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13 PUBLIC EMPLOYMENT RELATIONS BOARD

14 SAN BERNARDINO PUBLIC COUNTY
15 PUBLIC ATTORNEYS ASSOCIATION,

16 Petitioner,

17 vs.

18 COUNTY OF SAN BERNARDINO,

19 Respondent.

PERB CASE NO. LA-CE-554-M

RESPONDENT'S STATEMENT OF
EXCEPTIONS

20 The County of San Bernardino (the "County") hereby files exceptions to the proposed
21 decision dated March 27, 2013, in the above-referenced matter.

22 **I. EXCEPTIONS IN THE ISSUES OF FACT SECTION**

23 Exception No. 1

24 The proposed decision fails to include any findings of fact on the District Attorney's
25 Office's objections to a Deputy District Attorney (DDA) representing a Deputy Public
26 Defender (DPD) in a disciplinary investigation or proceeding conducted by the Public
27 Defender's Office. Such evidence includes, but is not limited to, the testimony of James B.
28

1 Hackleman, Assistant District Attorney, and the draft policy of the District Attorney's Office
2 prohibiting "cross representation." (Drew Resp. Ex. A.) This is a very serious omission of
3 material fact, given that the District Attorney's Office is a distinct legal entity from the Public
4 Defender's Office and the County and due to the nature of the objections raised by the District
5 Attorney's Office.

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7 Exception No. 2

8 The proposed decision fails to include any findings of fact on the Public Defender's
9 position that there is an inherent conflict of interest when a DDA represents a DPD in a
10 disciplinary investigation or proceeding conducted by the Public Defender's Office. This was a
11 serious omission of material fact.

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13 Exception No. 3

14 Page 5, lines 12-14. This finding is not accurate. Boxer did not say that it would be
15 unethical for Association members to discuss "the issues" raised in the interview with any
16 DDA. Boxer stated: "During this interview with Mr. Drew, our office will be discussing
17 confidential matters relating to Public Defender cases, consequently it would be inappropriate
18 and unethical to include a member of the District Attorney's office in the meeting. It is also
19 inappropriate and unethical for any member of the District Attorney's office to discuss the
20 details of these matters with Mr. Drew." (Drew Jt. Ex. 2 p. 1 (656).)

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22 Exception No. 4

23 Page 7, lines 19-21: "Relevant to this case is the draft policy entitled 'Confidential
24 Information in Attorney Personnel Actions' (Confidential Information policy)." Relevant also
25 to this case is the other draft policy, entitled "Potential Conflict Situations Due to Defined
26 Relationships." (Drew Jt. Ex. 7.) This is a serious omission of material fact. This other policy,
27 and its underlying rationale, are material because the Public Defender's Office and the District
28 Attorney's Office both raise the underlying inherent conflict as a legitimate basis to prohibit a

1 DDA representing a DPD in a disciplinary matter, and also because the proposed decision, in
2 effect, also holds that the Public Defender had no lawful basis to deny Drew from being
3 represented by a DDA. (See p. 13, lines 13-14.)
4

5 Exception No. 5

6 Page 7, lines 2 - 4: "Very little was said about what items need to be annotated or how
7 those annotations were used by the Public Defender's Office." This finding is contrary to the
8 evidence in the record. Ferguson discussed at length the need for updated annotations for
9 purposes of determining whether it had any conflicts of interest in its representation of clients.
10 (Drew Jt. Ex. 5 833:18 et seq.)
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12 Exception No. 6

13 The proposed decision fails to include any finding of fact that the investigative
14 interview with Drew also included a discussion about communicating with clients prior to trial,
15 with particular clients identified by name during the investigative interview. (Drew Jt. Ex. 5
16 860:14-863:10.) This was a serious omission of material fact.
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18 Exception No. 7

19 The proposed decision fails to include any finding of fact that the investigative
20 interview with Drew also included a discussion about a *Marsden* motion made against Drew by
21 a client who was identified in the investigative interview. (Drew Jt. Ex. 5 865:22-868:8.) This
22 was a serious omission of material fact.
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24 Exception No. 8

25 The proposed decision fails to include any finding of fact that the investigative
26 interview with Drew also included a discussion about Drew not ensuring his criminal case files
27 included up to date client interview sheets. (Drew Jt. Ex. 5 868:9 et seq.) This was a serious
28 omission of material fact.

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II. EXCEPTIONS IN THE ISSUES OF LAW SECTION

Exception No. 1

Page 11, lines 10-12: The administrative law judge denied the County's motion to dismiss the case for lack of subject matter jurisdiction. This was a serious error of law. As discussed more fully in our supporting brief, resolution of the dispute involves regulating the practice of law, defining the constitutional rights of criminal defendants, and defining the discretionary authority and independence of the Public Defender and the District Attorney. PERB has no authority to do this and therefore has no jurisdiction to resolve the dispute. The courts have jurisdiction in this matter.

Exception No. 2

Page 11, lines 7-10: "The County made no showing that either remedy, if ordered in this case, amounts to PERB regulating the practice of law. Nor has the County shown that such an order, in the context of this case, would cause either the Public Defender or Association unit members to "actually compromise [] client representations." Page 17, lines 17-20: "Therefore, the record does not show that confidential information was disclosed. [¶] For similar reasons, the County's assertion that Ferguson and Drew discussed confidential attorney work product during the meeting is also unpersuasive." Page 30, lines 22-23: The "County" shall cease and desist from: "Denying Association members the right to be represented in investigatory meetings involving potential discipline; and [] Denying the Association the right to represent its members."

These findings constitute a serious mistake of both fact and law. These findings indicate that, in reviewing the justifications of the "County" (i.e., the Public Defender), PERB clearly made a determination of whether the information discussed at the investigative

1 interview with Drew could be disclosed to prosecutors¹ without the Public Defender violating
2 Business and Professions Code section 6068(e)(1), Rule 3-100 of the Rules of Professional,
3 and Penal Code section 1054.6. PERB also indicated that the Public Defender had the option of
4 obtaining the consent of clients in order to disclose any confidential information to third
5 parties. (Page 19, lines 17-18.) These determinations constitute the regulation of the practice of
6 law in the criminal justice system.

7 These findings evidence PERB's regulation of the criminal justice system in another
8 way. The administrative law judge ignored the following arguments of the Public Defender's
9 Office and the District Attorney's Office: that the representation of a DPD by a DDA in a
10 disciplinary proceeding conducted by the Public Defender would constitute a conflict of
11 interest (regardless of whether confidential information was disclosed); that such
12 representation would force each office to avoid assigning the involved DDAs and DPDs to the
13 same criminal cases, thus interfering with each office's discretion in representing its clients in
14 criminal court proceedings; that such representation would chill the attorney-client relationship
15 between DPDs and clients; that such representation would undermine the faith of the public
16 and victims in the criminal justice system and undermine the relationship between the District
17 Attorneys' Office and law enforcement. By ignoring these arguments, the administrative law
18 judge implicitly ruled that such arguments had no validity. Ignoring such arguments is itself a
19 mistake of law. Such implicit ruling constitutes the regulation of the criminal justice system
20 and of the discretionary authority of the District Attorney and the Public Defender.

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22 Exception No. 3

23 Page 13, lines 14-16: "It offered to reschedule the meeting later that day if Drew could
24 find a DPD to represent him, but this was not a realistic option given the short notice and
25 because there were no DPD Association representatives at the time." This finding is contrary to
26 the evidence in the record. This was a realistic option given the Association's past practice of
27

28 ¹ Reinhold stated that she could not make a blanket promise not to disclose confidential information from the
interview to DDAs on the Association Board of Directors.

1 using only DPDs to represent DPDs in disciplinary proceedings and given that the objections
2 raised by the Public Defender that DDAs should not be permitted to obtain any confidential
3 information had been made for several years prior to the Drew interview. The Association
4 knew, or should have known, that this objection would arise if Reinhold did not promise not to
5 disclose confidential information to the DDAs on the Association Board of Directors or to any
6 other DDA.

7
8 Exception No. 4

9 Page 14, line 12/13: "Thus, the court's rationale in *City of Upland* does not provide a
10 defense in this case." This is a serious mistake of law.

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12 Exception No. 5

13 Page 16, lines 3-4: "Under these circumstances, Ferguson's insistence on Drew having
14 only a DPD represent him constitutes a total denial of the right to be represented by the
15 Association." Page 16, footnote 11, in part: "The County also contends that Drew also had the
16 option of hiring his own private counsel to assist him at the meeting." These findings are
17 incorrect as a matter of fact and law.

18
19 Exception No. 6

20 Page 17, lines 15-18: "Drew and Ferguson did not discuss any specific details about
21 cases handled by the Public Defender's Office and did not even discuss details of what items
22 Drew failed to document in his case files. Therefore, the record does not show that confidential
23 information was disclosed."

24 These findings are a mistake of fact and law. Ferguson identified by name a number of
25 clients that Drew was supposed to have pre-trial interviews with. Ferguson asked Drew why
26 these interviews did not occur. (Drew Jt. Ex. 5 860:14-863:10) Ferguson discussed with Drew
27 a *Marsden* motion filed against Drew and identified by name the client. (Drew J. Ex. 5 865:22-
28 868:8.) Ferguson identified by client name the files for which Drew had not adequately

1 annotated. (Drew Jt. Ex. 5 845:14-16.)

2 Confidential information does not merely consist of attorney-client privileged
3 information and attorney work product. The duty of confidentiality encompasses matters
4 protected by the attorney-client privilege, the work product doctrine, but also a much broader
5 category of information, including but not limited to information obtained during such
6 representation that would be embarrassing or likely detrimental to the client. (Bus. & Prof.
7 Code, § 6068(e)(1); Rules Prof. Conduct, rule 3-100, Discussion (Resp. Ex. 12); Resp. Ex. 1 p.
8 5:14-26; IV Trans. 17:24-18:18.)

9 Furthermore, there is information above and beyond that deemed confidential by
10 Business and Professions Code section 6068(e) the disclosure of which would intrude upon the
11 work of the Public Defender and interfere with the constitutionally required independence of
12 the Public Defender in representing clients. (See *Coronado Police Officers Association v.*
13 *Carroll* (2003) 106 Cal.App.4th 1001.) In the Drew investigation, such protected information
14 would include information on the conflict-check procedure and the procedure through which
15 all case files are kept up to date in terms of activity logs. Such procedures are for the direct
16 benefit of Public Defender clients. Such information would also include non-system
17 information, i.e., information that is adverse to DPD Drew even if no client names are
18 disclosed.

19

20 Exception No. 7

21 Page 18, line 9: “Mark Tuft, who the County identified as an ‘expert witness’ on
22 attorney ethics” This description of Tuft suggests that he is not an expert witness on
23 attorney ethics. There is no justification in the recommended decision supporting the position
24 that Tuft is not an expert witness on attorney ethics. There is no evidence in the record that the
25 Association objected to Tuft being designated an expert witness on attorney ethics.

26

27 Exception No. 8

28 Page 18, line 16, through page 19, line 9. The recommended decision misinterprets

1 *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001. The point to *Carroll*
2 was that the public disclosure of certain information, even if such information was not
3 attorney-client privileged or attorney work product, would burden the public defender's ability
4 to represent her clients. This point is dispositive but not addressed in the recommended
5 decision.

6
7 Exception No. 9

8 Page 19, lines 10-18. These findings are incorrect as a matter of fact and law. There
9 was no total denial of Drew's right to representation. The Association is obligated to appoint a
10 representative who is acceptable under the constitutional, legal, and ethical duties of the unit
11 members. The Association was obligated to do what it had done in the past, appoint a DPD to
12 represent a DPD in a disciplinary proceeding. The Association also could have hired outside
13 private counsel to represent Drew, at no expense to Drew.

14 The recommended decision misconstrues *San Bernardino City Unified School District*,
15 PERB Decision No. 1270. That case did not confront a set of facts, as we have here, where the
16 employer acknowledged the employee's right to representation at an investigative interview
17 but objected to the particular representative as unacceptable under the law. The case is simply
18 not on point. And if the recommended decision stands for the proposition that, even if the
19 Public Defender was justified in not permitting a DDA to represent Drew at the investigative
20 interview, the Public Defender was obligated to provide more time to Drew to obtain an
21 acceptable representative, then *San Bernardino* still would not be on point. *Upland* would be
22 the case under which such issue should be considered.

23 Moreover, cancelling the interview would eliminate a crucial investigative tool
24 available to the Public Defender to determine whether her DPDs have committed misconduct
25 or satisfactorily represented clients. Under the current position of the Association – only
26 appointing DDAs as representatives – the Public Defender would never be able to conduct an
27 investigative interview of a DPD. The Public Defender would be severely hindered in carrying
28 out her duty as a manager and as the attorney of record for all cases handled by her office to

1 ensure that her deputies are discharging their duties.

2 The recommended decision also indicates that the Public Defender had the option of
3 obtaining the consent of clients in order to disclose any confidential information to third
4 parties. (Page 19, lines 17-18.) There is no discussion whether the request for such consent
5 would be appropriate under the facts of the case, e.g., whether the Public Defender would be
6 upholding her constitutional duty to provide effective assistance of counsel to an indigent
7 criminal defendant by asking such defendant to consent to the disclosure of attorney-client and
8 other protected information to DDAs acting in their union capacity. This is a mistake of law,
9 and it also is further evidence of PERB's regulation of the criminal justice system.

10
11 Exception No. 10

12 Page 19, lines 19-20. The recommended decision is incorrect as a matter of law.
13 Under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215, and other law, an employee
14 has a "notice of the proposed action, the reasons therefor, a copy of the charges and materials
15 upon which the action is based, and the right to respond, either orally or in writing, to the
16 authority imposing the discipline." This finding in the recommended decision would allow the
17 Public Defender to raise issues with Drew or another DPD that could lead to disciplinary
18 action, and to take disciplinary action, without identifying the specific client cases in question
19 or the names of the judges who had issues with Drew or any other DPD or with any other
20 specific information that would presumably be necessary for Drew or any other DPD to
21 effectively respond to the issues raised. (Joint Ex. N p. 3.)

22
23 Exception No. 11

24 Page 20, lines 3-6. These findings are incorrect as a matter of fact and law. The
25 options identified do are not legally valid given the facts of the case.

26
27 Exceptions No. 12

28 Page 21, lines 10-20. These findings misconstrue the evidence in the record. The

1 findings provide that "the detailed restrictions completely prevent the Association from
2 selecting DDAs as authorized representatives for DPDs in disciplinary matters involving
3 confidential information" and that "the County was aware that the Association had no DPD
4 representatives at the time it implemented the policy."

5 This is misleading. The evidence in the record indicates that prior to the Public
6 Defender adopting this policy and prior to the dispute with the Association over appointing
7 DDAs to represent DPDs in disciplinary proceedings, *no* DDAs had ever been appointed to
8 represent DPDs in any disciplinary proceedings.

9
10 Exception No. 13

11 Page 22, lines 11-13. This finding is incorrect as a matter of fact and law. The Public
12 Defender's Office, and the District Attorney's Office, did not change any policy but, as
13 discussed above, merely memorialized what was already past practice. Therefore the issue of a
14 zipper clause is not applicable. Furthermore,

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16 Exception No. 14

17 Page 22, line 21, through page 23, line 4. This finding is incorrect as a matter of fact
18 and law, No. 4 on p. 2 herein.

19
20 Exception No. 15

21 Page 24, line 18, through page 25, line 2. The finding of fact that "the County's policy
22 actually prevents all current Association representatives from representing DPDs in
23 disciplinary proceedings," is incorrect as a matter of law and is misleading.

24 First, the Public Defender's policies on confidential information and conflicts in
25 personnel matters (Drew Jt. Ex. 6) and the draft policy of the District Attorney's Office (Drew
26 Resp. Ex. A) do not expressly prevent "all current Association representatives from
27 representing DPDs in disciplinary proceedings." The policies of both offices simply prevent
28 *DDAs* from representing DPDs in disciplinary proceedings. The fact that the Association *chose*

1 not to appoint a DPD as a representative does not negate the uncontested fact that the
2 Association could easily have made such appointment. Furthermore, neither offices' policy
3 prevents the appointment of outside counsel. Both offices' policies prohibit the sharing of
4 confidential information relating to Public Defender clients with DDAs.

5 The finding of fact improperly obscures the fact that past practice was that the
6 Association did not appoint DDAs to represent DPDs in disciplinary proceedings, but rather
7 appointed DPDs to represent DPDs in disciplinary proceedings (see Exception 14) and that the
8 Association at some point in time *chose* not to appoint DPDs as employee representatives.

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10 Exception No. 16

11 Page 26, lines 6-7: This is incorrect as a matter of fact and law. The policies merely
12 comport with past practice.

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14 Exception No. 17

15 Page 26, lines 10-17: The findings are incorrect as matter of fact and law. Only the
16 managing attorney is obligated under the rules of ethics to monitor the compliance of
17 subordinate attorneys' compliance with their ethical duties.

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19 Exception No. 18

20 Page 27, lines 15-17: The findings are incorrect as a matter of fact and law. The
21 County does explain the constitutional and ethical basis for the prohibition of DDAs
22 representing DPDs in disciplinary proceedings. The County also explains why the "expense" is
23 negligible.

24
25 Exception No 19

26 Page 28, lines 5-18: The findings are incorrect as a matter of fact and law. The County
27 demonstrated that, despite the language of the MOU, the past practice of the parties has been
28 that DDAs do not represent DPDs in disciplinary proceedings.

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Exception No. 20

Page 28, lines 9-11: The finding is incorrect as a matter of fact. Mr. Tuft testified that a protocol should be agreed to by the two offices (District Attorney and Public Defender), not the parties. Moreover, Tuft did not testify about the operational or non-confidential ethical issues.

III. CONCLUSION

Based upon the foregoing exceptions and the accompanying brief in support of these exceptions, the County respectfully requests that the Board reverse the proposed decision for the reasons set forth herein.

DATED: May 6, 2013

JEAN-RENE BASLE
County Counsel

By: _____
KENNETH C. HARDY,
Deputy County Counsel
Attorneys for Respondent
County of San Bernardino

2013 MAY -8 AM 11:43

PROOF OF SERVICE

At the time of service I was over 18 years of age, a citizen of the United States, employed in the County of San Bernardino, State of California, and **not a party to this action**. My business address is 385 North Arrowhead Avenue, Fourth Floor, San Bernardino, California 92415-0140.

On May 6, 2013, I served the following document: RESPONDENT'S STATEMENT OF EXCEPTIONS; PERB CASE LA-CE-554-M

I served a true copy of the document on the person below, as follows:

Marianne Reinhold, Esq.
Reich, Adell & Cvitan
2670 North Main Street, Suite 300
Santa Ana, California 92705

The document was served by the following means:

By United States Mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in San Bernardino, California, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at San Bernardino, California.

I declare under penalty of perjury under the laws of the United States of America, that the above is true and correct.

DATE: May 6, 2013

MARTHA H. FORRESTER, Declarant