.

B. MMBA Factfinding

1. The Plain Language of AB 646

We turn now to the language of MMBA section 3505.4 et seq., to consider the differences between that statute and EERA and HEERA to determine whether those differences mandate a different interpretation of the scope of MMBA factfinding, bearing in mind that our ultimate task is to discern the Legislature's intent in passing AB 646.

AB 646 added to the MMBA sections 3505.4 through 3505.7, which permit an employee organization to request that the parties' "differences" over bargaining be submitted to a factfinding panel after mediation, if utilized, was unsuccessful. The factfinding panel is empowered to hold hearings and investigations and ultimately make findings and recommendations to resolve the bargaining dispute. The panel's recommendations are not binding on either party, and the public agency is free to implement its LBFO after holding a public hearing on the impasse.

There are salient differences between the impasse resolution procedures prescribed by EERA and HEERA on the one hand, and those contained in the MMBA. Under the latter statute, mediation is either subject to local rule or regulation, or completely voluntary with the parties. (MMBA, § 3505.2.) PERB has no role in appointing a mediator under the MMBA and no role in determining at this stage whether an impasse exists. Likewise, a mediator, if utilized by the parties under the MMBA, has no role in determining that factfinding is appropriate to resolving the dispute. Instead, factfinding may be invoked under the MMBA only by the employee organization within certain timeframes after the completion of mediation, if it was utilized, or after a written declaration of impasse by either party. (MMBA, § 3505.4.) As under the EERA and HEERA, the Board selects the chairperson of the MMBA

factfinding panel, or the parties may mutually agree upon a chair in lieu of the person selected by the Board. (MMBA, § 3505.4.)

The MMBA borrows from EERA section 3548.2(b) in directing the factfinding panel to "consider, weigh and be guided by all the following criteria." (MMBA, § 3505.4(d).) These criteria, set forth *infra* at pages 42-43, are identical, except that an MMBA factfinding panel must consider local rules, regulations, and ordinances in addition to state and federal laws that are applicable to the employer.

The factfinding panel recommendation for terms of settlement under all three statutes is advisory only, and is to be submitted to the parties privately before the public employer is required to make it public. (MMBA, § 3505.5(a); EERA, § 3548.3(a); HEERA, § 3593(a).)

The cost of the panel chairperson is equally divided between the parties under the MMBA. (MMBA, § 3505.5(b) and (c).) EERA and HEERA require the Board to pay for the chairperson selected by the Board. (EERA, § 3548.3(b); HEERA, § 3593(b).)

The MMBA recognizes that some charter cities, charter counties, or a charter city and county may provide in their charter a provision for binding arbitration if an impasse has been reached between the parties. The provisions of MMBA section 3505.4 do not apply to such charter entities "with regard to its negotiations with a bargaining unit to which the impasse procedure applies." (MMBA, § 3505.5(e).) There is no similar provision for binding arbitration in either EERA or HEERA to resolve bargaining impasses.

MMBA section 3505.7 permits the public agency subject to the factfinding procedures to implement its LBFO no earlier than ten days after the factfinding panel's written findings of fact and recommended terms of settlement have been submitted to the parties and after the public agency has held a public hearing regarding the impasse. This codifies PERB decisions under EERA and HEERA holding that an employer may not implement its LBFO until after

impasse resolution procedures have been exhausted. (*Rowland Unified School District* (1994) PERB Decision No. 1053; *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S.)

MMBA section 3505.7 additionally clarifies the status of an imposed LBFO. The public agency may implement its LBFO after the exhaustion of impasse resolution procedures, but it may not implement an MOU. Further, "[t]he unilateral implementation of a public agency's last, best and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law." This language is not replicated in EERA or HEERA.

The County points to three differences between EERA and the MMBA that it claims justify a narrow interpretation of AB 646. First, EERA applies to schools and colleges, and the MMBA applies to municipalities and local governmental subdivisions of the state. Second, the MMBA permits local employers to adopt their own local rules governing employment relations, including resolution of impasses. And third, EERA has a "complicated" scope of bargaining, which specifically enumerates certain terms and conditions of employment and identifies circumstances in which the Education Code applies if the parties fail to reach agreement. The scope of bargaining under the MMBA, in contrast, requires bargaining on wages, hours and terms and conditions of employment. (County Appeal, p. 20-21.) While the County identifies these differences between the statutory schemes, it fails to explain why they require a radically different interpretation of the factfinding provisions contained in the MMBA. Nor do we believe the differences we identified above require, or even suggest, that MMBA factfinding applies only to comprehensive MOU negotiations.

At the time AB 646 was passed, the law regarding impasse resolution was well-established. The Legislature is presumed to have known that PERB applied existing impasse resolution procedures to single-issue bargaining disputes, mid-term contract negotiations disputes, and effects bargaining disputes. (*Moore v. California State Board of Accountancy* (1992) 2 Cal.4th 999, 1018; *Cooper v. Unemployment Ins. Appeals Bd.* (1981) 118 Cal.App.3d 166, 170.) Likewise, the Legislature is presumed to have knowledge of judicial decisions describing the scope of the duty to meet and confer in good faith, namely that the duty covers more than simply the duty to meet and confer over the terms of an MOU. (See *Claremont, supra,* 39 Cal.4th 623 [the duty to bargain attaches to proposed changes in wages, hours and other terms and conditions of employment]; *International Assn. of Fire Fighters, supra,* 51 Cal.4th 259 [duty to meet and confer on the effect of management decisions which are themselves within the prerogative of management to make].) (*Peters v. Superior Court* (2000) 79 Cal.App.4th 845, 850 (*Peters*).)

It is onto this statutory and regulatory landscape that the Legislature added the requirements of AB 646. The question before us then is whether, in passing AB 646, the Legislature intended to eschew PERB's earlier construction and application of impasse resolution procedures under EERA and HEERA and to create a much-constrained factfinding procedure applicable only to MOU negotiations.

In interpreting statutes, we are guided by the rules of statutory construction which seek to ascertain the intent of the Legislature so as to effectuate the purpose of the law by giving a reasonable and common sense interpretation consistent with the apparent purpose of the statute. Significance should be given, if possible, to every word, phrase and sentence of the statute, and effort must be made to harmonize the various parts of the enactment in the context of the statutory framework as a whole. We must take into account the harms to be remedied

and the history of legislation on the same subject, public policy and consistent administrative construction. (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) As noted in *Medical Board v. Superior Court* (2001) 88 Cal.App.4th 1001, 1016: "One 'elementary rule' of statutory construction is that statutes in pari materia—that is, statutes relating to the same subject matter—should be construed together." With these principles in mind, we turn to the task of ascertaining the Legislature's intent in passing AB 646.

Under all three statutes discussed here, the purpose of impasse resolution, whether mandatory or voluntary, is to bring resolution to bargaining disputes with the assistance of a neutral third party to mediate, persuade, or suggest terms of settlement. Impasse resolution procedures represent a legislative policy choice that favors negotiations above unilateral action by either party and seeks to provide a structured "cooling off" period. During this period, all avenues to a peaceful settlement of bargaining disputes can be explored as each party presents the factfinding panel with information, and the panel in turn makes findings of fact and suggests terms to settle the dispute.

The MMBA replicates EERA and HEERA in its description of the matters to which factfinding applies as "differences" and "disputes." (MMBA, §§ 3505.4(a) and 3505.6(a).)[20] No statute by its plain terms limits impasse resolution procedures to negotiations for collective bargaining agreements or comprehensive MOUs for a set duration. Yet the Legislature could have easily inserted such a limitation if that is what it intended. We find that the plain meaning of AB 646 is unambiguous. Therefore there is no need to resort to the legislative

[20] The MMBA defines "Mediation," the precursor to factfinding, as an effort by a third party "to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment." (MMBA, § 3501(e).)

history of AB 646 to discern the Legislature's intent. (*Peters, supra,* 79 Cal.App.4th 845; *Diamond Mutlimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047.)

2. Legislative History of AB 646

Even if we were to consider the legislative history of AB 646, it supports our construction of the statutory scheme. The County correctly notes that prior to the passage AB 646, local agencies had discretion to determine whether to adopt any impasse procedures or none at all. It is undeniable that one of the purposes of AB 646 was to provide for a uniform procedure for impasse resolution. A review of legislative committee reports that accompanied AB 646 through both houses of the Legislature shows that lawmakers believed that creating impasse procedures was likely to increase the effectiveness of the collective bargaining process by assuring that all avenues to agreement are fully explored before bargaining is declared unsuccessful.

Throughout AB 646's journey through the Assembly, committee reports replicate a quotation from its author, Assemblywoman Toni Atkins (Assemblywoman Atkins), on which the County relies heavily: "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed." (Assem. Com. on Public Employees, Retirement and Social Security, Rep. on AB 646 [2010-2011 Reg. Sess.] March 23, 2011 [proposed amendment].) Far from being conclusive, this statement indicates that impasse resolution would assist the parties in reaching agreement on MOUs. That does not imply an intent to limit impasse resolution procedures only to negotiations for a comprehensive MOU. That Assemblywoman Atkins did not provide a complete listing of all possible bargaining disputes in this sentence does not evince a legislative intent that factfinding would apply only to bargaining disputes over comprehensive MOUs. As we explained earlier, the term "MOU"

refers to any written agreement on negotiable terms and conditions of employment adopted by the parties. It is not only a contract covering a *comprehensive* set of employment terms and conditions for a set term.

Moreover, Assemblywoman Atkins' statement cannot be relied on for legislative history because it does not necessarily represent the intent of other members of the Legislature who voted to support the bill. (*In Re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589-590; *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 701; *Ross v. Ragingwire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 931.)

The summary prepared by the Assembly Committee on Public Employees, Retirement and Social Security for the May 4, 2011 hearing on AB 646 echoes Assemblywoman Atkins' comment: "SUMMARY: Establishes additional processes, including mediation and facfinding, that local public employers and employee organizations may engage in if they are unable to reach a collective bargaining agreement." (Assem. Com. on Public Employees, Retirement and Social Security, Rep. on AB 646 [2010-2011 Reg. Sess.] May 4, 2011 [Note: Date is the date of committee hearing.].) Significantly, the Assembly Public Employment, Retirement and Social Security Committee's summary changed by the third reading in the Assembly on the May 27, 2011 amended bill. Summarizing the amended bill, the committee report reads: "SUMMARY: Allows local public employee organizations to request fact-finding if a mediator is unable to reach a settlement within 30 days of appointment." (AB 646, 3d reading, as amended May 27, 2011.) (Emphasis added.) While the committee report also includes Assemblywoman Atkins' quote regarding the lack of a requirement for impasse resolution procedures where efforts to negotiate a collective bargaining agreement fail, it also includes the following observation from Assemblywoman Atkins: "The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process,

by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful." (*Ibid.*, emphasis added.) As discussed earlier, the "collective bargaining process" encompasses all labor negotiations, not simply negotiations for a comprehensive MOU.

By the time AB 646 reached the Senate, committee reports describing its purpose and effect described it as a bill that would allow local public employee organizations to request factfinding "if a mediator is unable to effect a settlement of a labor dispute." (Emphasis added.) (Sen. Com. on Public Employment & Retirement, Rep. on AB 646 [2010-2011 Reg. Sess.] as amended June 22, 2011.) The analysis by the Senate Rules Committee prepared for the third reading summarizes the bill using the same term, "labor dispute." (Sen. Rules Com. Off. of Sen. Floor Analyses, 3d reading analysis of AB 646 [2010-2011 Reg. Sess.] as amended June 22, 2011.)

A review of the several versions of the bill itself is instructive. The Legislative Counsel's Digest of the first version of AB 646, introduced on February 16, 2011 reads, in pertinent part:

> The Meyers-Milias-Brown Act contains various provisions that govern collective bargaining of local represented employees . . . . The act requires the governing body of a public agency to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized organizations. . . . if the representatives of the public agency and the employee organization fail to reach an agreement, they may mutually agree on the appointment of a mediator . . . . If the parties reach an impasse . . . the public agency may unilaterally implement its last, best and final offer.
>
> This bill would . . . . provide that if the parties fail to reach an agreement either party may request that the board appoint a mediator, and would require the board, if it determines that an impasse exists, to appoint a mediator . . . .

> This bill would authorize either party to request that the matter be submitted to a factfinding panel if the mediator is unable to effect settlement of the controversy . . . . [¶] . . . if the dispute is not settled within 30 days, the factfinding panel [is required] to make findings of fact and recommend terms of settlement."

(Emphasis added.)[21]

Nothing in this summary confines impasse procedures to a single type of MOU. It begins with a description of existing law, referring to the duty to meet and confer in good faith generally on wages, hours and terms and conditions of employment. If the parties fail to reach "an agreement," they may request mediation. Since "an agreement" (as opposed to the term, "memorandum of understanding") refers to the conclusion of negotiations on any matter to which the duty to meet and confer attaches, this phrase in the Legislative Counsel's Digest signifies that mediation applies not only to comprehensive MOU negotiations, but to negotiations in general.

The use of the terms "matter," "controversy" and "dispute," as opposed to the more limited "MOU" or "collective bargaining agreement" (a term used in EERA and HEERA), lends further weight to the notion that the Legislature did not intend for the factfinding procedures of AB 646 to be limited to only negotiations for a comprehensive MOU.[22] Instead, AB 646 intended to import the EERA/HEERA model, slightly modified to accommodate some

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[21] Digests of bills prepared by the Legislative Counsel, like statements in legislative committee reports, may be relied on to determine legislative intent when those statements are in accord with a reasonable interpretation of the statute. (*Maben v. Superior Court* (1967) 255 Cal.App.2d 708, 713.)

[22] See *Retail Clerks International Association, Locals Unions Nos. 128 and 633 v. Lion Dry Goods* (1962) 369 U.S. 17, 25, relying on the assumption that Congress was well-aware of the meaning of the term "collective bargaining agreements" as opposed to "contracts" when it passed section 301(a) of the Labor Management Relations Act (29 USC, § 185) giving federal courts jurisdiction over suits for violations of contracts between an employer and labor organization.

of the unique aspects of the MMBA (such as binding arbitration to resolve impasses in some jurisdictions). Use of these terms, i.e., "matter," "controversy," and "dispute," did not change when AB 646 was amended on May 5, 2011, to authorize only an employee organization to request factfinding. The Legislative Counsel continued to use the all-inclusive terms "controversy," "matter," and "dispute," rather than "MOU," in referring to what may be submitted to a factfinding panel. (AB 646, as amended in Assembly, May 5, 2011, County Ex. Q.) These terms remain unchanged by the time the bill was signed into law on October 9, 2011.

The legislative history of AB 646, when considered as a whole, supports our construction of the statute.

3. Harmonizing the Statutory Scheme

As additional support for its appeal, the County asserts that because AB 646 was inserted into the section of the MMBA specifically dealing with MOU negotiations, and immediately follows those sections concerning MOU negotiations, the scope of AB 646 must therefore be limited to negotiations for new or successor comprehensive MOUs. The County reads too much into the statute's architecture.

MMBA section 3505 establishes in its first paragraph the duty of a public agency to meet and confer in good faith with employee representatives regarding wages, hours and other terms and conditions of employment. It must also "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." (MMBA, § 3505.) Nothing in this paragraph limits the meet and confer duty to new or successor comprehensive MOUs. The duty applies prior to the public agency determining policy or course of action, and is limited only by the

appropriate subject matter of negotiations, i.e., wages, hours, and terms and conditions of employment.

The second paragraph of section 3505 defines "meet and confer." We do not read this definition to limit the duty only to negotiations that produce a comprehensive MOU. It reads, in pertinent part:

> "Meet and confer" means that a public agency . . . and representatives of recognized employee organizations, shall . . . meet and confer promptly upon request . . . and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year.

As discussed previously, the duty to meet and confer in good faith applies not only to negotiations for a new or successor comprehensive MOUs, but to mid-term negotiations, proposed changes the public agency seeks to make in negotiable subjects, and bargaining over the effects of decisions within managerial prerogative.

The term "memorandum of understanding" is not used in MMBA section 3505. It does appear in the text of MMBA section 3505.1, which requires a public agency to submit a tentative agreement to its governing body for approval. If the tentative agreement is adopted, "the parties shall jointly prepare a written memorandum of understanding." In light of well-settled case law regarding the continuous nature of the duty to meet and confer on all negotiable terms and conditions of employment, we do not read this section to limit the type of MOU to comprehensive agreements. Instead, MMBA section 3505.1 establishes the procedure for approving an MOU after the parties reach a tentative agreement on whatever subject they bargained about. The proximity of MMBA sections 3505 through 3505.1 does not imply any limitation on section 3505's definition of "meet and confer."

MMBA section 3505.2 authorizes voluntary mediation if the parties fail to reach agreement. This section does not mention an MOU or otherwise limit mediation to efforts only to disputes in certain types of negotiations. Nor does this section refer to a "tentative agreement" unlike MMBA section 3505.1. The more inclusive term "reach agreement," as used in MMBA section 3505.2 implies that mediation applies in a variety of bargaining contexts, not merely negotiations for new or successor comprehensive MOUs.[23]

MMBA section 3505.3 provides employer-paid released time for a reasonable number of employee organization representatives when they are "formally meeting and conferring with" the employer on matters within the scope of representation.

The factfinding provisions of AB 646 appear in MMBA sections 3505.4 through 3505.7, immediately following the provision for released time, and after the provision for voluntary mediation. The County is simply not correct when it claims the factfinding provisions "immediately follow the MMBA sections that relate to MOU negotiations." (County's Appeal, p. 17.)[24] The factfinding provisions are in the same general section of the MMBA that prescribe the duty to meet and confer in good faith on all matters within the scope of bargaining. Indeed, there are only two sections in this portion of the MMBA sections 3505 through 3505.7, that specifically mention MOUs, and those are sections 3505.1 and 3505.7. It is logical for the Legislature to have codified AB 646 within this part of the MMBA because

[23] The definition of "Mediation" in MMBA section 3501(e) supports this conclusion, as it refers to "dispute regarding wages, hours and other terms and conditions of employment." "Mediation" is not confined to negotiations for a comprehensive MOU.

[24] The County also mistakenly quotes MMBA section 3505.4(a) thusly: "If the mediator is unable to effect settlement of the controversy . . . ." This language appeared in an earlier version of section 3505.4. That section was amended by Statutes 2012, ch. 314. The version applicable to this case arising in 2013 begins: "The employee organization may request that the parties' differences be submitted to a factfinding panel . . . following the appointment . . . of a mediator . . . ."

the leading provision, MMBA section 3505, establishes the duty to meet and confer in good faith, and subsequent provisions prescribe certain procedures concerning bargaining. We do not find that the codification of AB 646 within that part of the MMBA that describes bargaining generally indicates the Legislature's intent to confine factfinding only to comprehensive MOU negotiations, especially where other subsections of MMBA section 3505 do not limit negotiations only to such comprehensive agreements.

The County contends that because factfinding follows from failed attempts at mediation, and mediation applies only to comprehensive MOU negotiations, factfinding also must apply only to MOU negotiations. We reject this argument because, as discussed above, nothing in MMBA section 3505.2 limits mediation only to comprehensive MOU negotiations.

Next, the County claims that the language of MMBA section 3505.7, prohibiting a public agency from implementing an MOU after exhausting impasse resolution procedures, shows that factfinding can only apply to MOUs. As noted above, the term "MOU" refers to any written agreement on negotiable terms and conditions of employment adopted by the parties, not solely to a contract covering a comprehensive set of terms and conditions for a set duration. Even if the County were correct that the term "MOU" implied a comprehensive MOU, the County's argument ignores the history of this section, which in fact preceded AB 646. These provisions were added to the MMBA in 2000, eleven years before the passage of AB 646. (Statutes 2000, ch. 316, AB 852 (AB 1852).) In its original form, the main provisions of what is now section 3505.7 appeared in MMBA section 3505.4 and were deemed necessary to overturn the court of appeals decision in *Cathedral City Public Safety Management Assn. v. City of Cathedral City* (*Cathedral City*) (1999, Docket No. E022719. Review den. and opn. ordered non-published 9/15/99 S080447.) That decision held that a public employer could impose an MOU after impasse (as opposed to terms and conditions of

employment), thereby depriving the representative employee organization of the right to bargain during the term imposed by the MOU. The Legislature passed AB 1852 in 2000 to correct this decision which had permitted a public employer to effectively deny employees' statutory right to bargain by imposing long-term agreements upon impasse.[25] See *City of Santa Rosa* (2013) PERB Decision No. 2308-M for a discussion of the legislative history of AB 1852.

When AB 646 was added to the MMBA, the language discussed above was moved from former MMBA section 3505.4 into the newly created section 3505.7. The concept embodied in current MMBA section 3505.7, i.e., that an employer may not impose an MOU, and that imposition does not deprive the employee organization of the right to meet and confer each year on matters within the scope of representation prior to the adoption of a budget or as otherwise required by law, was not new with the passage of AB 646, contrary to the County's contention. We therefore reject the County's argument that the language of MMBA section 3505.7 suggests that factfinding applies only to comprehensive MOU negotiations under the MMBA.

The change AB 646 made in MMBA section 3505.7 merely prohibits imposition of the employer's LBFO until "any applicable mediation and factfinding procedures have been exhausted" and until the public agency has held a public hearing regarding the impasse. Previously, the employer was permitted to impose its LBFO after exhaustion of any mediation, if mediation was agreed to or required by local rules. With the addition of factfinding, the

[25] Several years before *Cathedral City,* PERB recognized that an employer may not impose a collective bargaining agreement at the conclusion of impasse resolution procedures, but may impose only terms and conditions of employment, since unilaterally imposing a duration clause would illegally limit the right to bargain. (*Rowland Unified School District* (1994) PERB Decision No. 1053; see also, *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S.)

change in MMBA section 3505.7 simply clarifies that the employer must now wait until this new impasse resolution procedure is exhausted before it may implement its LBFO. The fact that MMBA section 3505.7 forbids the employer from imposing an MOU when and if it implements its LBFO does not mean that factfinding is limited to negotiations for a comprehensive MOU. Facfinding surely applies to this type of negotiation, but MMBA section 3505.7 does not mean that factfinding applies only to comprehensive MOU negotiations.

By the same token, the fact that MMBA section 3505.7 reserves to the employee organization the right to meet and confer on matters within the scope of representation each year prior to the adoption of a budget, even if the employer has imposed its LBFO, does not mean that factfinding is limited to comprehensive MOU negotiations, contrary to the County's claim. This provision was part of the 2000 legislation and was necessary to correct the *Cathedral City* decision. Thus, the language of a prior bill that had nothing to do with factfinding cannot be relied on to inform the interpretation of AB 646 or limit its application.

The County also points to the eight criteria the factfinding panel is to consider in arriving at its findings and recommendations, urging that these factors only make sense in the context of negotiations for a complete MOU. MMBA section 3505.4(d) provides:

> In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:
>
> (1) State and federal laws that are applicable to the employer.
>
> (2) Local rules, regulations, or ordinances.
>
> (3) Stipulations of the parties.
>
> (4) The interests and welfare of the public and the financial ability of the public agency.

> (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
>
> (6) The consumer price index for goods and services, commonly known as the cost of living.
>
> (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.
>
> (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

These are virtually the same criteria that EERA directs factfinders to "consider, weigh and be guided by."[26] Despite EERA's inclusion of these criteria, it is well-established that EERA factfinding applies to single-issue disputes, mid-term negotiations, and effects bargaining. That these criteria also appear in the MMBA supports our conclusion that the Legislature did not intend AB 646 to be applied differently than factfinding applies under EERA. These criteria have been instructive to resolving bargaining disputes involving single issues, since common sense and the way that factfinding panels actually work does not require that each of the criteria be considered in every bargaining dispute.

There are some disputes, such as whether binding arbitration should be the last step in a grievance process, that are not sensibly resolved by considering the consumer price index, or comparable compensation of other employees. On the other hand, arriving at recommendations regarding binding arbitration might require evidence described in MMBA

[26] Both EERA and the MMBA direct factfinding panels to be guided by all of these criteria.

section 3505.4(d)(5), the comparable "conditions of employment," or the all-inclusive criteria in subsection (7), which factfinding panels have read to include basic notions of fairness. The same could be said about negotiations over the effects of layoffs, which may raise both economic and non-economic issues. Bargaining disputes over health and welfare benefits would likely require the factfinding panel to assess the "financial ability" of the public agency and wage/benefit comparisons with similarly situated employees. Less obvious in such a dispute is the relevance of state and federal laws.

As discussed above, at page 27, such topics as binding arbitration and the effects of layoff are stand-alone, single subject bargaining disputes to which the factfinding process has been applied under EERA and HEERA. The fact that factfinding panels are directed to consider several different criteria does not imply that all criteria are relevant in all disputes, thereby negating the County's argument that the listing of criteria evidences a legislative intent to limit factfinding to comprehensive MOU negotiations.

As previously stated, AB 646 recognized that some charter cities and counties provide for binding arbitration as a means for resolving bargaining impasses, and in those instances, the factfinding process will not apply. (MMBA, § 3505.5(e).)[27] The County asserts that this accommodation to local rules further shows the legislative intent to limit factfinding only to negotiations for a comprehensive MOU. The County's argument assumes that the scope of binding arbitration under local rules is coterminous with the scope of factfinding under

[27] MMBA section 3505.5(e) provides, in pertinent part:

> A charter city, [or a] charter county . . . with a charter that has a procedure that applies if impasse has been reached . . . and the procedure includes . . . a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

AB 646. It is noted that the text of subsection (e) does not limit the types of disputes subject to binding arbitration. It refers only to "impasse," which, as seen in the definition in EERA section 3540.1(f), uses the terms "dispute" and "differences," placing no limitation on the type of negotiation that may reach impasse.[28] It is true that this exemption contained in MMBA section 3505.5(e) exists because where an impasse is subject to a binding arbitration process, it need not also be subject to a factfinding process. Binding arbitration, after all, resolves a bargaining dispute with finality, negating the need for any additional advisory factfinding and recommendation process. It does not follow, however, that factfinding is therefore limited only to impasses over negotiations for a comprehensive MOU. The applicability of factfinding and the scope of factfinding are two, wholly distinct issues.

The County takes issue with what it characterizes as the Office of the General Counsel's reliance on an EERA decision, *Redwoods CCD, supra,* PERB Decision No. 1141 in support of the determination that MMBA factfinding applies to single issue bargaining disputes. This decision should not be relied on, according to the County, because it arose under EERA and it was premised on the notion that EERA impasse procedures were intended to head off strikes, whereas AB 646 was intended to improve the effectiveness of the collective bargaining process. According to the County, the "MMBA factfinding process thus was clearly for the benefit of the exclusive representatives . . . to provide them with an additional procedural step for impasses in MOU negotiations—not for the public." (County's Appeal, p. 22.) We explained earlier that *Redwoods CCD* is appropriate precedent for the Board to rely on in interpreting AB 646, even though it arose under EERA. We address here the County's contention that factfinding in EERA serves a different purpose than that intended by AB 646.

[28] PERB has applied EERA's definition of "impasse" to cases arising under the MMBA. (*City & County of San Francisco* (2009) PERB Decision No. 2041-M.)

Factfinding is considered to be an effective tool to improve labor relations because it can facilitate mutual agreement by assisting reasoned decision-making after relevant facts are presented. Under EERA, the process may avert strikes by convincing the parties to reach agreement. It may postpone both strikes and unilateral impositions under EERA because neither party may legally use its weapon of last resort until the factfinding procedure is complete.[29] The overall purpose served by EERA's impasse resolution procedure is to assure labor peace by institutionalizing the assistance of a neutral and credible process when the parties have reached an impasse in whatever negotiations they are engaged in. As the Board stated in *Modesto, supra,* PERB Decision No. 291, p. 36:

> The impasse procedure of EERA contemplates a continuation of the bargaining process with the aid of neutral third parties. [Citation omitted.] Mediation is an instrument designed to advance the parties' efforts to reach agreement; factfinding is a second such tool required by the law when mediation fails to bring about agreement. . . . [T]he factfinder's recommendations are a crucial element in the legislative process structured to bring about peacefully negotiated agreements.

The same purpose—assuring labor peace—is served by AB 646, whether it averts or postpones strikes, or postpones imposition of LBFOs, or promotes "full communication between public employers and their employees by providing a reasonable method of resolving disputes." (MMBA, § 3500(a).) The purpose of factfinding under all three statutes that provide for the procedure is the same, and that purpose is not served by reading AB 646 so narrowly as the County urges us to do.

The County cites certain differences between the EERA and MMBA factfinding provisions, such as the fact that MMBA permits local employers to adopt their own rules and regulations governing employment relations, while EERA does not. The scope of bargaining

[29] We agree with the County that the purpose of AB 646 was probably not to head off strikes, because unlike under EERA, only the employee organization may invoke factfinding.

under EERA is more "complicated" than that under the MMBA, the County argues, because it enumerates subjects of bargaining and identifies circumstances in which the Education Code applies if the parties do not reach agreement. Under the MMBA the parties are to split the costs of factfinding, but under EERA, PERB pays for the neutral panel member, according to the County. We note these differences, but the County fails to explain, and we are unable to discern, why or how these differences support the view that MMBA factfinding is a radically constricted procedure, compared to that prescribed by EERA.[30]

C. The Constitutionality of AB 646

The County claims that AB 646 violates Article XI, sections 1 and 11 of the California Constitution because factfinding is an "almost identical" process to the binding arbitration process that was rejected in *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 (*Riverside v. Superior Ct.*). PERB is constitutionally prohibited from declaring any of the statutes it administers unconstitutional. (*Regents of Univ. of California v. Public Employment Relations Bd.* (1983) 139 Cal.App.3d 1037, 1042; Calif. Constitution, Art. III, § 3.5.) We have nevertheless recently explained our view on the scope and limitation of the Supreme Court's

[30] The County also cites to public testimony of former PERB Division Chief Chisholm (Chisholm) at a public meeting of PERB on June 13, 2013, explaining the rationale for proposed changes in MMBA regulations pertaining to the appealability of a board agent's determination regarding factfinding requests. The County quotes Chisholm as stating that "'the distinction' between MMBA and EERA, 'warrants treating these requests differently than the Board treats other impasse determinations.'" (County's Appeal, p, 21, fn. 9.) To the extent the County relies on this quote for its view that factfinding is limited to MOU negotiations, it misconstrues the context of Chisholm's comments. He was explaining why the Board should adopt a regulation that would permit the parties to appeal a Board agent's determination regarding the appropriateness, timeliness, and procedural sufficiency of a factfinding request. Under EERA and HEERA, Board agent decisions as to whether the parties are actually at impasse are not reviewable by the Board itself. Because the MMBA factfinding procedures were new, Chisholm recommended a rule change to allow the Board itself "to apply its expertise and develop case law and precedence [sic] that can then guide future determinations by Board agents and serves to inform the parties as what to expect." (County's Appeal, Ex. J., p. 9.) Nothing in Chisholm's comments suggest an interpretation of AB 646 that would limit it to MOU negotiations.

ruling in *Riverside v. Superior Ct.* in our own *County of Riverside* (2014) PERB Decision No. 2360, pp. 25-28. Nothing in AB 646 interferes with the ultimate decision-making authority of public agencies to determine wages or manage its finances. As the County well knows, it is not compelled to adopt the recommendations of the factfinding panel. Like negotiations, the factfinding process requires the parties to engage in a procedure with no particular outcome mandated. This is quite unlike the binding interest arbitration that was rejected by the Supreme Court in *Riverside v. Superior Ct.*.

CONCLUSION

The Legislature enacted AB 646 to bring to the MMBA a further procedure for resolving bargaining impasses, factfinding after mediation. This procedure has been part of the public sector bargaining landscape under EERA and HEERA since the mid-1970s and has been applied by PERB to a variety of bargaining disputes, not simply impasses over successor or new comprehensive agreements. It is completely within the purpose of the MMBA to import the range of bargaining disputes recognized under EERA and HEERA as appropriate to factfinding, given that one of the purposes of the MMBA is to provide a "reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment." (MMBA, § 3500.) These disputes may take many forms—single-issue disputes over the wages to be paid a new classification, re-opener negotiations, effects of layoff or effects of other management decisions, in addition to disputes over the terms of a comprehensive MOU. Based on application of the rules of statutory construction, we conclude that the Legislature did not intend that MMBA factfinding be cabined to a narrow classification of bargaining disputes, especially given that single-issue disputes, e.g., proposed reductions in health or pension benefits, may engender as much labor-management conflict as negotiations for new or

successor comprehensive MOUs. For these reasons, we affirm the administrative determination.

ORDER

The administrative determination of the Office of the General Counsel that the factfinding procedures set forth in the Meyers-Milias-Brown Act (MMBA) section 3505.4 et seq., are applicable to the dispute in this case is hereby AFFIRMED. AFSCME Local 2700's request for factfinding satisfies the requirements of MMBA section 3505.4 and PERB Regulation 32802(a)(2) and the matter is REMANDED to the Office of the General Counsel for further processing pursuant to PERB Regulation 32804.

Chair Martinez and Members Huguenin and Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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October 4, 2013

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Re: *County of Contra Costa and AFSCME Local 2700*
Case No. SF-IM-126-M
Administrative Determination

Dear Interested Parties:

On September 25, 2013, AFSCME Local 2700 (AFSCME or Union) filed a request for factfinding (Request) with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.[1] AFSCME asserts that the County of Contra Costa (County) and Union have been unable to effect a settlement in their current negotiations. AFSCME's Request describes the "type of dispute" as follows:

> The parties have spent considerable time negotiating over the creation of a Legal Clerk Classification. They have reached agreement on all issues except for the issue of whether employees in the Legal Clerk Classification should receive additional compensation.

The County sent the Union a written notice of impasse with respect to these negotiations on September 3, 2013.

[1] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code unless otherwise noted. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

Procedural Background

After AFSCME filed its Request, the County was given an opportunity to state its position. On October 1, 2013, the County verbally informed the undersigned Board agent that it would be opposing the Request, and would be filing a written statement to that effect. By letter dated October 2, 2013, the County opposed AFSCME's Request and asserted that the Request was insufficient to meet the statutory requirements for factfinding. The County requested that PERB deny the Request. Subsequently, AFSCME filed a letter disputing the County's position statement.

Later on October 2, 2013, PERB approved AFSCME's Request and informed the parties in an e-mail message that the determination would be memorialized in writing.

Discussion

A. The County's Position

The County explains that the parties have resolved all issues related to the creation of this new classification, with the exception of wages. The Memorandum of Understanding (MOU) between the parties expired on June 30, 2013 and the parties are currently in negotiations for a successor MOU. The County implicitly acknowledges that the negotiations regarding the Legal Clerk Classification were separate and distinct from successor MOU negotiations.

The County asserts that a "single" issue—such as the one asserted by AFSCME—is not subject to the MMBA factfinding provisions, since it is not negotiations for a new or successor collective bargaining agreement (CBA) or MOU. In support of its position, the County relies on several comments made by the author of Assembly Bill (AB) 646[2] and recites the following:

> The author of AB 646, Assembly Member Toni Atkins (D-San Diego) indicated the following purpose for AB 646:
>
> > Although the MMBA requires employers and employees to bargain in good faith, some municipalities and **agencies** choose not to adhere to this principle and instead attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer when negotiations for collective bargaining agreements fail. (Emphasis added.)
>
> Similarly, the State Assembly Floor analysis dated September 1, 2011 at Page 3 states:

[2] AB 646 (Statutes 2011, Chapter 680), is codified at Government Code sections 3505.4, 3505.5 and 3505.7.

> According to the author, "Currently, there is no requirement that public agency employers and employee organizations engage in **impasse procedures where efforts to negotiate a collective bargaining agreement have failed.** [...] the creation of mandatory impasse procedures is likely to increase the effectiveness of **the collective bargaining process,** by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful. [...] (Emphases added.)

Further, the County also relies upon the last sentence set forth in MMBA section 3505.7[3] and asserts as follows:

> It is apparent from the language of the statute and the legislative history that AB 646 is intended to slow the process of the implementation of last, best, and final offers by public employers. In fact, the statute institutes what is basically advisory interest arbitration to bring the parties to a negotiated resolution as opposed to an implemented one. The pause in bargaining created by AB 646 is intended to allow the parties additional time when negotiation for a collective bargaining agreement fails. The purpose is not served by applying AB 646 to each and every dispute that arises between the parties.
>
> The level of disruption in the ordinary course of labor relations that would follow a decision by PERB to apply AB 646 to all issues for which a meet and confer obligation attaches, is staggering. Neither PERB, the parties, nor the fact-finding community have the resources to apply AB 646 to all disputes. The purpose for this legislation is clearly stated, it was not intended to create a logjam of fact-finding activity to distract from ongoing negotiation for successor MOUs. PERB has the opportunity and responsibility to administratively prevent this paralysis of ongoing labor relations activity.

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[3] Section 3505.7 states in part:

> After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. (Emphasis added.)

B. AFSCME's Position

AFSCME disputes the County's position that the factfinding provisions under the MMBA are intended solely to be used when impasse is reached for a new or successor CBA/MOU. AFSCME asserts that the Legislature clearly intended for the MMBA factfinding provisions to apply to "single" issues, as well as to negotiations for an entire agreement. AFSCME argues that the definition of the terms "dispute" and "differences" as referenced in sections 3505.4 and 3505.5,[4] demonstrate that the Legislature had each and every impasse dispute in mind when drafting this legislation.

AFSCME asserts, in its response to the County's opposition, as follows:

> The County argues that because section 3505.7 provides that an employer may not, after exhausting fact-finding procedures, implement an MOU, this means that the fact-finding procedures of the MMBA must be limited to negotiations for an MOU. This simply doesn't follow. Some disputes that proceed to fact-finding under the MMBA will, of course, involve negotiations over an MOU, and section 3505.7 merely makes clear that after fact-finding in such cases the employer may not implement an MOU. Had the legislature intended to limit factfinding to cases involving negotiations over an MOU surely it would have said so in sections 3505.4 or 3505.5, or elsewhere in

[4] Section 3505.4 provides:

> If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.... (Emphasis added.)

Section 3505.5, subdivision (a) provides in part:

> If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt. (Emphasis added.)

the statute, rather than, as the County claims, by leaving a cryptic mark of its intent in section 3505.7. Because the statutory provisions clearly do not limit the utilization of the MMBA's factfinding procedures to instances in which parties have reached impasse in their negotiations for an MOU, PERB need not consider the legislative history of AB 646 or the County's public policy arguments.

C. MMBA Factfinding Is the Final Step in an Orderly Process Designed to Resolve Any Impasse That Arises From Negotiations Over Matters Within the Scope of Representation

Essentially, the County contends that the factfinding requirements under the MMBA apply only to impasses stemming from negotiations for a new or successor CBA/MOU, and do not apply to impasses resulting from isolated or single issue bargaining or from any other types of negotiations. In support of its position, the County quotes portions of the legislative history of AB 646 that reference the fact that under AB 646, the parties may engage in factfinding if they are unable to reach a "collective bargaining agreement."

1. The MMBA's Meet and Confer Obligations in General

The duty to meet and confer in good faith "means that the parties must genuinely seek to reach agreement, but the MMBA does not require that an agreement result in every instance, and it recognizes that a public employer has the ultimate power to reject employee proposals on any particular issue." (*International Assoc. of Fire Fighters, Local 188, AFL-CIO v. City of Richmond* (2011) 51 Cal.4th 259, 271 [*City of Richmond*].) The duty to meet and confer in good faith extends to all matters within the scope of representation, which is defined as "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment," but does not include "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (§ 3504.) "'The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse ....'" (*Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1083-1084, quoting *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537.)

2. The MMBA Factfinding Provisions Adopted by the Legislature Under AB 646

In 2011, the Legislature for the first time established a structured impasse procedure, applicable statewide, for the MMBA, by enacting factfinding provisions pursuant to AB 646.[5]

[5] The legislative history does not evidence the Legislature's intent to provide that negotiations for a new or successor CBA/MOU are the *only* types of disputes that can be submitted to factfinding. If the Legislature had wanted to exclude factfinding for all disputes other than for a CBA/MOU, it could have expressly included a provision to that effect, but failed to do so. Moreover, generally, the statements of the author of legislation are not determinative of legislative intent as there is no guarantee that others in the Legislature shared

The statute provided that only unions could invoke the MMBA's factfinding provisions. While AB 646 imposed new obligations on MMBA employers, it also provided them with a more orderly and expeditious process for resolving impasse disputes, with enhanced certainty as to when—i.e., upon completion of the statutorily mandated factfinding procedures—they could impose their "last, best, and final offer" on the subject of the parties' negotiations. (§ 3505.7.) Also in 2011, PERB promulgated regulations for administering the MMBA factfinding process. (Cal. Code Regs., tit. 8, §§ 32802, 32804.)

In 2012, the Legislature amended Government Code section 3504.5, pursuant to Assembly Bill 1606 (Statutes 2012, Chapter 314, effective January 1, 2013), in part to expressly codify the procedures PERB had adopted by regulation to implement AB 646. The Legislature deemed the 2012 amendments as technical and clarifying of existing law. (*Ibid.*)

Previously PERB Regulation 32802, subdivision (e), prohibited an appeal of a determination of the sufficiency of a factfinding request. Effective October 1, 2013, PERB's regulations have been modified to delete subdivision (e), and now permit an appeal by either party to the Board itself of a factfinding determination.

It is also noted that although the use of PERB's form, titled "MMBA Factfinding Request" is not required, the form, under Type of Dispute, lists as examples all of the following: "initial contract, successor contract, reopeners, effects of layoff, other."

3. PERB's Interpretation of the Term "Impasse"

Where the parties are not required to and have not engaged the services of a mediator, the MMBA factfinding provisions may be invoked by an exclusive representative only after one party provides the other with a written declaration of *impasse*. (§ 3505.4 ["an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse"].)

Although the MMBA uses the term "impasse," it does not define that term, unlike other statutes within PERB's jurisdiction. For instance, the Educational Employment Relations Act (§ 3540 et seq. [EERA]) defines "impasse" to mean "the parties to a *dispute* over matters within the scope of representation have reached a point in meeting and negotiating at which their *differences* in positions are so substantial or prolonged that future meetings would be futile." (§ 3540.1, subd. (f), emphasis added.)[6] Thus, PERB has held that an impasse in bargaining exists where the "parties have considered each other's proposals and

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the same view. (*San Mateo City School District v. Public Employment Relations Board* (1983) 33 Cal.3d 850, 863.)

[6] Similarly, under the Higher Education Employer-Employee Relations Act (§ 3560 et seq. [HEERA]), impasse is defined to mean that "the parties have reached a point in meeting and conferring at which their differences in positions are such that further meetings would be futile." (§ 3562, subd. (j).)

counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." (*Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124.)

Given the longstanding acceptance of the concept of impasse as a term of art central to labor relations, the Board has held that the definition of impasse under EERA, as interpreted by PERB, is the appropriate standard under the MMBA as well. (*Fire Fighters Union* v. *City of Vallejo* (1974) 12 Cal.3d 608 [*Fire Fighters Union*]; *City & County of San Francisco* (2009) PERB Decision No. 2041-M.) The definition of impasse does not limit the types of "disputes" or "differences" that the parties may have to just those for a new or successor CBA/MOU. In fact, nowhere in the statutory or decisional law definitions of impasse do the terms "agreement" or "collective bargaining" appear.

4. The Courts, PERB and NLRB's Interpretation of the Terms "Collective Bargaining" and "Collective Bargaining Agreement"

As noted previously, the County asserts that the Legislature's use of the term "collective bargaining" means that the public agency and the exclusive representative are negotiating a complete new or successor CBA/MOU that governs all of the employees' terms and conditions of employment. In other words, the County appears to assert that collective bargaining only occurs during a certain period of time, culminating in some type of comprehensive master agreement that ideally addresses all wages, hours, and other terms and conditions of employment, with the term of such agreement set for one or more years. As the County would have it, only if the parties cannot reach agreement on this "master" CBA/MOU, may the Union invoke the MMBA's factfinding procedures for assistance.

PERB and NLRB decisions have made clear, however, that collective bargaining is a *continuing process* that is not restricted to one comprehensive agreement or one single period of bargaining. California's public sector collective bargaining statutes are largely modeled after the federal National Labor Relations Act (NLRA) (29 U.S.C. § 151, et seq.). (*Long Beach Community College District* (2003) PERB Decision No. 1564; *City of San Jose* (2010) PERB Decision No. 2141-M.) Accordingly, when interpreting the MMBA, courts and PERB have appropriately taken guidance from the express language of the NLRA, as well as from cases interpreting the NLRA. (*Fire Fighters Union*, *supra*, 12 Cal.3d at pp. 615-617.) For instance, the Supreme Court has noted that the phrase in the MMBA's meet and confer requirement regarding "wages, hours, and other terms and conditions of employment" was taken directly from section 8(d) of the NLRA concerning the "the obligation to bargain collectively," which states in relevant part:

> 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. . .

(29 U.S.C. § 158(d), emphasis added, *Fire Fighters Union*, *supra*, at p. 617.)

As the express language of the NLRA makes clear, the obligation to bargain collectively is not just limited to the "negotiation of an agreement." Rather, such an obligation also encompasses meeting with respect to any wages, hours, and other terms and conditions of employment, as well as concerning questions or disputes that may arise within the agreement. In the words of the United States Supreme Court:

> Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.

(*Conley v. Gibson* (1957) 355 U.S. 41, 46, overruled in part on other grounds; see also, *National Labor Relations Board v. Acme Indus. Co.* (1967) 385 U.S. 432, 435-436.)

More importantly, courts have described a "collective bargaining agreement" as "the framework within which the process of collective bargaining may be carried on." (*J.I. Case Co. v. National Labor Relations Board* (7th Cir. 1958) 253 F.2d 149, 153.) In *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, the California Supreme Court observed that a collective bargaining agreement '"is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate .... It calls into being a new common law - the common law of the particular industry.'" (*Id.* at p. 177, quoting *United Steelworkers v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 578 [*Warrior & Gulf Co.*].)

5. The MMBA Does Not Expressly Limit Factfinding Solely to Impasses Over Negotiations for a CBA/MOU

The MMBA, when construed as a whole, simply does not limit the applicability of its factfinding provisions solely to disputes arising from negotiations for a CBA/MOU. Section 3505.4, provides that an "employee organization may request that the parties' differences be submitted to a factfinding panel" following mediation, or if the "dispute" is not submitted to mediation, then the employee organization may request that the parties "differences be submitted to a factfinding panel...." (§ 3505.4, subd. (a).) There is no language in the statute that limits the types of "differences" or "disputes" that may be submitted to a factfinding panel.

As added by AB 646, moreover, section 3505.5 provides that if the "dispute" is not settled within a set time, the factfinding panel "shall make findings of fact and recommended terms of settlement, which shall be advisory only." (§ 3505.5, subd. (a).) Again, there is no language in that statute limiting the parties' "dispute," which can be submitted to a factfinding panel, to negotiations for an MOU, or any other "type" of negotiations. Section 3505.7 further provides that after any applicable impasse procedures have been exhausted, and written findings of fact

and recommended terms of settlement have been submitted to the parties and made public, a public agency may implement its last, best, and final offer, but is not permitted to implement a MOU. (§ 3505.7.)

Thus, once an employee organization requests the parties' "differences" be submitted to factfinding, and the procedural aspects of the factfinding sections are met, then participation in factfinding is mandatory. The plain language of the factfinding sections does not distinguish or limit the types of disputes that arise in collective bargaining negotiations that may be submitted to factfinding. If the Legislature intended to limit the types of disputes or differences that could be submitted to a factfinding panel only to those arising during negotiations for a CBA or MOU, it could have done so explicitly. It did not. Accordingly, when the MMBA's statutory scheme is viewed as a whole, the County's interpretation of the factfinding provisions as applying only to negotiations for an CBA/MOU is simply not a correct interpretation of the statute.

Finally, it is well settled that public employers who are subject to the MMBA and other collective bargaining statutes administered by PERB may not make a unilateral change in a negotiable subject until all applicable impasse procedures have been exhausted, as impasse procedures are part of the collective bargaining process. (*Moreno Valley Unified School District v. PERB* (1983) 142 Cal.App.3d 191, 199-200 [*Moreno Valley*]; *Temple City Unified School District* (1990) PERB Decision No. 841, p. 11; see also § 3506.5, subd. (e).) According to the County's interpretation that MMBA factfinding applies only to impasse over negotiations for a complete CBA or MOU, this would necessarily mean that single employment issues would be excluded from the statutory impasse procedures, and would thus allow the public agency to impose its will on employees if the parties cannot reach agreement. Unlike "main table" negotiations for a new or successor CBA/MOU, employers often have control over the timing of "single" subjects, such as layoffs or the creation of a new position. If PERB were to accept the County's position that only new or successor CBAs/MOUs are subject to factfinding, an employer could splinter subjects within the scope of representation into multiple "single" issues, in order to intentionally avoid factfinding.

This interpretation is contrary to the intent of AB 646, which was enacted to prevent public agencies from rushing through the motions of the meet-and-confer process to unilaterally impose the agency's goals and agenda before exhausting available impasse procedures. Moreover, the County's claim that the MMBA does not authorize factfinding other than for negotiations for a CBA/MOU cannot be squared with the MMBA's stated purposes "to promote full communication between public employers and employees," and "to improve personnel management and employer-employee relations." (§ 3500.) Allowing the County to take unilateral action concerning the parties' employment relationship without exhausting the MMBA's impasse procedures simply because the parties' dispute does not arise during negotiations for a CBA/MOU, does not further, but would rather frustrate, the MMBA's purpose of promoting full communications between the parties and improving employer-employee relations.

6. PERB Has Interpreted Statutory Impasse Procedures Under EERA and HEERA to Apply to a Wide Variety of Collective Bargaining Negotiations, and Not Just Those for a CBA/MOU

The County's assertion that MMBA factfinding provisions are limited only to those negotiations for a CBA/MOU that reach impasse is contrary to the language and judicial interpretation of factfinding provisions found in the other collective bargaining statutes that PERB administers. As discussed above, it is well settled that statutes should be construed in harmony with other statutes on the same general subject. (*Farrell*, 41 Cal.3d at p. 665) Moreover, when interpreting the MMBA, PERB appropriately takes guidance from cases interpreting not only the NLRA, but also other collective bargaining statutes that PERB administers with provisions similar to those of the MMBA. (*Fire Fighters Union*, *supra*, 12 Cal.3d 608.)

EERA and HEERA contain provisions governing impasse resolution that are similar, though not identical, to the those in the MMBA. (Compare §§ 3548-3548.8 [EERA], with §§ 3590-3594 [HEERA], and §§ 3505.4-3505.7 [MMBA].) Under long-standing case law, PERB and the courts have interpreted the impasse provisions under EERA and HEERA as applying to negotiations other than just those for an MOU or CBA. Under this body of related law, to which our Supreme Court has directed the courts to look for reliable guidance when they are called upon to interpret the latter statute (*City of San Jose*, *supra*, 49 Cal.4th at pp. 605-607 & fn. 3), it is clear that public employers are prohibited from making a unilateral change on a matter subject to *impacts* and *effects* bargaining until all applicable impasse procedures have been exhausted.

For example, in *Moreno Valley Unified School District* (1982) PERB Decision No. 206, the Board upheld a hearing officer's determination that, among other things, the District violated section 3543.5, subdivision (e), by failing to participate in impasse procedures in good faith, and by making unilateral changes prior to the exhaustion of the statutory impasse procedures under EERA, as to proposals to eliminate teaching and staff positions. (*Id.* at pp. 1-2, 11-12.) The District subsequently filed a writ of mandate challenging the Board's decision. In *Moreno Valley*, *supra*, 142 Cal.App.3d 191, the Court of Appeal upheld PERB's determination that the school district committed an unfair labor practice under EERA by unilaterally implementing changes in employment conditions before exhausting statutory impasse procedures, including failing to participate in good faith in impasse procedures regarding the "effects" of the school district's decision to eliminate certain teaching and staff positions. (*Id.* at pp. 200, 202-205.) The court stated that "[s]ince 'impasse' under EERA's statutory scheme denotes a continuation of the labor management dispute resolution process . . . the Board reasonably interpreted the statute in finding a per se violation of the statutory duty of employers to participate in good faith in the impasse procedures." (*Id.* at p. 200.)

In *Redwoods Community College District* (1996) PERB Decision No. 1141 (*Redwoods*), the Board determined that EERA's statutory impasse procedures applied to the parties' negotiations over hours of security officers, which were conducted *separate and apart* from the parties' negotiations for a successor MOU. In that regard, the parties negotiated a contract provision covering workweeks and work schedules, which provided for negotiations between the employer and the employee representative regarding any change in hours. (*Ibid.*) That

provision further stated that if negotiations were unsuccessful, the parties would submit the dispute to mediation. (*Ibid.*) The provision also stated that the dispute "shall not be submitted to a fact-finding panel under the provisions of the [EERA]." (*Ibid.*) The Board held that the parties could not waive EERA's statutory impasse procedures, ***noting that until the impasse procedures are completed, the employer may not make a unilateral change in a negotiable subject.*** (*Ibid.*; see also, *California State University* (1990) PERB Decision No. 799-H [a HEERA case, where the parties participated in mediation and factfinding concerning negotiations over increased parking fees].)

Thus, as PERB has properly interpreted and applied the impasse procedures under EERA and HEERA to negotiations other than just those for an MOU, PERB's similar interpretation regarding impasse procedures under the MMBA is also proper, and should be applied to factfinding requests made under sections 3505.4, 3505.5 and 3505.7.

7. The MMBA Factfinding Provisions Do Not Raise a Constitutional Issue

To the extent the County may be suggesting that the MMBA factfinding is an unconstitutional imposition on local agencies, there is no legal authority to support such a claim. MMBA factfinding, as an *advisory* method of post-impasse dispute resolution, does not delegate or deprive the County of its constitutional authority to set terms and conditions of employment and, as such, MMBA factfinding clearly passes constitutional muster. Because MMBA factfinding does not impair or delegate to a private party any of the County's powers, it does not suffer any constitutional infirmity. (*County of Sonoma v. Sonoma County Law Enforcement Assn.* (2009) 173 Cal.App.4th 322 [*Sonoma*]; *County of Riverside v. Riverside Sheriffs' Assn.* (2003) 30 Cal.4th 278 [*Riverside*].) While the decisions in *Riverside* and *Sonoma* eradicated the ability of unions to compel an MMBA employer to participate in ***binding*** interest arbitration after negotiations have reached impasse, the decisions make clear that an impasse resolution method that leaves intact a County's constitutional right to set terms and conditions of employment is a lawful method of impasse resolution. (*Ibid.*)

Determination

Applying the precedent discussed above, PERB concludes that the factfinding procedures set forth in MMBA section 3505.4 et seq. are applicable under the particular facts of this case.

Given the specific facts of this case, PERB determines that AFSCME's Request satisfies the requirements of MMBA section 3505.4 and PERB Regulation 32802, subdivision (a)(2). Therefore, AFSCME's Request will be processed by PERB.

Next Steps

Each party must select its factfinding panel member and notify this office in writing of his/her name, title, address and telephone number no later than October 11, 2013.[7] Service and proof of service are required.

[7] This deadline, and any other referenced, may be extended by mutual agreement of the parties.

The résumés of seven factfinders, drawn from the PERB Panel of Neutrals, are being provided to the parties via electronic mail.[8] The parties may mutually agree upon one of the seven, or may select any person they choose, whether included on the PERB Panel of Neutrals or not. In no case, however, will the Board be responsible for the costs of the chairperson.

If the parties select a chair, the parties should confirm the availability of the neutral, *prior* to informing PERB of the selection.

Unless the parties notify PERB, on or before October 11, 2013, that they have mutually agreed upon a person to chair their factfinding panel, PERB will appoint one of these seven individuals to serve as chairperson.

Right to Appeal

Pursuant to PERB Regulations, the County may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid.*)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If the County appeals this determination, the Union may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

[8] The seven neutrals whose résumés are being provided are Robert M. Hirsch, Carol Vendrillo, Barry Winograd, Paul Roose, David Weinberg, Katherine Thomson, and Christopher Burdick.

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Sincerely,

Wendi L. Ross
Deputy General Counsel

Exhibit 17

County of Fresno (2014)
PERB Order No. Ad-414-M p. 15

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF FRESNO, Employer, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 521, Exclusive Representative.	Case No. SA-IM-136-M Administrative Appeal PERB Order No. Ad-414-M June 17, 2014

Appearances: Catherine E. Basham and Amanda Ruiz, Attorneys, County Counsel, for County of Fresno; Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 521.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the County of Fresno (County) from an administrative determination (attached) made by the Office of the General Counsel that concluded factfinding procedures defined in the Meyers-Milias-Brown Act (MMBA) section 3505.4[1] and PERB Regulation 32802[2] applied to the bargaining impasse between the County and Service Employees International Union, Local 521 (SEIU).[3] The bargaining dispute concerned two

[1] The MMBA is codified at Government Code section 3500 et seq.

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[3] Statutory references are to the Government Code unless otherwise noted. MMBA section 3505.4 establishes a non-binding factfinding procedure for resolving post-impasse bargaining disputes that may be invoked by the representative employee organization after mediation efforts, if available, have failed to produce a settlement.

County proposals regarding the number of employees working 12-hour shifts at the county jail and the addition of specialized assignments at the jail.

Based on our recent decision *County of Contra Costa* (2014) PERB Decision No. Ad-410-M (*Contra Costa*), in which we held that the factfinding procedures set forth in MMBA sections 3505.4 through 3505.7 apply to bargaining disputes over all matters within the scope of representation, we affirm the administrative determination.[4]

PROCEDURAL HISTORY

SEIU filed its request for factfinding on October 30, 2013, pursuant to MMBA section 3505.4 claiming that the parties declared impasse on October 28, 2013. The parties had met and conferred on three occasions prior to this date, and the County began to implement its proposals regarding jail staffing.

The County objected to SEIU's request for factfinding on three separate grounds. First, it asserted that the request was premature because no written notice of impasse had been issued by either party.

Second, the County argued that PERB was bound by a ruling by the superior court in *County of Riverside v. Public Employment Relations Board* (2013) Case No. RIC 1305661 (*Riverside*), which enjoined PERB from approving any request for factfinding in any bargaining dispute other than for a new or successor comprehensive memorandum of understanding (MOU). Thus, argued the County, PERB is prohibited from processing SEIU's request for factfinding in this case.

[4] PERB Regulation 32315 does not provide for oral argument on review of an administrative determination. Oral argument may only be requested upon exceptions being filed to a proposed decision. Therefore, SEIU's request for oral argument is denied.

Lastly, the County asserted that the legislative history of Assembly Bill (AB) 646 definitively shows the Legislature intended to limit factfinding procedures only to "collective bargaining agreements or MOUs." (County's November 1, 2013 Letter to PERB, p. 2.)

In response, SEIU asserted that *Riverside* does not bar PERB from processing its factfinding request in this case because the superior court ruling is not final and therefore the doctrine of res judicata does not apply in this case.[5] Addressing the merits, SEIU argued that AB 646 was intended to apply to bargaining disputes such as the one presented by this case.

ADMINISTRATIVE DETERMINATION

The Office of the General Counsel rejected the County's objections to factfinding, concluding that AB 646 applies to all bargaining disputes concerning matters within the scope of representation, and that such a reading comports with PERB's decisions interpreting similar language under the Educational Employment Relations Act (EERA).[6]

The Office of the General Counsel further concluded that the County's implementation of its proposals "is deemed to be or to include a 'written notice of declaration of impasse' within the meaning of section 3505.4." (Admin. Determination, p. 12.)[7]

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[5] The doctrines of res judicata, or "claim preclusion" hold that a final judgment on the merits is a complete bar to further litigation on the same cause of action or defense by the same parties or those in privity with them. (7 Witkin California Procedure, Judgment, §§ 334 to 482 (5th ed. 2008).) The related doctrine of collateral estoppel or "issue preclusion," bars the parties from relitigating issues actually determined against them in an action in a subsequent cause of action. (7 Witkin, *id.* §§ 413-451.)

[6] EERA is codified at Government Code section 3540 et seq.

[7] The County did not object to this conclusion in its appeal. The issue is therefore not before us and we do not consider it.

Finally, the Office of the General Counsel rejected the County's assertion that res judicata or collateral estoppel precluded the Board from acting on SEIU's request for appointment of a factfinding panel because no final decision had issued in *Riverside.*

Having concluded that the factfinding procedures set forth in MMBA section 3505.4 were applicable to this dispute, the Office of General Counsel ordered each party to select its factfinding panel member and notify the Office of the General Counsel of the selection by November 19, 2013.

The County filed a timely appeal from this administrative determination.

THE COUNTY'S APPEAL

The County asserts three reasons for overturning the administrative determination. It claims that PERB does not have jurisdiction to review the Office of the General Counsel's determination that factfinding should occur because in this case, SEIU filed an unfair practice charge alleging that the County "improperly failed to engage in fact finding prior to creating a specialized assignment and increasing the number of 12-hour shifts for correctional officers." (County's Appeal, p. 5.) Therefore, the appropriateness of factfinding should be determined only after the full evidentiary process of an unfair practice proceeding, according to the County. It claims that the administrative determination is an advisory opinion, and by implication, a decision affirming the administrative determination would also be advisory in nature.

Second, the County renews its argument that PERB is enjoined and estopped from ordering factfinding by the superior court's decision in *Riverside.*

Finally, the County argues that AB 646 was not intended to apply to all impasses in bargaining disputes, but only to those reached in the course of negotiating new or successor comprehensive MOUs.

SEIU'S RESPONSE

SEIU contends in response to the County's appeal that the County conflates statutory impasse procedures with unfair practice proceedings, and that nothing precludes it from simultaneously pursuing its claim made in its unfair practice charge—that the County violated the MMBA by unilaterally implementing a unilateral change in negotiable terms and conditions of employment before exhausting impasse procedures—and requesting factfinding under MMBA section 3505.4.

SEIU also argues that the order by the superior court in *Riverside* does not enjoin or estop PERB from processing factfinding requests on "single issue" bargaining disputes because the superior court order is on appeal and therefore not final.

As to the intent of AB 646, SEIU asserts that it was intended to apply to all bargaining disputes, and not just those arising from the negotiation of new or successor MOUs.

DISCUSSION

1. The Board's Jurisdiction to Administer Factfinding Under the MMBA

The County makes two claims in its objection to PERB's jurisdiction. It first asserts that MMBA section 3509(b) provides that alleged violations of the MMBA shall be processed as unfair practices charges, implying that PERB may not "enforce" the MMBA by any means other than an unfair practice charge.

We addressed this claim in our recent decision in *Contra Costa, supra,* PERB Order No. Ad-410-M, pp. 12-13, fn. 8, where we noted the difference between an administrative

determination that orders the parties to participate in factfinding and a complaint that alleges a violation of the MMBA. We further explained in *City of Redondo Beach* (2014) PERB Order No. Ad-409-M, p. 5 that MMBA section 3509 is not the source of PERB's authority to appoint a factfinding panel. That authority derives from MMBA section 3505.4, and is not predicated on an alleged violation of the MMBA. As in *Contra Costa, supra,* PERB Order No. Ad-410-M, the County's appeal of the administrative determination will not result in any determination that the County violated the MMBA.

Secondly, the County argues that a determination in this administrative appeal could result in a determination of the County's liability in the unfair practice charge filed by SEIU alleging that the County unilaterally changed negotiable terms and conditions of employment before exhausting required impasse procedures.[8] The County urges the Board to declare the administrative determination void as an invalid advisory opinion. According to the County, the only situation in which this Board may determine whether factfinding applies to the parties' bargaining dispute is in the context of unfair practice proceedings. The County asserts that the administrative determination directing the parties to participate in factfinding "bypasses" the unfair practice adjudication process and would constitute an advisory opinion. We disagree.

[8] We take administrative notice of the agency's file in Unfair Practice Case No. SA-CE-846-M. PERB issued a complaint based on this charge on November 26, 2013 and a formal hearing is scheduled for July 2014. The complaint alleges that the County increased the number of 12-hours shifts available to corrections officers and created two new specialty assignments that are exempt from seniority-based bidding procedures without providing SEIU an opportunity to meet and confer over the decision and/or the effects of these changes in policy. The complaint further alleges that between October 30, 2013 (when SEIU requested factfinding) and November 14, 2013 (when the administrative determination issued), the County engaged in the unilateral conduct described above, which constitutes a failure and refusal to participate in factfinding procedures in good faith.

As we explained in *Contra Costa, supra,* PERB Order No. Ad-410-M, pp. 11-12, PERB has jurisdiction to determine whether the provisions of MMBA section 3505.4 apply to a particular factfinding request and PERB Regulation 32802(c) empowers the Board to notify the parties whether a request for factfinding has met the requirements of subsection (a)(1) or (2) of PERB Regulation 32802. Such a determination is necessarily made on a case-by-case basis after a review of the request itself and an assessment of the timelines, and, as in this case, after determining whether factfinding applies to the dispute between the parties. The administrative determination in this case was based on a review of the facts and an analysis of the law and it resulted in a direction to the parties to implement the next steps in the factfinding process. In sum, there was nothing "advisory" about the administrative determination.

Nor is a ruling by the Board itself on the County's appeal of the administrative determination an advisory opinion.[9] The County has appealed the administrative determination, presumably seeking an order from the Board itself overturning the administrative determination and absolving it of the duty to participate in factfinding. Such an order would not be theoretical or advisory, since it would resolve an actual, concrete dispute between the parties. Depending on the outcome of the appeal, an order would require either an affirmative act on the part of the County to participate in factfinding, or would direct the Office of the General Counsel to rescind its order to the parties to take the next steps in the factfinding process. We conclude, therefore that our decision resolving the County's appeal is not an advisory opinion.

[9] PERB does not render advisory opinions, but instead exercises its adjudicatory function through decisions resolving actual controversies between the parties concerning findings of facts and/or conclusions of law. (*Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506, pp. 27-28, and cases cited therein.)

Our resolution of the issue presented by the County's appeal—whether the MMBA factfinding procedure applies to the two County proposals in dispute between the parties—conceivably overlaps with an issue in the unfair practice case, but does not prejudice nor determine the ultimate outcome in the unfair practice case. Our determination that factfinding applies to the bargaining dispute that is also the subject of the unfair practice complaint does not assess or decide any potential defenses the County may interpose to the unfair practice complaint. That task lies initially with the administrative law judge.

The issue before us in the instant case is simply whether the Office of the General Counsel correctly determined that the factfinding process applied to this bargaining dispute. The outcome of this case will be an order directing the parties to select their respective members of the factfinding panel and proceed to factfinding, a process that assists the parties in reaching agreement pursuant to the factfinding panel's recommended terms of settlement. The recommended terms of settlement are not binding on the parties. Unlike a remedy in an unfair practice proceeding, which could result in an order to rescind unilateral changes if the employer is determined to have violated the MMBA, an order resolving the issues raised by this appeal does not dictate a particular outcome to the underlying bargaining dispute.

In sum, both unfair practice litigation and this appeal may deal with the issue of whether the County was obligated to participate in factfinding. But our determination in this case that it was obligated to do so does not necessarily determine the outcome of the unfair practice proceeding. PERB's determination of the issues presented in this case is therefore not an advisory opinion that the County implies would interfere with the unfair practice case.

2. Effect of Superior Court's Decision in *Riverside*

The County's claims on this point have been addressed by *Contra Costa, supra,* PERB Order No. Ad-410-M, pp. 13-14. It is well-settled that doctrines of res judicata and collateral estoppel do not apply until and unless a court decision is final. (7 Witkin Calif. Procedure, 5th ed. (2008) Judgment, § 364.) PERB has appealed the superior court's ruling in *Riverside,* so these doctrines, even if they were applicable to this case, do not preclude this Board from ordering the parties to participate in factfinding.

Likewise, the County's assertion that PERB is bound by the superior court's injunction and issuance of a writ of mandate is rejected, because an appeal of the issuance of a writ of mandate and of an injunction automatically stays those orders. (Code of Civil Proc., § 916; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189-190; *Private Investors v. Homestake Mining Co.* (1936) 11 Cal.App.2d 488.)[10]

3. Factfinding Procedures Apply to All Bargaining Disputes Over Negotiable Matters

As did the employer in *Contra Costa, supra,* PERB Order No. Ad-410-M , the County here argues that the legislative history of AB 646 indicates that it was intended to apply only to impasses in negotiations for new or successor MOUs, and not to impasses in bargaining over mid-term reopeners, or the effects of non-mandatory subjects of bargaining, such layoffs, or other single-issue disputes. The County also points to the placement of factfinding requirements in the sections of the MMBA dealing with negotiations of MOUs as evidence of the Legislature's intent to limit the scope of factfinding under the MMBA. It further argues

[10] In *Riverside,* the county filed a petition in the Court of Appeal for a writ of supersedeas seeking to lift the automatic stay of the superior court's order. The writ was summarily denied by the Court of Appeal on January 14, 2014.

that the eight criteria set forth in MMBA sec. 3505.4 that the factfinding panel is directed to consider in arriving at their findings and recommendations primarily concern factors relating to wages. Since none of the criteria would allegedly be relevant to the negotiations regarding the issues that divide the parties in this case, factfinding cannot apply to this dispute, according to the County.

All of these contentions were addressed and resolved in *Contra Costa, supra,* PERB Order No. Ad-410-M. In that case we determined that the plain meaning of AB 646 did not limit factfinding procedures only to impasses in negotiations for comprehensive MOUs. (*Contra Costa*, p. 32.) Nevertheless, we reviewed the legislative history of AB 646, and rejected the employer's claim, repeated in this case, that comments by the author of AB 646 were dispositive that the bill was intended only for disputes over comprehensive MOUs. It is well-settled that a single legislator's comments, even the author's, cannot be relied on for legislative history because they do not necessarily represent the intent of the Legislature as a whole. (*Contra Costa*, p. 34.) We also reviewed various summaries of AB 646 as it moved through the Legislature, noting changes in those summaries from describing factfinding as a procedure parties may engage in "if they are unable to reach a collective bargaining agreement," to permitting factfinding "if a mediator is unable to reach a settlement" or a "settlement of a labor dispute." (*Contra Costa*, pp. 34-35, emphasis in original.)

We also considered in *Contra Costa, supra,* PERB Order No. Ad-410-M, the contention that the placement of the language of AB 646 following the portion of the MMBA section 3505 concerning the duty to meet and confer in good faith meant that AB 646 applies only to comprehensive MOUs. (*Contra Costa,* pp. 37-42.) We rejected that argument, concluding:

> It is logical for the Legislature to have codified AB 646 within this part of the MMBA because the leading provision, MMBA section 3505, establishes the duty to meet and confer in good faith, and subsequent provisions prescribe certain procedures concerning bargaining. We do not find that the codification of AB 646 within that part of the MMBA that describes bargaining generally indicates the Legislature's intent to confine factfinding only to comprehensive MOU negotiations, especially where other subsections of MMBA section 3505 do not limit negotiations only to such comprehensive agreements.

Contra Costa, supra, PERB Order No. Ad-410-M also addressed the County's argument that the enumeration in MMBA section 3505.4(c) of eight criteria that the factfinding panel must consider supports its view that factfinding applies only to comprehensive MOUs. (*Contra Costa,* pp. 42-44.) We noted that these are virtually the same criteria enumerated in EERA, and it is well-established that under EERA, factfinding has been applied to single-issue disputes, mid-term negotiations and effects bargaining. Common sense does not require that each of these criteria be applied in every bargaining dispute. Depending on the dispute, some criteria may be more relevant than others.

Finally, the County contends that PERB's reliance on EERA for any conclusion that factfinding applies to all bargaining disputes is misplaced because there are three main differences between EERA and the MMBA factfinding procedures that require the narrow construction of AB 646 that the County urges. The County points out that under the MMBA, only the employee organization may invoke factfinding, whereas under EERA, either party may invoke it and the procedure commences only after PERB determines that the parties are at an impasse.[11] According to the County, the fact that only employee organizations may invoke

[11] EERA section 3548 provides that either party may declare impasse and request the appointment of a mediator. If the board determines that an impasse exists, it appoints a mediator. EERA section 3548.1 provides: "If a mediator is unable to effect settlement of the

factfinding, combined with the lack of PERB oversight in the determination of whether there is actually an impasse "greatly increases the likelihood that the process will be abused by employee representatives who seek only to delay." (County's Appeal, p. 14.)

It is not for PERB to speculate about the policy choices made by the Legislature. We do note however, that the Legislature is presumed to have known when AB 646 was passed that PERB applied the impasse resolution procedures under EERA to single-issue bargaining disputes, mid-term contract negotiations and effects bargaining disputes. (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1018; *Cooper v. Unemployment Ins. Appeals Bd.* (1981) 118 Cal.App.3d 166, 170.) Had the Legislature intended that AB 646 apply to a narrower range of bargaining disputes than PERB had previously sanctioned, it could have easily drafted language saying so. As for the County's speculation that the legislative choice made by the Legislature will cause employee organizations to abuse the process and cause delay, this is a policy argument best addressed to the Legislature.

The second distinction between EERA and the MMBA factfinding procedure cited by the County is the fact that under EERA, the factfinding panel chair is appointed by PERB at no cost to the parties, whereas the costs of factfinding are split between the public agency and employee organization under the MMBA. According to the County, "It is inconceivable that the Legislature intended public agencies to expend their limited resources—taxpayer funding—engaging in factfinding over the effects of a management right or single issue negotiations at the whim of an employee organization." (County's Appeal, p. 14.) Again, this is an argument best addressed to the Legislature, rather than PERB. We note that because the costs are split between the parties under the MMBA, the employee organizations may be

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controversy . . . and declares that facfinding is appropriate to the resolution of the impasse, either party may . . . request that their differences be submitted to a factfinding panel."

constrained by similar economic forces as employers. Unions undoubtedly will be forced to pick and choose the disputes they take to factfinding, as they do not have limitless funds to spend on factfinding panels without regard to the importance of the dispute to their members.

Finally, the County argues that the differences between EERA and the MMBA on public disclosure of bargaining proposals requires that we find that MMBA factfinding is limited only to bargaining disputes over comprehensive MOUs. Under EERA, bargaining proposals of both parties must be presented at a public meeting of the public employer before negotiations may commence. (EERA, § 3547.) The requirement in EERA section 3548.3 that the factfinding report is to be made public by the employer before it makes any decision regarding the report is therefore "consistent with the rest of the EERA impasse procedures," according to the County. In contrast, there is no requirement under the MMBA for public employers to "sunshine" either their proposals or agreements, according to the County. "Public employers . . . are only required under the Brown Act . . . to place on the agenda and take a public vote on contracts, including memoranda of understanding or collective bargaining agreements. There is no requirement for a public meeting on proposals or negotiations over single issues that do not result in contracts or negotiations on the impact of decisions outside the scope of bargaining." (County Appeal, p. 14.) If factfinding is applicable to disputes other than initial or successor MOUs, then public employers would be required by MMBA section 3505.7 to hold public hearings on a factfinding report before they implement their last, best and final offer (LBFO) over, for example, the effects of layoff, before it can "move forward with action that it has an unmistakable right to take." (County Appeal, p. 15.)

We reject this argument for several reasons. As an initial matter, we determined in *Contra Costa, supra,* PERB Order No. Ad-410-M that the term "MOU" does not refer only to

a comprehensive collective bargaining agreement that typically addresses all subjects the parties bargained over and is in effect for a set duration of time. As we explained in *Contra Costa,* pp. 23-24:

> The duty to bargain in good faith applies to any matter within the scope of representation and is not confined to negotiations that result in a comprehensive MOU for a certain duration . . . .
>
> [¶]
>
> . . . . Under the MMBA, an MOU is the end product of meeting and conferring on matters within the scope of representation if a tentative agreement is adopted by the governing body of the public agency. (MMBA, § 3505.1.) In other words, an 'MOU' signifies a written agreement on any matter within the scope of representation. It can address a single subject, the effect of a decision within the managerial prerogative, mid-term negotiations, or side letters of agreement, etc.

Thus, whenever a tentative agreement on any negotiable subject is reached by the parties, MMBA section 3505.1 obligates the public agency to vote to accept or reject such agreement at a duly noticed public meeting. The purpose of any public meeting is to inform the public of official actions taken by the governing board of the public entity and presumably to receive input from the public before official action is taken (Brown Act at Gov. Code, § 54954.3; *Chaffee v. San Francisco Library Commission* (2004) 115 Cal.App.4th 461 [Brown Act is intended to facilitate public participation in all phases of local government decision-making]). Therefore, when the County places a tentative agreement with an employee representative organization on its agenda for a "duly noticed public meeting," it presumably makes the tentative agreement available to the public so that the public may meaningfully comment on the tentative agreement.

The obligation under MMBA section 3505.7 is no more onerous or time-consuming than what is already required when the parties reach a tentative agreement

without resort to impasse resolution procedures. The County need only wait 10 days after the factfinding panel's recommendations have been submitted to the parties before holding a public meeting regarding the impasse before it may implement its LBFO. Given the Legislature's choice favoring public disclosure of tentative agreements and matters regarding the impasse, delaying implementation of an LBFO for ten days in order to keep the public informed is not an onerous requirement.

Factfinding imposes a new process on the parties in MMBA jurisdictions, a process that is intended to assist the parties in reaching agreement, a goal which is firmly established as one of the purposes of the MMBA—to provide a "reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment." (MMBA, § 3500.) That this process may delay a public agency from imposing its LBFO the day after it determines the parties are at impasse is something the Legislature no doubt considered in passing AB 646. Any claim that this legislative policy choice will waste public funds or impede the functioning of local governments is thus best addressed to the Legislature.

For all of these reasons, we affirm the administrative determination.

ORDER

The administrative determination of the Office of the General Counsel that the factfinding procedures set forth in the Meyers-Milias-Brown Act (MMBA) section 3505.4 et seq., are applicable to the dispute in this case is hereby AFFIRMED. Service Employees International Union, Local 521's request for factfinding satisfies the

requirements of MMBA section 3505.4 and PERB Regulation 32805(a)(2) and the matter is REMANDED to the Office of the General Counsel for further processing pursuant to PERB Regulation 32804.

Chair Martinez and Member Banks joined in this Decision.

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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November 14, 2013

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Re: *County of Fresno and Service Employees International Union Local 521*
Case No. SA-IM-136-M
Administrative Determination

Dear Interested Parties:

On October 30, 2013, Service Employees International Union Local 521 (SEIU or Union) filed a request for factfinding (Request) with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.[1] In that request, SEIU asserted that the County of Fresno (County) and the Union have been unable to effect a settlement in their current negotiations.[2] SEIU's Request provides that impasse was declared on "October 28, 2013."[3]

[1] The MMBA is codified at Government Code section 3500 et seq. and all future references are to the Government Code unless otherwise noted. PERB Regulations are codified at California Code of Regulations, title 8, section 31000 et seq. and will be referred to as PERB Regulations hereafter. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

[2] In its initial Request, SEIU merely described the "type of dispute" with the County as "meet and confer." Subsequent correspondence from the parties clarified that the "dispute" in question, involves the parties' negotiations over the County's two proposals to alter certain terms set forth in an addendum to the parties' expired Memorandum of Understanding (MOU) for Bargaining Unit 2, which includes all Correctional Officers employed by the County in the Jail, Probation Department, and Juvenile detention facilities (Unit 2). Specifically, the County's two proposals were to: (1) increase the number of employees working 12-hour shifts at the County Jail; and (2) add two specialized assignments in the County Jail that are exempt from the seniority-based bidding procedure.

[3] As will be discussed in greater detail below, the parties do not dispute that the County has not provided SEIU with a written notice of a declaration of impasse. SEIU contends

After SEIU filed its Request, the County was given an opportunity to state its position. On November 1, 2013, the County notified the undersigned Board agent that it would be opposing the Request, and would be filing a written statement to that effect. By letter dated November 1, 2013, the County opposed SEIU's Request and asserted that the Request was insufficient to meet the statutory requirements for factfinding. The County requested that PERB deny the Request. On November 5, 2013, SEIU filed a responsive letter in support of its Request and a Request for Judicial Notice disputing the County's position statement.

On November 6, 2013, PERB approved SEIU's Request and informed the parties in an e-mail message that the determination would be subsequently memorialized in writing.

Brief Factual Background

The parties' MOU expired on October 30, 2011 and on December 6, 2011, the County imposed its last, best and final offer (LBFO).

During the parties' negotiations in 2012, the parties did ultimately submit their dispute to a factfinding panel. On or about June 4, 2013, the County imposed its LBFO from those negotiations.

The current round of negotiations commenced on or about September 6, 2013, when the County proposed to create two new specialized assignments for Correctional Officers in the County Jail that would be exempt from the seniority-based bidding procedure described in an addendum to the parties' expired MOU. In or around September 2013, the County also proposed to increase the number of twelve-hour (12-hour) shifts in the County Jail.[4]

The parties met and conferred on three occasions: October 16, 25, and 28, 2013.[5] The Union submitted documentary evidence attached to the sworn declaration of Tom Abshere that indicates that the County has begun—or is in the process of—implementing both proposals. The Union has submitted information that on or about October 28, 2013, the County posted a new announcement on its Job Line for a "Booking/Records Unit" assignment – one of the newly created specialized assignments that was the subject of the parties' 2013 negotiations. Also, on October 28, 2013, the County sent an e-mail message to all employees in the County

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however, that the County's unilateral implementation of both proposals on or about October 28, 2013, equates to an "impasse" in the parties' negotiations ["It must be inferred from the County's unilateral conduct that the County is declaring 'impasse' in the meet and confer process"].

[4] The Union also asserts that the County unilaterally increased the number of twelve-hour shifts prior to September 2013 from 210 to 244.

[5] There is no dispute that during these negotiations, the County only agreed to negotiate the impacts of the creation of the two specialized assignments, but not the decision itself.

Jail regarding the Correctional Officers' December 9, 2013 bid for assignments. The attachment to the e-mail message contains a number of twelve-hour shifts (270), that far exceeds the number set forth in the parties' addendum to the expired contract (210).[6]

The Parties' Respective Positions

A. The County's Position

The County objects to the Petition based on several different grounds. It asserts that the Request is premature since no written notice of impasse has been issued by either party. The County notes in pertinent part as follows, "The Request states that impasse was declared on October 28, 2013, but no copy of a written notice of impasse is provided. The County has neither issued a notice of a declaration of impasse nor received such a notice from SEIU. As this prerequisite has not been met, SEIU's Request must be denied as premature."

The County also argues that approval of SEIU's request is "barred" based on a tentative ruling from the pending litigation in Riverside County Superior Court entitled *County of Riverside v. PERB; SEIU, Local 721*, Case No. RIC 1305661. The County states in pertinent part, that "[t]he Court ruled on September 13, 2013, that the clear intent of the legislature in adopting AB 646 was to address the negotiations for new or successor MOUs. The Court further found that PERB's interpretation of AB 646 to apply to negotiations over matters other than new or successor MOUs to be 'clearly erroneous.' . . . Thus SEIU is precluded from requesting fact-finding in this matter and PERB is precluded from granting such a request."

Finally, the County asserts that the legislative history of Assembly Bill 646 (AB 646)[7] conclusively demonstrates that SEIU's Request is "outside the purview of the fact-finding process." In particular, the County relies upon comments made by Assembly Member Toni Akins, the author of AB 646. The County references an undated comment by Assembly Member Akins:

> Although the MMBA requires employers and employees to bargain in good faith, some municipalities and agencies choose not to adhere to this principle and instead attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer when negotiations for collective bargaining agreements fail. (Emphasis added.)

[6] The Union has filed two unfair practice charges (UPC Nos. SA-CE-841-M, SA-CE-846-M) with respect to the County's alleged unlawful unilateral action regarding the specialized assignments and shift schedules. Although this determination does not make any findings with respect to those charges, it does appear from the undisputed information provided by SEIU, that the County has begun the process of implementing both proposals and that, therefore, the parties are at impasse in their negotiations.

[7] AB 646 (Statutes 2011, Chapter 680), is codified at Government Code sections 3505.4, 3505.5, and 3505.7.

(County's November 1, 2013 Letter, p. 2.) Similarly, the County relies on an Assembly Floor analysis dated September 1, 2011, at Page 3, which states:

> According to the author, "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. [...] The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful. [...] (Emphasis added.)

(*Ibid.*) The County notes in part, "it is inconceivable that the Legislature intended the public employer to use taxpayer dollars participating [*sic*] in this fact-finding process for anything other than negotiations over collective bargaining agreements or MOUs."

B. SEIU's Position

SEIU asserts that the parties met on three occasions, but the County "failed and refused to present a written notice of a declaration of impasse to SEIU Local 521. . . . Instead, shortly after the conclusion of the parties' October 28, 2013 meet and confer session, the County proceeded to unilaterally implement its two proposed changes to Correctional Officers' working conditions. . . . It must be inferred from the County's unilateral conduct that the County is declaring "impasse" in the meet and confer process."

The Union also provides five reasons why the *County of Riverside* case is not relevant to its factfinding demand: (1) the trial court in the *County of Riverside* case has made only an oral ruling on the record and has not issued a final written order with "res judicata" effect; (2) PERB's timeline to request reconsideration or file an appeal in the *County of Riverside* case has not expired yet; (3) an order from a County of Riverside Superior Court judge "does not dictate law or policy for the rest of the state"; (4) SEIU Local 721, the Real Party in Interest in the *County of Riverside* case, is not the same entity as SEIU Local 521; and (5) the trial court judge's ruling is clearly erroneous and will likely be vacated on appeal.

Finally, the Union asserts that AB 646 was meant to encompass the types of issues that the parties were negotiating over in this case: the County's proposal to add two specialized assignments that are exempt from the seniority-based bidding process and multiple new twelve-hour shift proposals.[8]

[8] The Union's Request for Judicial Notice is granted solely for purposes of this Administrative Determination. (*Compton Community College District* (1988) PERB Decision No. 704; *Antelope Valley Community College District* (1979) PERB Decision No. 97.)

Discussion

A. AB 646 Factfinding is the Final Step in an Orderly Process Designed to Resolve Any Impasse That Arises From Negotiations Over Matters Within the Scope of Representation Under the MMBA.

1. The Duty to Bargain to Impasse Over Matters Within the Scope of Representation Under the MMBA

Essentially, the County contends that the factfinding requirements under the MMBA apply only to impasses stemming from negotiations for a new or successor MOU, and do not apply to impasses resulting from isolated or separate issues arising from any other types of negotiations. However, when read together, MMBA sections 3505.7, 3505.4, and 3505.5,[9] demonstrate that the Legislature had each and every impasse dispute in mind when drafting this legislation.

a. The Courts, PERB and NLRB's Interpretation of the Terms "Collective Bargaining" and "Collective Bargaining Agreement"

PERB and NLRB decisions have made clear that collective bargaining is a *continuing process* that is not restricted to one comprehensive agreement or one single period of bargaining.

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[9] Section 3505.7 states, in relevant part:

After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. (Emphasis added.)

Section 3505.4 provides:

If the *dispute* was not submitted to mediation, an employee organization may request that the parties' *differences* be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.... (Emphasis added.)

Section 3505.5, subdivision (a) provides, in relevant part:

If the *dispute* is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt. (Emphasis added.)

California's public sector collective bargaining statutes are largely modeled after the federal National Labor Relations Act (NLRA) (29 U.S.C. § 151, et seq.). (*Long Beach Community College District* (2003) PERB Decision No. 1564; *City of San Jose* (2010) PERB Decision No. 2141-M.) Accordingly, when interpreting the MMBA, courts and PERB have appropriately taken guidance from the express language of the NLRA, as well as from cases interpreting the NLRA. (*Fire Fighters Union* v. *City of Vallejo* (1974) 12 Cal.3d 608, 615-617 [*Fire Fighters Union*].) For instance, the Supreme Court has noted that the phrase in the MMBA's meet and confer requirement regarding "wages, hours, and other terms and conditions of employment" was taken directly from section 8(d) of the NLRA concerning the "the obligation to bargain collectively," which states in relevant part:

> 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. . .

(29 U.S.C. § 158(d), emphasis added, *Fire Fighters Union*, *supra*, at p. 617.)

As the express language of the NLRA makes clear, the obligation to bargain collectively is not just limited to the "negotiation of an agreement." Rather, such an obligation also encompasses meeting with respect to any wages, hours, and other terms and conditions of employment, as well as concerning questions or disputes that may arise within the agreement. In the words of the United States Supreme Court:

> Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.

(*Conley v. Gibson* (1957) 355 U.S. 41, 46, overruled in part on other grounds; see also, *National Labor Relations Board v. Acme Indus. Co.* (1967) 385 U.S. 432, 435-436.)

More importantly, courts have described a "collective bargaining agreement" as "the framework within which the process of collective bargaining may be carried on." (*J.I. Case Co. v. National Labor Relations Board* (7th Cir. 1958) 253 F.2d 149, 153.) In *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, the California Supreme Court observed that a collective bargaining agreement '"is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate .... It calls into being a new common law - the common law of the particular industry.'" (*Id.* at p. 177, quoting *United Steelworkers v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 578 [*Warrior & Gulf Co.*].)

These cases are clear, collective bargaining means more than negotiations for a new or successor MOU—as the County asserts—it means negotiations for all disputes within the scope of representation.

b. The MMBA's Meet-and Confer Obligations

Under the MMBA, the duty to meet and confer in good faith "means that the parties must genuinely seek to reach agreement, but the MMBA does not require that an agreement result in every instance, and it recognizes that a public employer has the ultimate power to reject employee proposals on any particular issue." (*International Assoc. of Fire Fighters, Local 188, AFL-CIO v. City of Richmond* (2011) 51 Cal.4th 259, 271 [*City of Richmond*].) The duty to meet and confer in good faith extends to all matters within the scope of representation, which is defined as "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment," but does not include "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (§ 3504.) "'The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse ....'" (*Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1083-1084, quoting *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537.)

Although the MMBA uses the term "impasse," it does not define that term, unlike other statutes within PERB's jurisdiction. For instance, the Educational Employment Relations Act (§ 3540 et seq. [EERA]) defines "impasse" to mean "the parties to a *dispute* over matters within the scope of representation have reached a point in meeting and negotiating at which their *differences* in positions are so substantial or prolonged that future meetings would be futile." (§ 3540.1, subd. (f), emphasis added.)[10] Thus, PERB has held that an impasse in bargaining exists where the "parties have considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." (*Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124.)

Given the longstanding acceptance of the concept of impasse as a term of art central to labor relations, the Board has held that the definition of impasse under EERA, as interpreted by PERB, is the appropriate standard under the MMBA as well. (*Fire Fighters Union, supra*, 12 Cal.3d 608; *City & County of San Francisco* (2009) PERB Decision No. 2041-M.) The definition of impasse does not limit the types of "disputes" or "differences" that the parties

[10] Similarly, under the Higher Education Employer-Employee Relations Act (§ 3560 et seq. [HEERA]), impasse is defined to mean that "the parties have reached a point in meeting and conferring at which their differences in positions are such that further meetings would be futile." (§ 3562, subd. (j).)

may have to just those for a new or successor MOU. In fact, nowhere in the statutory or decisional law definitions of impasse do the terms "agreement" or "collective bargaining" appear.

c. The MMBA Does Not Expressly Limit Factfinding Solely to Impasses Over Negotiations for an MOU

The MMBA, when construed as a whole, simply does not limit the applicability of its factfinding provisions solely to disputes arising from negotiations for an MOU. Section 3505.4, provides that an "employee organization may request that the parties' differences be submitted to a factfinding panel" following mediation, or if the "dispute" is not submitted to mediation, then the employee organization may request that the parties "differences be submitted to a factfinding panel...." (§ 3505.4, subd. (a).) There is no language in the statute that limits the types of "differences" or "disputes" that may be submitted to a factfinding panel.

As added by AB 646, moreover, section 3505.5 provides that if the "dispute" is not settled within a set time, the factfinding panel "shall make findings of fact and recommended terms of settlement, which shall be advisory only." (§ 3505.5, subd. (a).) Again, there is no language in that statute limiting the parties' "dispute," which can be submitted to a factfinding panel, to negotiations for an MOU, or any other "type" of negotiations. Section 3505.7 further provides that after any applicable impasse procedures have been exhausted, and written findings of fact and recommended terms of settlement have been submitted to the parties and made public, a public agency may implement its last, best, and final offer, but is not permitted to implement an MOU. (§ 3505.7.)

Thus, once an employee organization requests the parties' "differences" be submitted to factfinding, and the procedural aspects of the factfinding sections are met, then participation in factfinding is mandatory. The plain language of the factfinding sections do not distinguish or limit the types of disputes that arise in collective bargaining negotiations that may be submitted to factfinding. If the Legislature intended to limit the types of disputes or differences that could be submitted to a factfinding panel only to those arising during negotiations for an MOU, it could have done so explicitly. It did not. Accordingly, when the MMBA's statutory scheme is viewed as a whole, the County's interpretation of the factfinding provisions as applying only to negotiations for an MOU is simply not a correct interpretation of the statute.

Finally, as noted above, it is well-settled that public employers who are subject to the MMBA and other collective bargaining statutes administered by PERB may not make a unilateral change in a negotiable subject until all applicable impasse procedures have been exhausted, as impasse procedures are part of the collective bargaining process. (*Moreno Valley Unified School District v. PERB* (1983) 142 Cal.App.3d 191, 199-200 [*Moreno Valley*]; *Temple City Unified School District* (1990) PERB Decision No. 841, p. 11; see also § 3506.5, subd. (e).) According to the County's interpretation that MMBA factfinding applies only to impasse over negotiations for a complete MOU, this would necessarily mean that single employment issues would be excluded from the statutory impasse procedures, and would thus allow the public agency to impose its will on employees if the parties cannot reach agreement. Unlike "main

table" negotiations for a new or successor MOU, employers often have control over the timing of "single" subjects, such as layoffs or the creation of a new position. If PERB were to accept the County's position that only new or successor MOUs are subject to factfinding, an employer could splinter subjects within the scope of representation into multiple "single" issues, in order to intentionally avoid factfinding.

This interpretation is contrary to the intent of AB 646, which was enacted to prevent public agencies from rushing through the motions of the meet-and-confer process to unilaterally impose the agency's goals and agenda before exhausting available impasse procedures. Moreover, the County's claim that the MMBA does not authorize factfinding other than for negotiations for an MOU cannot be squared with the MMBA's stated purposes "to promote full communication between public employers and employees," and "to improve personnel management and employer-employee relations." (§ 3500.) Allowing the County to take unilateral action concerning the parties' employment relationship without exhausting the MMBA's impasse procedures simply because the parties' dispute does not arise during negotiations for an MOU, does not further, but would rather frustrate, the MMBA's purpose of promoting full communications between the parties and improving employer-employee relations.

d. PERB Has Interpreted Statutory Impasse Procedures Under EERA and HEERA to Apply to a Wide Variety of Collective Bargaining Negotiations, and Not Just Those for an MOU

The County's assertion that MMBA factfinding provisions are limited only to those negotiations for an MOU that reach impasse is contrary to the language and judicial interpretation of factfinding provisions found in the other collective bargaining statutes that PERB administers. It is well-settled that statutes should be construed in harmony with other statutes on the same general subject. (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 665.) Moreover, when interpreting the MMBA, PERB appropriately takes guidance from cases interpreting not only the NLRA, but also other collective bargaining statutes that PERB administers with provisions similar to those of the MMBA. (*Fire Fighters Union, supra,* 12 Cal.3d 608.)

EERA and HEERA contain provisions governing impasse resolution that are similar, though not identical, to those in the MMBA. (Compare §§ 3548-3548.8 [EERA], with §§ 3590-3594 [HEERA], and §§ 3505.4-3505.7 [MMBA].) Under long-standing case law, PERB and the courts have interpreted the impasse provisions under EERA and HEERA as applying to negotiations other than just those for an MOU. Under this body of related law, to which our Supreme Court has directed the courts to look for reliable guidance when they are called upon to interpret the latter statute (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 605-607 & fn. 3), it is clear that public employers are prohibited from making a unilateral change on a matter subject to *impacts* and *effects* bargaining until all applicable impasse procedures have been exhausted.

For example, in *Moreno Valley Unified School Dist.* (1982) PERB Decision No. 206, the Board upheld a hearing officer's determination that, among other things, the District violated section 3543.5, subdivision (e), by failing to participate in impasse procedures in good faith, and by making unilateral changes prior to the exhaustion of the statutory impasse procedures under EERA, as to proposals to eliminate teaching and staff positions. (*Id.* at pp. 1-2, 11-12.) The District subsequently filed a writ of mandate challenging the Board's decision. In *Moreno Valley*, *supra*, 142 Cal.App.3d 191, the Court of Appeal upheld PERB's determination that the school district committed an unfair labor practice under EERA by unilaterally implementing changes in employment conditions before exhausting statutory impasse procedures, including failing to participate in good faith in impasse procedures regarding the "effects" of the school district's decision to eliminate certain teaching and staff positions. (*Id.* at pp. 200, 202-205.) The court stated that "[s]ince 'impasse' under EERA's statutory scheme denotes a continuation of the labor management dispute resolution process . . . the Board reasonably interpreted the statute in finding a per se violation of the statutory duty of employers to participate in good faith in the impasse procedures." (*Id.* at p. 200.)

In *Redwoods Community College District* (1996) PERB Decision No. 1141 (*Redwoods*), the Board determined that EERA's statutory impasse procedures applied to the parties' negotiations over hours of security officers, which were conducted *separate and apart* from the parties' negotiations for a successor MOU. In that regard, the parties negotiated a contract provision covering workweeks and work schedules, which provided for negotiations between the employer and the employee representative regarding any change in hours. (*Ibid.*) That provision further stated that if negotiations were unsuccessful, the parties would submit the dispute to mediation. (*Ibid.*) The provision also stated that the dispute "shall not be submitted to a fact-finding panel under the provisions of the [EERA]." (*Ibid.*) The Board held that the parties could not waive EERA's statutory impasse procedures, *noting that until the impasse procedures are completed, the employer may not make a unilateral change in a negotiable subject.* (*Ibid.*; see also, *California State University* (1990) PERB Decision No. 799-H [a HEERA case, where the parties participated in mediation and factfinding concerning negotiations over increased parking fees].)

Thus, as PERB has properly interpreted and applied the impasse procedures under EERA and HEERA to negotiations other than just those for an MOU, PERB's similar interpretation regarding impasse procedures under the MMBA is also proper, and should be applied to factfinding requests made under sections 3505.4, 3505.5 and 3505.7.

2. MMBA Factfinding Process and Procedure

    a. The MMBA Factfinding Provisions Adopted by the Legislature Under AB 646, and Implemented by Duly Adopted PERB Regulations

As noted above, in 2011, the Legislature for the first time established a structured impasse procedure, applicable statewide, for the MMBA, by enacting factfinding provisions pursuant to

AB 646.[11] The statute provided that only unions could invoke the MMBA's factfinding provisions. While AB 646 imposed new obligations on MMBA employers, it also provided them with a more orderly and expeditious process for resolving impasse disputes, with enhanced certainty as to when—i.e., upon completion of the statutorily mandated factfinding procedures—they could impose their "LBFO" on the subject of the parties' negotiations. (§ 3505.7.) Also in 2011, PERB promulgated emergency regulations for administering the MMBA factfinding process. (Cal. Code Regs., tit. 8, §§ 32802, 32804.)

In 2012, the Legislature amended MMBA section 3504.5, pursuant to Assembly Bill 1606 (Statutes 2012, Chapter 314, effective January 1, 2013 [AB 1606]), in part to expressly codify the procedures PERB had adopted by emergency and, later, final regulations implementing AB 646. The Legislature deemed the 2012 amendments as technical and clarifying of existing law. (*Ibid.*)

Previously PERB Regulation 32802, subdivision (e), prohibited an appeal of a determination of the sufficiency of a factfinding request. Effective October 1, 2013, PERB's regulations have been modified to delete subdivision (e), and now permit an appeal by either party to the Board itself by any party aggrieved by a factfinding determination.

It is also noted that although the use of PERB's form, titled "MMBA Factfinding Request" is not required, the form, under Type of Dispute, lists as examples all of the following: "initial contract, successor contract, reopeners, effects of layoff, other."

b. A Written Declaration of Impasse

Both MMBA section 3505.4, subdivision (a), as amended by AB 646, and PERB Regulation 32802, subdivision (a)(2), as adopted by PERB to administer the new factfinding procedure required by AB 646, provide that if the dispute was not submitted to mediation,[12] an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.

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[11] The legislative history does not evidence the Legislature's intent to provide that negotiations for a new or successor MOU are the *only* types of disputes that can be submitted to factfinding. If the Legislature had wanted to exclude factfinding for all disputes other than for an MOU, it could have expressly included a provision to that effect, but failed to do so. Moreover, generally, the statements of the author of legislation are not determinative of legislative intent as there is no guarantee that others in the Legislature shared the same view. (*San Mateo City School District v. Public Employment Relations Board* (1983) 33 Cal.3d 850, 863.)

[12] There is no evidence in this case indicating that the parties utilized, or intend to utilize, mediation to resolve the current dispute.

As noted previously, it appears from undisputed testimony and documentary evidence in the record of this case that the County has gone forward with the implementation of its two proposals. For present purposes, this evidence is deemed to be or to include a "written notice of declaration of impasse" within the meaning of section 3505.4. It is, in any event, clear from undisputed testimony and documentary evidence in the record that the parties are, in fact, at impasse in their current negotiations.

B. Res Judicata/Collateral Estoppel Do Not Apply in This Matter

The County cites the decision of *Boekin v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, in support of its assertion that SEIU is "barred" from filing the instant Request under the doctrine of "res judicata." In that case, the Supreme Court noted,

> As generally understood, '[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy.' . . . The doctrine 'has a double aspect.' . . . 'In its primary aspect,' commonly known as claim preclusion, it 'operates as a bar to the maintenance of a second suit *between the same parties* on the same cause of action.' . . . 'In its secondary aspect,' commonly known as collateral estoppel, '[t]he prior judgment ... "operates"' in 'a second suit ... based on a different cause of action ... "as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." . . . 'The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.'"

(*Id.* at pp. 797-798, emphasis in the original.) None of the required elements for "res judicata" or "collateral estoppel" appear to have been met in this case because: as of today's date, no "final judgment" has been issued in *County of Riverside v. PERB; SEIU, Local 721* (Case No. RIC 1305661); SEIU, Local 521 is a separate and distinct entity from SEIU, Local 721, and therefore the parties are not the same; and since the County has imposed the terms of its LBFO two years in a row, it is unclear from the record whether SEIU and the County were negotiating terms of a successor agreement or side/single issues.[13]

[13] PERB makes no determination as to whether the parties were in fact engaged in "successor" negotiations. Rather, PERB does not make such determinations with respect to the subject matter of a factfinding.

Determination

Applying the precedent discussed above, PERB concludes that the factfinding procedures set forth in MMBA section 3505.4 et seq. are applicable under the particular facts of this case.

Given the specific facts of this case, PERB determines that SEIU's Request satisfies the requirements of MMBA section 3505.4 and PERB Regulation 32802, subdivision (a)(2). Therefore, SEIU's Request will be processed by PERB.

Next Steps

Each party must select its factfinding panel member and notify this office in writing of his/her name, title, address and telephone number no later than November 19, 2013.[14] Service and proof of service are required.

The résumés of seven factfinders, drawn from the PERB Panel of Neutrals, are being provided to the parties via electronic mail.[15] The parties may mutually agree upon one of the seven, or may select any person they choose, whether included on the PERB Panel of Neutrals or not. In no case, however, will the Board be responsible for the costs of the chairperson.

If the parties select a chair, the parties should confirm the availability of the neutral, *prior* to informing PERB of the selection.

Unless the parties notify PERB, on or before November 19, 2013, that they have mutually agreed upon a person to chair their factfinding panel, PERB will appoint one of these seven individuals to serve as chairperson.

Right to Appeal

Pursuant to PERB Regulations, the County may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid.*)

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[14] This deadline, and any other referenced, may be extended by mutual agreement of the parties.

[15] The seven neutrals whose résumés are being provided are: Ron Hoh, Jerilou Cossack, John LaRocco, Catherine Harris, John Moseley, William Gould, and Katherine Thomson.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If the County appeals this determination, the Union may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Sincerely,

Wendi L. Ross
Deputy General Counsel

Exhibit 18

***County of Sonoma* (2010)**
PERB Dec. No. 2100-M, p. 13

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SONOMA COUNTY LAW ENFORCEMENT ASSOCIATION, Charging Party, v. COUNTY OF SONOMA, Respondent.	Case No. SF-CE-523-M PERB Decision No. 2100-M February 25, 2010

Appearances: Mastagni, Holstedt, Amick, Miller, Johnsen & Uhrhammer by Kathleen N. Mastagni, Attorney, for Sonoma County Law Enforcement Association; Renne Sloan Holtzman Sakai by Timothy G. Yeung and Genevieve Ng, Attorneys, for County of Sonoma.

Before McKeag, Neuwald and Wesley, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the Sonoma County Law Enforcement Association (SCLEA) and the County of Sonoma (County) to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the County violated the Meyers-Milias-Brown Act (MMBA)[1] by: (1) unilaterally implementing its last, best and final offer prior to the completion of impasse procedures; (2) unilaterally implementing terms and conditions of employment not reasonably contemplated within the parties' pre-impasse negotiations; and (3) unilaterally imposing a waiver of SCLEA's right to negotiate health benefit changes for the upcoming year.

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

The ALJ found that the County violated MMBA section 3505.4[2] by refusing to participate in statutorily-mandated interest arbitration and unilaterally implementing terms and conditions as to those law enforcement employees who are entitled to interest arbitration, and thereby also denied SCLEA its right to represent bargaining unit employees, in violation of MMBA section 3505.[3] The ALJ dismissed the remaining allegations that the County violated MMBA by: (1) unilaterally implementing terms and conditions not reasonably contemplated within its last, best and final offer; and (2) depriving SCLEA of the right to negotiate on a yearly basis.

The County appeals only from that portion of the ALJ's proposed decision that found that it was required to submit to interest arbitration with respect to certain law enforcement employees, arguing that the governing statute is unconstitutional. SCLEA appeals from the findings that: (1) the County was not required to submit to interest arbitration as to all

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[2] MMBA section 3505.4 states:

> If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

[3] The ALJ found that the County was not required to submit to interest arbitration with respect to employees not covered by MMBA section 3505.4.

employees; and (2) the County unilaterally implemented terms and conditions reasonably contemplated within its last, best and final offer.[4]

The Board has reviewed the proposed decision and the record in light of the parties' exceptions and responses thereto, and the relevant law. Based on this review, the Board reverses the proposed decision in part and affirms it in part for the reasons discussed below.

BACKGROUND[5]

The County is a public agency within the meaning of MMBA section 3501(c). SCLEA is an employee organization within the meaning of Section 3501(a).

SCLEA exclusively represents four bargaining units composed of sworn and non-sworn law enforcement employees. The units include classifications such as correctional officers, probation officers, district attorney investigators, welfare fraud investigators, park rangers, fire inspectors, communications dispatchers, and residential care counselors.

SCLEA and the County were parties to a memorandum of understanding (MOU) covering all four units, effective March 4, 2003 through June 18, 2007. The parties began negotiations for a single successor agreement in February 2007. The parties agreed to a number of ground rules: tentative agreements were to be signed by the teams' principals, but the principals lacked authority to enter into such agreements without first consulting with the team. It was understood that if neither side made a proposal as to an article in the MOU, the status quo would remain. The parties also agreed that all proposals and counterproposals would be presumed to be rejected unless specifically accepted by the other party.

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[4] SCLEA did not except to the dismissal of the allegation that the County denied SCLEA its statutory right to bargain on a yearly basis. Accordingly, the ALJ's determination on this issue is final. (PERB Reg. 32300(c); PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 3100 et seq.)

[5] The Board adopts the ALJ's findings of fact to the extent set forth herein.

During the Spring of 2007, the parties engaged in approximately 13 bargaining sessions. The parties agreed, at least in principle, to carry over many of the provisions of the existing MOU without change. The negotiations revolved primarily around the County's proposals offering a cost-of-living adjustment (COLA) for the entire unit, equity adjustments for particular positions, and changes in health and welfare benefits.

At the May 16, 2007 bargaining session, the County's lead negotiator, Kenneth Couch (Couch), provided SCLEA with a proposal on revisions to Article 18 of the MOU covering health and welfare benefits. In the past, the County had maintained a practice of contributing the same percentage of the monthly premium costs, regardless of the cost of the premium(s) associated with the selected health plan, for the employee (alone, with one dependent, or two or more dependents). The County proposed restricting that percentage to only the lowest-cost plan, beginning with the 2008-2009 plan year. In what the parties termed the "85-Y plan," the County's contribution dollar amount would be set at 85 percent of the lowest cost plan. For any higher cost plan, a "Y-rating" would freeze the County's contribution dollar amount at the 2007-2008 contribution dollar amount for those electing the more expensive plans, until the contribution dollar amount for the lowest-cost plan rose to the dollar amount of the higher-cost plan. Thereafter, any difference above the lowest-cost plan would be picked up by the employee. Having already adopted these provisions for its unrepresented employees, the County was interested in having these provisions apply to SCLEA's active bargaining unit employees as well as its future retirees, who received this benefit through the MOU. The County also offered an across-the-board COLA of 3.25 percent and, as a quid pro quo for acceptance of the 85-Y plan, equity adjustments to bring specified classifications to 100 percent of market wages, to be implemented in two steps.

The discussions during the May 16, 2007 bargaining session focused primarily on the COLA, equity adjustments, and the 85-Y health plan issues set forth in Article 18, sections 18.1, 18.2, and 18.3 of the MOU. The parties also discussed changes to future retiree health premiums, unpaid medical and pregnancy leaves, and long-term disability. During its review of the proposal, the SCLEA representatives noticed that three pages of the Article 18 text appeared to be missing and notified the County of the omission. Sections 18.1, 18.2 and 18.3 were not among the missing sections, and the parties continued to negotiate over those sections.

Although SCLEA requested that the County provide all new proposals in "legislative format," showing changes in strikeout and underlined text, the County determined it would be unfeasible to do so for Article 18, because the changes were numerous and were not of the type that lent itself to that type of formatting. Numerous sections were renumbered, previous whole sections split, and language was moved.

At the end of the May 16, 2007 session, SCLEA asserted that the parties were at impasse. The parties used a previously scheduled negotiation session on May 31, 2007 to identify issues for mediation, and formally declared impasse on that date. The County's local employee-relations ordinance (ERO) provides that mediation is the only mandatory impasse procedure, with factfinding optional. If factfinding is not undertaken, the County's negotiator may present the employer's last, best and final offer to the governing board for implementation. The ordinance makes no mention of interest arbitration proceedings as set forth in title 9.5 of the Code of Civil Procedure. (Code Civ. Proc., § 1299 et seq.; Stats. 2000, ch. 906 ["Arbitration of Firefighter and Law Enforcement Officer Disputes"].)

At the first mediation session on July 11, 2007, SCLEA presented a proposal, to which the County did not respond formally at that time. On July 17, 2007, Couch and SCLEA's chief

negotiator, Shaun DuFosee (DuFosee), met at a restaurant where Couch delivered the County's counter-proposal. The County's proposal consisted of two pages and stated:

> Acceptance by the SCLEA results in settlement of all issues raised by the parties in these negotiations for a successor Memorandum Of Understanding (MOU). Tentative agreements (T/As) signed by the parties on March 08, 2007, and the terms and conditions of this counter proposal will comprise the only changes to be incorporated in the successor MOU between the parties. All articles not previously tentatively agreed to, or included in this proposal as detailed below, shall remain unchanged from the current MOU.

The two-page document called for a one-year term (June 19, 2007 through June 16, 2008), the COLA, the equity adjustments, and the same 85-Y plan that had been included in the May 16, 2007 proposal. The proposal further stated that the County would implement the 85-Y plan as soon as possible, including plan design changes implemented on April 10, 2007 for both active and retired bargaining members, and that existing language concerning the retiree/active employee health insurance link would remain unchanged. The proposal further stated that if it was not accepted in writing by July 23, 2007, the offer would be withdrawn in its entirety. DuFosee testified that he did not consider this limitation to have any practical effect, as he believed the July 17, 2007 proposal did not materially differ from the County's May 16, 2007 proposal.

Couch testified that, as he was presenting the proposal to DuFosee, he realized that the version of Article 18 that was attached to the proposal was not the correct one, so he removed it from the rest of the document and promised to e-mail the correct version to DuFosee following the meeting.

Couch testified that on July 18, 2007, he e-mailed DuFosee the corrected version of the Article 18 proposal both at SCLEA and at work. Neither message was returned as undeliverable. Couch's testimony was corroborated by a copy of the e-mail transmission dated

July 18, 2007 stating that the settlement offer was attached, including the correct Article 18 proposal. DuFosee denied both that Couch removed a version of Article 18 from the July 17, 2007 proposal during their meeting or that he received the July 18, 2007, e-mail transmission at either address. He asserted he sometimes had difficulty retrieving e-mails at one of the addresses. Given Couch's credible testimony that he sent the e-mails and that the e-mail transmission was not returned as undeliverable, we adopt the ALJ's credibility determination that, on July 18, 2007, Couch e-mailed DuFosee a complete copy of proposed Article 18 and that DuFosee received it.

The language of Article 18 included in the July 18 transmission is identical to that set forth in the May 16, 2007 proposal with respect to Sections 18.1, 18.2 and 18.3. The cover e-mail states that current language contained in Article 18.16 would replace the County's proposed language in Sections 18.4 and 18.5 concerning retiree health insurance contributions. The July 18, 2007 transmission also appeared to contain the missing pages from the May 16, 2007 proposal concerning, *inter alia*, dental benefits, long-term disability, and unpaid medical/pregnancy disability leave. SCLEA rejected the proposal.

At a second mediation session on August 17, 2007, the County presented SCLEA with a revised offer, consisting of a two-page summary of the County's last offer on the three major issues in dispute: the 85-Y plan, COLAs, and equity adjustments. Couch informed SCLEA that Article 18 was still part of the County's last offer and had not changed since the May 16, 2007 proposal; therefore, it was not attached to the August 17, 2007 offer. The August 17, 2007 summary was substantially the same as the July 17, 2007 offer, but changed the timing of the second equity adjustment due to the passage of time during bargaining. The SCLEA team took this written proposal directly to the membership for a vote. The membership rejected this proposal as well.

After meeting again with SCLEA representatives in an effort to answer questions and come to a resolution on August 30, 2007, the County sent a letter to all bargaining unit employees explaining the County's August 17, 2007 offer and including a copy of the August 17, 2007 two-page proposal.

A final, unsuccessful, mediation session was held on November 13, 2007. On November 19, 2007, DuFosee submitted a request to the chair of the County's governing board that the matter be submitted for interest arbitration pursuant to Code of Civil Procedure section 1299.4. The County refused, asserting that Section 1299.4 was unconstitutional and that many of the bargaining unit classifications were not covered by that statute in any event.

By letter dated December 20, 2007 to the County, SCLEA requested the opening of negotiations for a successor memorandum, while acknowledging the ongoing bargaining impasse. By this time, DuFosee's term as president had expired and he was replaced by Thomas Gordon (Gordon), who had been a member of the bargaining team throughout the negotiations. In addition, Couch had ceased employment with the County and had been replaced by Interim Labor Relations Manager David Mackowiak (Mackowiak).

In late December 2007, Mackowiak attempted unsuccessfully to contact Gordon by telephone to inform him that the County intended to present an implementation resolution to the governing board at its January 8, 2008 meeting. On December 31, 2007, the County's human resources director, Ann Goodrich, sent Gordon and a representative of the law firm representing SCLEA an e-mail notifying them that the County had submitted an agenda item to the County's governing board to implement the County's last offer, and promised to send a copy of the agenda item on January 2, 2008. Gordon was out of town on vacation in late December 2007, but he acknowledged that he did receive the County's e-mail on January 2, 2008, with an attachment containing the finalized board agenda item. The attachment included

the language for Article 18 that was substantially the same as the version Couch sent to DuFosee on July 18, 2007. Gordon did not respond to Mackowiak or communicate any concerns to the County about the proposed implementation prior to January 8, 2008.

DuFosee was out of town on vacation between December 26, 2007 and January 15, 2008. He received an e-mail that included the implemented terms, which he reviewed after his return. DuFosee testified that he never conducted a side-by-side comparison of the existing Article 18 and the County's new proposal, because he felt it was confusing.

The staff recommendation called for implementation of the 3.25 percent COLA, effective January 15, 2008, together with the equity adjustments for identified classifications, one-half to be provided immediately and the remainder on July 15, 2008. In the summary section, the staff report described the health benefit changes as including changes in co-pays and deductibles for all three medical plans that would take effect "as soon as practical," and that changes in the amount of County contributions to premiums under its 85-Y proposal would take effect beginning with the 2008-2009 health plan year. The recommendation noted that the implemented terms would remain in effect through June 15, 2008, "the start of the normal contract cycle for this unit."

Gordon testified that he did not try to compare the proposed Article 18 language with the existing contract language because he was never confident he could ascertain all of the differences.

Gordon appeared at the January 8, 2008 governing board meeting to object to the implementation proposal. Among his comments he asserted:

> Finally, SCLEA has only had a brief time to review the text of this resolution. It appears to us that some changes may have been made after the date for final submission of proposals and/or after the County submitted its last, best, and final offer. We will be researching this issue further and will respond accordingly.

Mackowiak approached Gordon after the meeting to seek clarification about SCLEA's concerns. Gordon replied that he could not tell Mackowiak what the issues were, claiming he had not had sufficient time to review it. After Mackowiak scheduled a meeting with Gordon for January 18, 2008 to identify and address the purported errors, Gordon cancelled the meeting. Mackowiak tried unsuccessfully to reschedule the meeting with Gordon.

Sometime after the January 8, 2008 board action, the County reviewed the agenda item and discovered certain errors in its submission to the board. Therefore, it submitted an agenda item to the board requesting an amendment to the January 8, 2008 resolution. The written submittal identified as errors the omission of subdivision (b)(iii) of Section 18.3 ("Contributions Toward Medical Insurance for Employees"), omissions of the proper revisions to Section 18.5 ("Medical Insurance Eligibility & Contributions for Retirees Employed After January 1, 1990"), and designation of $9.00 per pay period as the employee contribution to dental insurance, when it should have been $11.00. The County notified SCLEA of the proposed changes. SCLEA did not respond to the notification. The board adopted the recommended amendment at its January 29, 2008 meeting.

In February 2008, the County held a special open enrollment period to allow bargaining unit members the opportunity to select other health plan choices in response to the plan design changes for the current year. In May 2008, the County held its customary open enrollment period prior to the 2008-2009 health plan year.

DISCUSSION

Request for Interest Arbitration

The County asserts that it was not required to submit to the binding interest arbitration provisions of Code of Civil Procedure section 1299 et seq. prior to implementing its last, best and final offer because that statute is unconstitutional. In *County of Riverside v. Superior*

Court (2003) 30 Cal.4th 278 (*Riverside*), the Supreme Court held that a prior version of section 1299 et seq. (SB 402, Stats. 2000, ch. 906, § 2) violated Article XI, section 1, subdivision (b) and section 11, subdivision of (a), the California Constitution by delegating to a private body the power to interfere with county financial affairs and to perform a municipal function. (*Riverside*, at p. 282.)[6] In response to the court's decision in *Riverside*, the Legislature adopted SB 440 (Stats. 2003, ch. 877), which amended Section 1299.7 to provide that the arbitrator's decision would be binding unless the county's governing body, by unanimous vote, rejects the arbitration.

While this matter was pending before PERB, the County filed a judicial action challenging the constitutionality of SB 440. On April 24, 2009, the First District Court of Appeal determined that the amendments did not cure the constitutional violation because: (a) it merely gave the county veto power over the arbitrator's decision but did not allow the county to "provide for" the compensation of county employees; and (b) empowered a minority of the governing board, via the requirement of unanimity, to make the arbitrator's decision binding on the county, even if the majority disagreed. (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 344, 346-347, review denied.)[7]

While we have no authority to declare a statute unconstitutional (Cal. Const., art. III, § 3.5), we are bound by the determination of the court of appeal that Code of Civil Procedure section 1299 et seq., the interest arbitration statute at issue in this case, constitutes an unlawful

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[6] Senate Bill 402, entitled "Arbitration of Firefighter and Law Enforcement Officer Labor Disputes," authorized public safety employee unions to declare an impasse in negotiations and require a local public agency to submit unresolved economic issues to binding interest arbitration.

[7] Given that the judicial proceedings are complete, we deny as moot the County's motion to abate and/or sever the allegation that the County unlawfully refused to submit to interest arbitration.

delegation of power in violation of Article IX of the Constitution. Accordingly, we reverse the ALJ's decision to the extent that it determined that the County violated the MMBA by refusing to submit to interest arbitration prior to implementing its last, best and final offer.[8]

Implementation of Last, Best and Final Offer

PERB has long held that an employer's unilateral change in terms and conditions of employment prior to reaching an impasse in negotiations or completion of statutory impasse resolution procedures is a per se violation of the statutory duty to bargain in good faith. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51; *Rowland Unified School District* (1994) PERB Decision No. 1053 (*Rowland*).) Once impasse has been reached and the parties have completed statutory impasse resolution procedures, the employer may thereafter implement changes reasonably contemplated within its last, best and final offer. (*Rowland*; *Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*); *Charter Oak Unified School District* (1991) PERB Decision No. 873 (*Charter Oak*).) "The employer need not implement changes *absolutely identical* with its last offer on a given issue. However, the unilateral adoptions must be reasonably comprehended within the preimpasse proposals." (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900 [citations omitted; emphasis in original].) Thus, PERB has stated, "matters reasonably comprehended within pre-impasse negotiations include neither proposals better than the last best offer nor proposals less than the status quo which were not previously discussed at the

[8] Because we conclude that the County was not required to submit to interest arbitration, we do not address the issue of whether the interest arbitration procedures of Code of Civil Procedure section 1299 et seq. apply to a mixed unit of public safety and non-public safety employees.

table." (*Modesto.*) PERB will not, however, dissect a package proposal to "separately compare each provision of the package to prior proposals concerning that provision." (*Charter Oak.*)

Under the MMBA, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer. (MMBA, § 3505.4.) The County complied with the mandatory impasse procedure specified in the ERO. As discussed above, we have concluded that the County was not required to proceed to interest arbitration after impasse once it completed the mediation procedures required under the ERO. Therefore, the only remaining question is whether the County unilaterally implemented changes "reasonably contemplated" within its pre-impasse proposals.

SCLEA asserts three exceptions to the ALJ's determination that the County did not violate the MMBA by unilaterally implementing terms of conditions of employment after impasse. First, SCLEA excepts to the ALJ's finding that DuFosee received the correct version of Article 18 on July 18, 2007. As discussed above, we find that the record supports the ALJ's determination that DuFosee received Couch's July 18, 2007 email transmitting Article 18 to him.

Second, SCLEA excepts to the ALJ's finding that the complete language of Article 18 was presented to SCLEA. Third, SCLEA excepts to the ALJ's conclusion of law that the entire Article 18 was reasonably comprehended in the County's last, best, and final offer. We address these two exceptions together.

The record reflects that the County provided SCLEA with copies of revised Article 18 on at least three occasions prior to implementation. First, the County provided SCLEA with a revised Article 18 on May 16, 2007, at the meeting where the parties first reached impasse. Although three pages were missing from the document, it is clear that the primary issues in

negotiations were included in the May 16, 2007 document provided to SCLEA: the health care provisions contained in Sections 18.1, 18.2 and 18.3. The May 16, 2007 proposal also included proposed language on retiree health benefits in Sections 18.4, 18.5 and 18.6.

Second, the County provided SCLEA with a complete copy of its proposed Article 18 on July 18, 2007, when Couch emailed it to DuFosee following their July 17, 2007 meeting. Again, this document included the health care provisions contained in Sections 18.1, 18.2 and 18.3, which remained unchanged from the May 16, 2007 proposal. In addition, both the July 17, 2007 and the August 17, 2007 proposals confirmed the County's agreement that the existing language for retiree health benefits set forth in Section 18.16 of the prior MOU would remain unchanged, but would be moved to Sections 18.4 and 18.5. Both DuFosee and his successor, Gordon, admitted that the County's July 17, 2007 and August 17, 2007 proposals, respectively, did not differ materially from the May 16, 2007 proposal. They admitted, however, that they did not go through the proposals line by line to determine whether any other changes had been proposed.

Finally, the County provided SCLEA with a copy of its proposed implementation of Article 18 prior to the January 8, 2008 governing board meeting. Although given the opportunity to do so, SCLEA never objected to that proposal prior to January 8, 2008. After SCLEA asserted at the governing board meeting that the implementation proposal contained matters not previously included in the County's proposals, the County attempted to meet with SCLEA to discuss this assertion, but SCLEA cancelled a scheduled meeting and did not respond to the County's requests to reschedule.

Although the County again changed some of the language of Article 18 in its January 29, 2008 resolution, we do not find that these changes represented a significant departure from the County's proposals during negotiations. The addition of subdivision (iii) to

Section 18.3(b) discusses the County's implementation of the 85-Y plan and is substantially similar to language contained in the County's July 17, 2007 and August 17, 2007 proposals. The changes to Sections 18.4 and 18.5 incorporate existing language from Section 18.16 of the original MOU. The change in employee dental insurance contributions reflects a return to language contained in the original MOU. We agree with the ALJ that all of the changes were reasonably comprehended within the County's pre-impasse proposals.

SCLEA's argument essentially is that the County failed to provide it with a copy of its final proposal that specifically identified all changes to Article 18 that it intended to implement. Therefore, SCLEA asserts, because the versions of Article 18 provided to it did not specifically highlight the specific language changes to the original agreement, the County's January 2008 implementation violated the MMBA. SCLEA has not, however, identified any specific terms implemented in January 2008 that were not reasonably contemplated within the County's pre-impasse proposals.[9] During the formal hearing, the burden is on the charging party to present evidence to prove the allegations in the complaint. (See, e.g., *Oakland Unified School District* (2009) PERB Decision No. 2061.) SCLEA has not established that the terms implemented in January 2008 deviated in any significant way from the proposals presented or discussed during negotiations. Accordingly, we conclude that SCLEA has failed to establish a violation of the MMBA.

[9] In the proceedings before the ALJ, SCLEA appeared to suggest that the implemented proposal made changes in the area of employee dental benefit contributions, coordination of leave benefits with statutory requirements, and long-term disability benefits. On appeal, SCLEA has not excepted to the ALJ's findings that all of these items were included in the parties' negotiations and were reasonably comprehended within the County's pre-impasse proposals. Therefore, we affirm the ALJ's findings that the County did not violate the MMBA with respect to these issues.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-523-M are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.

Exhibit 19

National Labor Relations Act
(29 U.S.C. 151, *et seq.*)

National Labor Relations Act

Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.

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NATIONAL LABOR RELATIONS ACT

Also cited NLRA or the Act; 29 U.S.C. §§ 151-169

[Title 29, Chapter 7, Subchapter II, United States Code]

FINDINGS AND POLICIES

Section 1.[§151.] The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

Sec. 2. [§152.] When used in this Act [subchapter]--

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code [under title 11], or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

[Pub. L. 93-360, § 1(a), July 26, 1974, 88 Stat. 395, deleted the phrase "or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual" from the definition of "employer."]

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8 [section 158 of this title].

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act [section 153 of this title].

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means--

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance

organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.
[Pub. L. 93-360, § 1(b), July 26, 1974, 88 Stat. 395, added par. (14).]

NATIONAL LABOR RELATIONS BOARD

Sec. 3. [§ 153.] (a) [Creation, composition, appointment, and tenure; Chairman; removal of members] The National Labor Relations Board (hereinafter called the "Board") created by this Act [subchapter] prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. § 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) [Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal] The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 [section 159 of this title] to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 [section 159 of this title] and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) [Annual reports to Congress and the President] The Board shall at the close of each fiscal year make a report in writing to Congress and to the President summarizing significant case activities and operations for that fiscal year.

(d) [General Counsel; appointment and tenure; powers and duties; vacancy] There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [section 160 of this title], and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

Sec. 4. [§ 154. Eligibility for reappointment; officers and employees; payment of expenses] (a) Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No administrative law judge's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no administrative law judge shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act [subchapter] shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefore approved by the Board or by any individual it designates for that purpose.

Sec. 5. [§ 155. Principal office, conducting inquiries throughout country; participation in decisions or inquiries conducted by member] The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all

of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

Sec. 6. [§ 156. Rules and regulations] The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [by subchapter II of chapter 5 of title 5], such rules and regulations as may be necessary to carry out the provisions of this Act [subchapter].

RIGHTS OF EMPLOYEES

Sec. 7. [§ 157.] 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 8(a)(3) [section 158(a)(3) of this title].

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act [subchapter];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents--
(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) [section 159(a) of this title];

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is- -

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsection (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title];

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) [this subsection] shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act [subchapter]: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) [of this section] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective- bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act [subchapter] any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act [section 159(c) of this title],

(B) where within the preceding twelve months a valid election under section 9(c) of this Act [section 159(c) of this title] has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) [section 159(c) of this title] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) [section 159(c)(1) of this title] or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b) [this subsection].

(c) [Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

(d) [Obligation to bargain collectively] 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: Provided, That where there is in effect a collective- bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:
The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) [paragraphs (2) to (4) of this subsection] shall become inapplicable upon an intervening certification of the Board, under which the labor

organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [section 159(a) of this title], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act [sections 158, 159, and 160 of this title], but such loss of status for such employee shall terminate if and when he is re-employed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) [this subsection] shall be modified as follows:

(A) The notice of section 8(d)(1) [paragraph (1) of this subsection] shall be ninety days; the notice of section 8(d)(3) [paragraph (3) of this subsection] shall be sixty days; and the contract period of section 8(d)(4) [paragraph (4) of this subsection] shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3) [in paragraph (3) of this subsection].

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

[Pub. L. 93-360, July 26, 1974, 88 Stat. 395, amended the last sentence of Sec. 8(d) by striking the words "the sixty-day" and inserting the words "any notice" and by inserting before the words "shall lose" the phrase ", or who engages in any strike within the appropriate period specified in subsection (g) of this section." It also amended the end of paragraph Sec. 8(d) by adding a new sentence "Whenever the collective bargaining . . . aiding in a settlement of the dispute."]

(e) [Enforceability of contract or agreement to boycott any other employer; exception] It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) [this subsection] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) [this subsection and subsection (b)(4)(B) of this section] the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act [subchapter] shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) [Agreements covering employees in the building and construction industry] It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsection (a)(3) of this section]: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [section 159(c) or 159(e) of this title].

(g) [Notification of intention to strike or picket at any health care institution] A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act [subsection (d) of this section]. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

[Pub. L. 93-360, July 26, 1974, 88 Stat. 396, added subsec. (g).]

REPRESENTATIVES AND ELECTIONS

Sec. 9 [§ 159.] (a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) [Determination of bargaining unit by Board] The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) [Hearings on questions affecting commerce; rules and regulations] (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) [Secret ballot; limitation of elections] (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to section 8(a)(3) [section 158(a)(3) of this title], of a petition alleging they desire that such authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve- month period, a valid election shall have been held.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(b) [Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six- month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor

practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

(d) [Modification of findings or orders prior to filing record in court] Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) [Institution of court proceedings as stay of Board's order] The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) [Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title] When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of title 29, United States Code [chapter 6 of this title] [known as the "Norris-LaGuardia Act"].

(i) Repealed.

(j) [Injunctions] The Board shall have power, upon issuance of a complaint as provided in subsection (b) [of this section] charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) [Hearings on jurisdictional strikes] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) [section 158(b) of this title], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) [Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b) [section 158(b) of this title], or section 8(e) [section 158(e) of this title] or section 8(b)(7) [section 158(b)(7) of this title], the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) [section 158(b)(7) of this title] if a charge against the employer under section 8(a)(2) [section 158(a)(2) of this title] has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D) [section 158(b)(4)(D) of this title].

(m) [Priority of cases] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8 [section 158 of this title], such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1) [of this section].

INVESTIGATORY POWERS

Sec. 11. [§ 161.] For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 [sections 159 and 160 of this title]--

(1) [Documentary evidence; summoning witnesses and taking testimony] The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any

agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) [Court aid in compelling production of evidence and attendance of witnesses] In case on contumacy or refusal to obey a subpoena issued to any person, any United States district court or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) Repealed.

[Immunity of witnesses. See 18 U.S.C. § 6001 et seq.]

(4) [Process, service and return; fees of witnesses] Complaints, orders and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefore when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) [Process, where served] All process of any court to which application may be made under this Act [subchapter] may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) [Information and assistance from departments] The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

Sec. 12. [§ 162. Offenses and penalties] Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act [subchapter] shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

Sec. 13. [§ 163. Right to strike preserved] Nothing in this Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

Sec. 14. [§ 164. Construction of provisions] (a) [Supervisors as union members] Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act [subchapter] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) [Agreements requiring union membership in violation of State law] Nothing in this Act [subchapter] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c) [Power of Board to decline jurisdiction of labor disputes; assertion of jurisdiction by State and Territorial courts] (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act [to subchapter II of chapter 5 of title 5], decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act [subchapter] shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

Sec. 15. [§ 165.] Omitted.

[Reference to repealed provisions of bankruptcy statute.]

Sec. 16. [§ 166. Separability of provisions] If any provision of this Act [subchapter], or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act [subchapter], or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Sec. 17. [§ 167. Short title] This Act [subchapter] may be cited as the "National Labor Relations Act."

Sec. 18. [§ 168.] Omitted.

[Reference to former sec. 9(f), (g), and (h).]

INDIVIDUALS WITH RELIGIOUS CONVICTIONS

Sec. 19. [§ 169.] Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employee's employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 of the Internal Revenue Code [section 501(c)(3) of title 26], chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

[Sec. added, Pub. L. 93-360, July 26, 1974, 88 Stat. 397, and amended, Pub. L. 96-593, Dec. 24, 1980, 94 Stat. 3452.]

LABOR MANAGEMENT RELATIONS ACT

Also cited LMRA; 29 U.S.C. §§ 141-197
[Title 29, Chapter 7, United States Code]

SHORT TITLE AND DECLARATION OF POLICY

Section 1. [§ 141.] (a) This Act [chapter] may be cited as the "Labor Management Relations Act, 1947." [Also known as the "Taft-Hartley Act."]

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act [chapter], in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I, Amendments to

NATIONAL LABOR RELATIONS ACT

29 U.S.C. §§ 151-169 (printed above)

TITLE II

[Title 29, Chapter 7, Subchapter III, United States Code]

CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

Sec. 201. [§ 171. Declaration of purpose and policy] It is the policy of the United States that--

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may by advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective bargaining agreements may be avoided or minimized

by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

Sec. 202. [§ 172. Federal Mediation and Conciliation Service]

(a) [Creation; appointment of Director] There is created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service," except that for sixty days after June 23, 1947, such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall not engage in any other business, vocation, or employment

.(b) [Appointment of officers and employees; expenditures for supplies, facilities, and services] The Director is authorized, subject to the civil service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with sections 5101 to 5115 and sections 5331 to 5338 of title 5, United States Code [chapter 51 and subchapter III of chapter 53 of title 5], and may, without regard to the provisions of the civil service laws, appoint such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefore approved by the Director or by any employee designated by him for that purpose.

(c) [Principal and regional offices; delegation of authority by Director; annual report to Congress] The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act [chapter] to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) [Transfer of all mediation and conciliation services to Service; effective date; pending proceedings unaffected] All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 51 [repealed] of title 29, United States Code [this title], and all functions of the United States Conciliation Service under any other law are transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after June 23, 1947. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

FUNCTIONS OF THE SERVICE

Sec. 203. [§ 173. Functions of Service] (a) [Settlement of disputes through conciliation and mediation] It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) [Intervention on motion of Service or request of parties; avoidance of mediation of minor disputes] The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) [Settlement of disputes by other means upon failure of conciliation] If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lockout, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act [chapter].

(d) [Use of conciliation and mediation services as last resort] Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

(e) [Encouragement and support of establishment and operation of joint labor management activities conducted by committees] The Service is authorized and directed to encourage and support the establishment and operation of joint

labor management activities conducted by plant, area, and industry wide committees designed to improve labor management relationships, job security and organizational effectiveness, in accordance with the provisions of section 205A [section 175a of this title].

[Pub. L. 95-524, § 6(c)(1), Oct. 27, 1978, 92 Stat. 2020, added subsec. (e).]

Sec. 204. [§ 174. Co-equal obligations of employees, their representatives, and management to minimize labor disputes] (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall--

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective- bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act [chapter] for the purpose of aiding in a settlement of the dispute.

Sec. 205. [§175. National Labor-Management Panel; creation and composition; appointment, tenure, and compensation; duties] (a) There is created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be elected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of $25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

Sec. 205A. [§ 175a. Assistance to plant, area, and industry wide labor management committees]

(a) [Establishment and operation of plant, area, and industry wide committees] (1) The Service is authorized and directed to provide assistance in the establishment and operation of plant, area and industry wide labor management committees which--

(A) have been organized jointly by employers and labor organizations representing employees in that plant, area, or industry; and

(B) are established for the purpose of improving labor management relationships, job security, organizational effectiveness, enhancing economic development or involving workers in decisions affecting their jobs including improving communication with respect to subjects of mutual interest and concern.

(2) The Service is authorized and directed to enter into contracts and to make grants, where necessary or appropriate, to fulfill its responsibilities under this section.

(b) [Restrictions on grants, contracts, or other assistance] (1) No grant may be made, no contract may be entered into and no other assistance may be provided under the provisions of this section to a plant labor management committee unless the employees in that plant are represented by a labor organization and there is in effect at that plant a collective bargaining agreement.

(2) No grant may be made, no contract may be entered into and no other assistance may be provided under the provisions of this section to an area or industry wide labor management committee unless its participants include any labor organizations certified or recognized as the representative of the employees of an employer participating in such committee. Nothing in this clause shall prohibit participation in an area or industry wide committee by an employer whose employees are not represented by a labor organization.

(3) No grant may be made under the provisions of this section to any labor management committee which the Service finds to have as one of its purposes the discouragement of the exercise of rights contained in section 7 of the National Labor Relations Act (29 U.S.C. § 157) [section 157 of this title], or the interference with collective bargaining in any plant, or industry.

(c) [Establishment of office] The Service shall carry out the provisions of this section through an office established for that purpose.

(d) [Authorization of appropriations] There are authorized to be appropriated to carry out the provisions of this section

$10,000,000 for the fiscal year 1979, and such sums as may be necessary thereafter.

[Pub. L. 95-524, § 6(c)(2), Oct. 27, 1978, 92 Stat. 2020, added Sec. 205A.]

NATIONAL EMERGENCIES

Sec. 206. [§ 176. Appointment of board of inquiry by President; report; contents; filing with Service] Whenever in the opinion of the President of the United States, a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

Sec. 207. [§ 177. Board of inquiry]

(a) [Composition] A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) [Compensation] Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) [Powers of discovery] For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 49 and 50 of title 15, United States Code [sections 49 and 50 of title 15] (relating to the attendance of witnesses and the production of books, papers, and documents) are made applicable to the powers and duties of such board.

Sec. 208. [§ 178. Injunctions during national emergency]

(a) [Petition to district court by Attorney General on direction of President] Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lockout or the continuing thereof, and if the court finds that such threatened or actual strike or lockout--

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lockout, or the continuing thereof, and to make such other orders as may be appropriate.

(b) [Inapplicability of chapter 6] In any case, the provisions of sections 101 to 115 of title 29, United States Code [chapter 6 of this title] [known as the "Norris-LaGuardia Act"] shall not be applicable.

(c) [Review of orders] The order or orders of the court shall be subject to review by the appropriate United States court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in section 1254 of title 28, United States Code [section 1254 of title 28].

Sec. 209. [§ 179. Injunctions during national emergency; adjustment efforts by parties during injunction period]

(a) [Assistance of Service; acceptance of Service's proposed settlement] Whenever a district court has issued an order under section 208 [section 178 of this title] enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act [chapter]. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) [Reconvening of board of inquiry; report by board; contents; secret ballot of employees by National Labor Relations Board; certification of results to Attorney General] Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer, as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

Sec. 210. [§ 180. Discharge of injunction upon certification of results of election or settlement; report to Congress] Upon

the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

COMPILATION OF COLLECTIVE-BARGAINING AGREEMENTS, ETC.

Sec. 211. [§ 181.] (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

EXEMPTION OF RAILWAY LABOR ACT

Sec. 212. [§ 182.] The provisions of this title [subchapter] shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time.

CONCILIATION OF LABOR DISPUTES IN THE HEALTH CARE INDUSTRY

Sec. 213. [§ 183.] (a) [Establishment of Boards of Inquiry; member- ship] If, in the opinion of the Director of the Federal Mediation and Conciliation Service, a threatened or actual strike or lockout affecting a health care institution will, if permitted to occur or to continue, substantially interrupt the delivery of health care in the locality concerned, the Director may further assist in the resolution of the impasse by establishing within 30 days after the notice to the Federal Mediation and Conciliation Service under clause (A) of the last sentence of section 8(d) [section 158(d) of this title] (which is required by clause (3) of such section 8(d) [section 158(d) of this title]), or within 10 days after the notice under clause (B), an impartial Board of Inquiry to investigate the issues involved in the dispute and to make a written report thereon to the parties within fifteen (15) days after the establishment of such a Board. The written report shall contain the findings of fact together with the Board's recommendations for settling the dispute, with the objective of achieving a prompt, peaceful and just settlement of the dispute. Each such Board shall be composed of such number of individuals as the Director may deem desirable. No member appointed under this section shall have any interest or involvement in the health care institutions or the employee organizations involved in the dispute.

(b) [Compensation of members of Boards of Inquiry] (1) Members of any board established under this section who are otherwise employed by the Federal Government shall serve without compensation but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in carrying out its duties under this section.

(2) Members of any board established under this section who are not subject to paragraph (1) shall receive compensation at a rate prescribed by the Director but not to exceed the daily rate prescribed for GS-18 of the General Schedule under section 5332 of title 5, United States Code [section 5332 of title 5], including travel for each day they are engaged in the performance of their duties under this section and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section.

(c) [Maintenance of status quo] After the establishment of a board under subsection (a) of this section and for 15 days after any such board has issued its report, no change in the status quo in effect prior to the expiration of the contract in the case of negotiations for a contract renewal, or in effect prior to the time of the impasse in the case of an initial bargaining negotiation, except by agreement, shall be made by the parties to the controversy.

(d) [Authorization of appropriations] There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

TITLE III

[Title 29, Chapter 7, Subchapter IV, United States Code]

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. [§ 185.] (a) [Venue, amount, and citizenship] Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act [chapter], or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) [Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments] Any labor organization which represents employees in an industry affecting commerce as defined in this Act [chapter] and any employer whose activities affect commerce as defined in this Act [chapter] shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts

of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) [Jurisdiction] For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) [Service of process] The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) [Determination of question of agency] For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

Sec. 302. [§ 186.] (a) [Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations] It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) [Request, demand, etc., for money or other thing of value]

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) [of this section].

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 U.S.C. § 301 et seq.]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) [Exceptions] The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral

persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor Relations Act, or this Act [under subchapter II of this chapter or this chapter]; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor- Management Reporting and Disclosure Act of 1959 [29 U.S.C. § 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industry wide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

[Sec. 302(c)(7) was added by Pub. L. 91-86, Oct. 14, 1969, 83 Stat. 133; Sec. 302(c)(8) by Pub. L. 93-95, Aug. 15, 1973, 87 Stat. 314; Sec. 302(c)(9) by Pub. L. 95-524, Oct. 27, 1978, 92 Stat. 2021; and Sec. 302(c)(7) was amended by Pub. L. 101-273, Apr. 18, 1990, 104 Stat. 138.]

(d) [Penalty for violations] Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) [Jurisdiction of courts] The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of rule 65 of the Federal Rules of Civil Procedure [section 381 (repealed) of title 28] (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 7 of title 15 and section 52 of title 29, United States Code [of this title] [known as the "Clayton Act"], and the provisions of sections 101 to 115 of title 29, United States Code [chapter 6 of this title] [known as the "Norris-LaGuardia Act"].

(f) [Effective date of provisions] This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) [Contributions to trust funds] Compliance with the restrictions contained in subsection (c)(5)(B) [of this section] upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) [of this section] be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

Sec. 303. [§ 187.] (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act [section 158(b)(4) of this title].

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) [of this section] may sue therefore in any district court of the United States subject to the limitation and provisions of section 301 hereof [section 185 of this title] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

RESTRICTION ON POLITICAL CONTRIBUTIONS

Sec. 304. Repealed.

[See sec. 316 of the Federal Election Campaign Act of 1972, 2 U.S.C. § 441b.]

Sec. 305.[§ 188.] Strikes by Government employees. Repealed.

[See 5 U.S.C. § 7311 and 18 U.S.C. § 1918.]

TITLE IV

[Title 29, Chapter 7, Subchapter V, United States Code]

CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

Secs. 401-407. [§§ 191-197.] Omitted.

TITLE V

[Title 29, Chapter 7, Subchapter I, United States Code]

DEFINITIONS

Sec. 501. [§ 142.] When used in this Act [chapter]--

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

(3) The terms "commerce," "labor disputes," "employer," "employee," "labor organization," "representative," "person," and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act [in subchapter II of this chapter].

SAVING PROVISION

Sec. 502. [§ 143.] [Abnormally dangerous conditions] Nothing in this Act [chapter] shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act [chapter] be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act [chapter].

SEPARABILITY

Sec. 503. [§ 144.] If any provision of this Act [chapter], or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act [chapter], or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Exhibit 20

Gov't. Code § 3501

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10. Local Public Employee Organizations [3500 - 3511] *(Heading of Chapter 10 amended by Stats. 1971, Ch. 254.)*

As used in this chapter:

3501. (a) "Employee organization" means either of the following:

(1) Any organization that includes employees of a public agency and that has as one of its primary purposes representing those employees in their relations with that public agency.

(2) Any organization that seeks to represent employees of a public agency in their relations with that public agency.

(b) "Recognized employee organization" means an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency.

(c) Except as otherwise provided in this subdivision, "public agency" means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, "public agency" does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California.

(d) "Public employee" means any person employed by any public agency, including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state.

(e) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment between representatives of the public agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion and advice.

(f) "Board" means the Public Employment Relations Board established pursuant to Section 3541.

(Amended by Stats. 2003, Ch. 215, Sec. 2. Effective January 1, 2004.)

Exhibit 21

Govt. Code §3505.4

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10. Local Public Employee Organizations [3500 - 3511] *(Heading of Chapter 10 amended by Stats. 1971, Ch. 254.)*

3505.4. (a) The employee organization may request that the parties' differences be submitted to a factfinding panel not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

(e) The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived.

(Amended by Stats. 2012, Ch. 314, Sec. 1. Effective January 1, 2013.)

Exhibit 22

Gov't. Code § 3505.5

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10. Local Public Employee Organizations [3500 - 3511] *(Heading of Chapter 10 amended by Stats. 1971, Ch. 254.)*

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

(Added by Stats. 2011, Ch. 680, Sec. 3. Effective January 1, 2012.)

Exhibit 23

Govt. Code §3505.7

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10. Local Public Employee Organizations [3500 - 3511] *(Heading of Chapter 10 amended by Stats. 1971, Ch. 254.)*

3505.7. After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

(Added by Stats. 2011, Ch. 680, Sec. 4. Effective January 1, 2012.)

Exhibit 24

Gov't. Code § 3507

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10. Local Public Employee Organizations [3500 - 3511] *(Heading of Chapter 10 amended by Stats. 1971, Ch. 254.)*

3507. (a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter.

The rules and regulations may include provisions for all of the following:

(1) Verifying that an organization does in fact represent employees of the public agency.

(2) Verifying the official status of employee organization officers and representatives.

(3) Recognition of employee organizations.

(4) Exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself or herself as provided in Section 3502.

(5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.

(6) Access of employee organization officers and representatives to work locations.

(7) Use of official bulletin boards and other means of communication by employee organizations.

(8) Furnishing nonconfidential information pertaining to employment relations to employee organizations.

(9) Any other matters that are necessary to carry out the purposes of this chapter.

(b) Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of recognition.

(c) No public agency shall unreasonably withhold recognition of employee organizations.

(d) Employees and employee organizations shall be able to challenge a rule or regulation of a public agency as a violation of this chapter. This subdivision shall not be construed to restrict or expand the board's jurisdiction or authority as set forth in subdivisions (a) to (c), inclusive, of Section 3509.

(Amended by Stats. 2003, Ch. 215, Sec. 3. Effective January 1, 2004.)

Exhibit 25

Gov't. Code § 3548.3

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10.7. Meeting and Negotiating in Public Educational Employment [3540 - 3549.3] *(Chapter 10.7 added by Stats. 1975, Ch. 961.)*

ARTICLE 9. Impasse Procedures [3548 - 3548.8] *(Article 9 added by Stats. 1975, Ch. 961.)*

3548.3. (a) If the dispute is not settled within 30 days after the appointment of the panel, or, upon agreement by both parties, within a longer period, the panel shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only. Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately before they are made public. The public school employer shall make such findings and recommendations public within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses shall be borne by the board.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's resume on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of such interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public school employer and the exclusive representative. Any separately incurred costs for the panel member selected by each party, shall be borne by such party.

(Amended by Stats. 1980, Ch. 949.)

Exhibit 26

Gov't. Code § 3593

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 12. Higher Education Employer-Employee Relations [3560 - 3599] *(Chapter 12 added by Stats. 1978, Ch. 744.)*

ARTICLE 9. Impasse Procedure [3590 - 3594] *(Article 9 added by Stats. 1978, Ch. 744.)*

3593. (a) If the dispute is not settled within 30 days after the appointment of the panel, or, upon agreement by both parties, within a longer period, the panel shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only. Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately before they are made public. The panel, subject to the rules and regulations of the board, may make those findings and recommendations public 10 days thereafter. During this 10-day period, the parties are prohibited from making the panel's findings and recommendations public.

(b) The costs for the services of the panel chairperson, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be borne by the board. Any other mutually incurred costs shall be borne equally by the employer and the exclusive representative. Each party shall bear the costs it incurs for the panel member it selects.

(c) (1) This subdivision applies only to disputes relating to the faculty and librarians of the University of California and the Hastings College of the Law. For the purposes of this subdivision, "faculty" means teachers employed to teach courses and authorize the granting of credit for the successful completion of courses, and excludes employees whose employment is contingent on their status as students.

(2) Irrespective of whether the panel makes its findings and recommendations public pursuant to subdivision (a), the Regents of the University of California and the Directors of the Hastings College of the Law, as appropriate, shall make the findings and recommendations of the panel public after the 10-day period prescribed by subdivision (a) has ended. These findings and recommendations shall be posted in a prominent public place, and copies of the findings and recommendations shall be made available to any person attending the next regularly scheduled public meeting of the regents or the directors, as appropriate. The publicly distributed agenda of the next regularly scheduled meeting of the regents or the directors, as appropriate, shall reference the availability of these findings and recommendations.

(3) It is the intent of the Legislature that the regents or the directors, as appropriate, shall act upon the findings and recommendations of the panel at an open and public meeting within 90 days of their submission to the parties by the panel.

(Amended by Stats. 2003, Ch. 62, Sec. 106. Effective January 1, 2004.)

Exhibit 27

8 CCR § 32802

Barclays Official California Code of Regulations Currentness
Title 8. Industrial Relations
Division 3. Public Employment Relations Board
Chapter 1. Public Employment Relations Board
Subchapter 6. Representation Proceedings
Article 6. Impasse Procedures

8 CCR § 32802

§ 32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days,"for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

Note: Authority cited: Sections 3509(a), 3541.3(e) and 3541.3(g), Government Code. Reference: Sections 3505.4, 3505.5 and 3505.7, Government Code.

HISTORY

1. New section filed 12-29-2011 as an emergency; operative 1-1-2012 (Register 2011, No. 52). A Certificate of Compliance must be transmitted to OAL by 6-29-2012 or emergency language will be repealed by operation of law on the following day.

2. Certificate of Compliance as to 12-29-2011 order transmitted to OAL 6-22-2012 and filed 7-30-2012 (Register 2012, No. 31).

3. Repealer of subsection (e) filed 8-22-2013; operative 10-1-2013 (Register 2013, No. 34).

This database is current through 9/2/16 Register 2016, No. 36.

8 CCR § 32802, 8 CA ADC § 32802

End of Document

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On September 16, 2016, I served the:

Claimant's Rebuttal Comments
Local Agency Employee Organizations: Impasse Procedures, 15-TC-01
Government Code Section 3505.4, 3505.5, and 3505.7;
Statutes 2011, Chapter 680 (AB 646)
City of Glendora, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 16, 2016 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/14/16

Claim Number: 15-TC-01

Matter: Local Agency Employee Organizations: Impasse Procedures

Claimant: City of Glendora

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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