STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO COUNTY AIRCRAFT RESCUE FIREFIGHTERS ASSOCIATION, Charging Party, v. COUNTY OF SACRAMENTO, Respondent.	Case No. SA-CE-31-M PERB Decision No. 1581-M January 9, 2004

Appearances: Carroll, Burdick & McDonough by Timothy K. Talbot, Attorney, for Sacramento County Aircraft Rescue Firefighters Association; Sacramento County Counsel by Melvyn W. Price, Assistant County Counsel, for County of Sacramento.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of Sacramento (County) to a proposed decision (attached) of the administrative law judge (ALJ). The ALJ held that the County violated the Meyers-Milias-Brown Act (MMBA)[1] when it rejected a petition for unit modification filed by the Sacramento County Aircraft Rescue Firefighters Association (Association). The Association had sought to create a new bargaining unit comprised of the County's fire operations workers who were currently in the Operations and Maintenance Unit (OM Unit) represented by the Stationary Engineers Local 39 of the International Union of Operating Engineers (IUOE). The County rejected the Association's petition on the ground that it was

[1]The MMBA is codified at Government Code section 3500 et seq.

prohibited by the County's contract bar rule. The ALJ found that although the County's local ordinance did impose a "contract bar" on petitions for unit modification during the term of a contract, the ordinance also prohibited any contracts exceeding three years. Since the County had inappropriately agreed to a five-year contract with IUOE, the ALJ found that the local ordinance provided no "contract bar" protection at all. Thus, the ALJ held that the County violated the MMBA by rejecting the Association's petition for unit modification.

After reviewing the entire record in this case, including the proposed decision, the County's exceptions and the Association's response, the Board finds the ALJ's proposed decision to be free from prejudicial error and adopts it as the decision of the Board itself.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the County of Sacramento (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3509 and 3502, and PERB Regulation 32603(g)[2], by giving status as a contract bar to a Memorandum of Understanding longer than three years. Because the County's action violated section 2.79.105 of the local Employee Relations Ordinance, adopted by the County pursuant to Section 3507 of the MMBA, the County violated MMBA section 3509 and PERB Regulation 32603(g) and interfered with employee rights protected under MMBA section 3502.

Pursuant to MMBA sections 3509(a) and 3541.3(i), it is hereby ORDERED that the County, its governing board and its representatives shall:

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A. CEASE AND DESIST FROM:

1. Refusing to accept and process in accord with County rules, the petition for modification of the County's Operations and Maintenance Unit (OM Unit) filed by the Sacramento County Aircraft Rescue and Firefighters Association (Association) on December 4, 2001.

2. Interfering with employee rights by refusing to accept and process in accord with County rules, the Association's petition for modification of the County's OM Unit.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Immediately accept and process in accord with County rules, the petition for modification of the County's OM Unit filed by the Association on December 4, 2001.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Association.

Members Whitehead and Neima joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SA-CE-31-M, Sacramento County Aircraft Rescue Firefighters Association v. County of Sacramento, in which all parties had the right to participate, it has been found that the County of Sacramento (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3509 and 3502, and PERB Regulation 32603(g), by giving status as a contract bar to a Memorandum of Understanding longer than three years. Because the County's action violated section 2.79.105 of the local Employee Relations Ordinance, adopted by the County pursuant to Section 3507 of the MMBA, the County violated MMBA section 3509 and PERB Regulation 32603(g) and interfered with employee rights protected under MMBA section 3502.

Pursuant to MMBA sections 3509(a) and 3541.3(i), it is hereby ORDERED that the County, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to accept and process in accord with County rules, the petition for modification of the County's Operations and Maintenance Unit (OM Unit) filed by the Sacramento County Aircraft Rescue and Firefighters Association (Association) on December 4, 2001.

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B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Immediately accept and process in accord with County rules, the petition for modification of the County's OM Unit filed by the Association on December 4, 2001.

Dated: _____ COUNTY OF SACRAMENTO

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO COUNTY AIRCRAFT RESCUE FIREFIGHTERS ASSOCIATION, Charging Party, v. COUNTY OF SACRAMENTO, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-31-M PROPOSED DECISION (11/27/02)

Appearances: Carroll, Burdick & McDonough by Timothy K. Talbot, Attorney, for Sacramento County Aircraft Rescue Firefighters Association; Sacramento County Counsel by Melvin W. Price, Assistant County Counsel, for County of Sacramento.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A union seeking to represent firefighters contends here that a county employer violated its own local ordinance and thereby interfered with protected employee rights when it rejected the union's petition for a unit modification. The county replies that the unit modification petition was untimely filed under the contract bar provision of the local ordinance and that its action was consistent with how it has interpreted the local rule for nearly 30 years.

This action was commenced on January 10, 2002, when the Sacramento County Aircraft Rescue Firefighters Association (Union) filed an unfair practice charge against the County of Sacramento (County). The charge alleged that the County violated various sections of the County Employee Relations Ordinance (Ordinance) when on December 18, 2001, the County rejected the Union's unit modification and representation petition.

The General Counsel of the Public Employment Relations Board (PERB or Board) followed on March 26, 2002, by issuing a complaint against the County. The complaint

alleges that on or about December 18, 2001, the County violated two of its own local rules when it rejected the Union's unit modification and certification petition. The complaint alleges that the County violated local rule 2.79.105 when it asserted that the contract bar rule precluded the filing of the petition during the first three years of a five-year agreement covering the Operations and Maintenance unit. The complaint alleges that the County violated local rule 2.79.080(f) when it refused to seek or allow modification of the Operations and Maintenance unit to remove firefighter classifications because they are covered by a different impasse procedure than other members of the unit.

By these actions, the complaint alleges, the County interfered with rights guaranteed by the Meyers-Milias-Brown Act (MMBA or Act),[1] specifically section 3509(b)[2] and PERB Regulation 32603(g).[3] The County filed an answer to the complaint on April 11, 2002, admitting certain jurisdictional facts but denying all other allegations. The hearing was held in

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[1] The MMBA is set out at Government Code section 3500 et seq. Unless otherwise indicated, all subsequent references are to the Government Code.

[2] Section 3509 provides that:

> (b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et. seq. Regulation 32603 provides in relevant part that it shall be an unfair practice for a public agency to:

> (g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Sacramento on September 9, 2002. With the filing of post-hearing briefs, the case was submitted for decision on November 18, 2002.

FINDINGS OF FACT

The County is a "public agency" within the meaning of section 3501(c). The Union is an employee organization within the meaning of section 3501(a).

As written during the relevant period, section 2.79.080, the portion of the County Ordinance that sets out unit determination criteria, reads in relevant part as follows:

> **Determination of Unit.** (f) Employees shall not be included in a unit which includes employees that are not covered by the same impasse resolution procedures.

As written during the relevant period, section 2.79.105, the contract bar provision of the County Ordinance, reads as follows:

> **Multi-Year Memorandums**. (a) No decertification or modification petitions shall be received, nor elections held in respect to any unit whose employees are covered by a multi-year memorandum of understanding whose term extends beyond the calendar year in which an election might otherwise be held pursuant to Section 2.79.095.
>
> (b) Such memorandums shall not exceed a three-year term.

As written during the relevant period, section 2.79.110, the unit modification provision of the County Ordinance, reads in relevant part as follows:

> **Modification.** (a) Modifications of units shall be proposed by petition . . . .
>
> (b) A petition for modification of a unit may be filed with the county executive by an employee organization. The petition shall contain such information as may be prescribed by the county executive. The petition may only be filed from December 1st to December 20th of the calendar year prior to the year in which the memorandum of understanding covering the unit is due to expire. Regarding newly established units, a valid petition may not be filed earlier than the calendar year succeeding the calendar year in which the unit was determined. These time limitations shall

not apply to modifications initiated pursuant to subsections (e) or (f), nor shall such modifications affect the timing of modifications subject to initiation by petition.

(d) If the county executive and concerned employee organizations are unable to agree on a modification of the unit, any of the parties may petition to have an arbitrator decide on the modification. The petition shall contain such information as may be prescribed by the county executive. The arbitration procedure shall be the same as prescribed under Section 2.79.070 of this chapter. Said petition may be filed no earlier than January 5th and by January 10th, except that this limitation shall not apply to modifications initiated pursuant to subsections (e) and (f). The matter shall be heard, submitted and decided by March 10th. Only the county executive and concerned organizations shall participate in selection of the arbitrator and in the conduct of the arbitration.

As written during the relevant period, section 2.79.111, an alternate unit modification provision of the County Ordinance, reads in relevant part as follows:

Modification of Units by Petition of the County Executive.
(a) As a result of changes in the law governing employee relations, the impasse procedures generally governing county employees differ from the impasse procedures governing certain county employees who are firefighters or law enforcement officers. Where employees governed by different impasse procedures are included within the same representation unit, there is an irreconcilable conflict in the method of resolving any impasse, where said conflict creates the potential for undermining the integrity of the employee relations program. This section serves as the means whereby the prohibition of Section 2.79.080(f) may be effected, thereby ensuring that all employees in a representation unit are governed by the same impasse resolution procedures.

(d) The county executive shall give notice of any proposed modification between December 1st and December 20th of any calendar year; provided that, where an employee organization files a petition to create a new unit or modify an existing unit during said December period, the county executive shall have until five p.m. on January 20th to give notice of any proposal to create a different unit or to modify an existing unit in answer to any petition for arbitration filed by said employee organization. Any employee organization certified as recognized in respect to units proposed for modification shall be notified and joined as a

concerned employee organization in the unit modification proceedings.

The Union was formed in late 2001 to represent County employees in the job classifications of Fire Operations Worker (Level I and Level II) and Senior Fire Operations Worker. The 45 employees in these job classes are responsible for fire suppression, fire rescue and the servicing of all types of aircraft with fuel and oil. In addition, they fight structural fires and have some responsibility in airport security. They are considered safety employees and are thus entitled to higher retirement and worker's compensation benefits[4] than non-safety employees. Fire operations workers are stationed at the County's two airports, Sacramento International Airport and Mather Airport.

Fire operations workers are members of the County's Operations and Maintenance bargaining unit, which is represented by Stationary Engineers Local 39 of the International Union of Operating Engineers (IUOE). With approximately 1,119 budgeted positions in some 50 different job classifications, the Operations and Maintenance Unit is the fourth largest of the County's 24 bargaining units. Fire operations workers are the only safety employees in the Operations and Maintenance bargaining unit. On August 31, 2001, the County and IUOE entered into a Memorandum of Understanding (MOU) covering the period from July 1, 2001, through June 30, 2006.

On December 4, 2001, the Union filed a petition for modification of the Operations and Maintenance Unit to create a new unit composed of employees in the job classifications of Fire Operations Worker (Level I and Level II) and Senior Fire Operations Worker. Accompanying the petition for unit modification was a showing of support from employees in the three job classifications and a request by the Union to represent employees in the proposed new unit. In

[4] See sections 31469.3 and 31470.4 and Labor Code section 4850.

its petition for unit modification, the Union argued that since January 1, 2001, fire operations workers were the only employees in the Operations and Maintenance Unit subject to an impasse resolution procedure that concluded with interest arbitration.[5] "This fact creates a 'conflict' in the method of resolving any impasse within the bargaining unit," the petition reads. "Requiring those classifications to remain in the Operations and Maintenance Unit has the purpose and effect of depriving those employees of their collective bargaining rights and undermining the integrity of the employee relations program."

Moreover, the Union asserted, fire operations workers "do not share an identifiable community of interest with other non-safety employee classifications" and their retention in the Operations and Maintenance Unit "is inappropriate and does not contribute to sound employer-employee relations." The Union argued that even though there was an agreement in existence between the County and IUOE the agreement served as no bar to the unit modification because the contract was for a term longer than three years. The Union argued that under section 2.79.105 of the County Ordinance, a MOU may not exceed a term of three years and the contract bar was thus inapplicable. In its petition, the Union further argued that under section 2.79.111 of the Ordinance, the County Executive is permitted to petition for modification of any unit in which employees do not share a common impasse procedure. The Union acknowledged that the Ordinance "seemingly does not afford that same right to employee organizations" but argued that arbitrary or capricious denial of unit modification would be bad faith.

In a letter dated December 18, 2001, Steve Lakich, the County director of employee relations, denied the petition as "not validly filed" under the contract bar provision, of

[5] Section 1299 et seq. of the Code of Civil Procedure.

the County Ordinance. Mr. Lakich noted that the MOU covering the Operations and Maintenance Unit was in its first year of a five-year agreement. It has been the County's consistent interpretation, Mr. Lakich stated, that when a unit has been covered by an MOU longer than three years, no unit modification or decertification petitions can be accepted during the first three years of its term. The restriction on the length of an MOU has never been interpreted to invalidate an MOU or to make the contract bar inapplicable, he wrote.

In his letter of December 18, 2001, Mr. Lakich also rejected the Union's request to invoke section 2.79.111 of the County Ordinance as an exception to the contract bar provision. Mr. Lakich wrote that only the County Executive has authority under the Ordinance to initiate a severance request for the purpose of complying with the prohibition against placing employees with different impasse procedures. Any exercise of the provision would trigger an omnibus arbitration to determine unit placement for all public safety employees, Mr. Lakich wrote.

At the hearing, Mr. Lakich testified that section 2.79.111 was written in response to the passage of SB 402 (Code of Civil Procedure section 1299 et seq.) that instituted interest arbitration to resolve collective bargaining impasses for police and firefighters. However, he testified, section 2.79.111 has never been implemented because of uncertainty over the constitutionality of SB 402. He said the County did not want to create new units on the basis of differing impasse procedures because it was not clear that the law would survive legal challenge. He said he anticipated major problems with employee organizations that might lose members in a unit modification which, he testified, would have been very unhappy to have their units split when there was uncertainty about the law.

The County presented evidence that over the years it had rejected unit modification and decertification petitions because they had not been filed within the window period or had been filed in the wrong year and were subject to a contract bar. However, the County offered no evidence of any prior situation where it had rejected a unit modification petition filed within the first three years of an MOU with a duration longer than three years.

Subsequent to the events at issue, the County amended section 2.79.105 of the Ordinance to permit MOUs of five years upon mutual agreement. The amendment, which was adopted on or about January 15, 2002, reads as follows:

> **Multi-Year Memorandums.** (a) Except as provided under section 2.79.111, no decertification or modification petitions shall be received, nor elections held in respect to any unit whose employees are covered by a multi-year memorandum of understanding whose term extends beyond the calendar year in which an election might otherwise be held pursuant to Section 2.79.095.
>
> (b) A multi-year memorandum of understanding shall not exceed a three-year term; provided that, by mutual agreement, the County and an employee organization may enter into memorandums not exceeding a five-year term.

Mr. Lakich testified that the revised language was drafted because of the County's desire to have longer agreements with the exclusive representatives that would all expire on July 1, 2006. He said the unions replied that if the contracts were to be up to five years in length, then the contract bar should be five years, also. He said he accepted the unions' argument but wanted to ensure that an interest arbitrator would be precluded from imposing a contract of longer than three-years should the interest arbitration provisions for police and firefighters be upheld and go into effect. It is for this reason that the revised Ordinance permits MOUs of longer than three years only "by mutual agreement" of the County and a union.

ISSUES

Did the County interfere with protected rights by violating local rules adopted pursuant to section 3507 when, on or about December 18, 2001, it:

1. Rejected the Union's petition to modify the Operations and Maintenance Unit by asserting that the contract bar provision of section 2.79.105 of the local Ordinance precluded the filing of a petition for the first three years of a five-year agreement?

2. Refused to seek or allow modification of the Operations and Maintenance Unit under section 2.79.080(f) to remove firefighter classifications because they are covered by a different impasse procedure from other employees in the Operations and Maintenance Unit?

CONCLUSIONS OF LAW

Public agencies are empowered under section 3507 to "adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations." This includes rules involving the "recognition" (section 3507(c)) and "exclusive recognition" (section 3507(d)) of employee organizations. It is an unfair practice under section 3509 and PERB Regulation 32603(g) for a public agency employer to violate the MMBA or to violate any rules and regulations adopted pursuant to section 3507.

The County has adopted rules under section 3507 that establish a procedure whereby an employee organization can become an exclusive representative. These include a contract bar and rules pertaining to unit modification and the decertification of an incumbent exclusive representative. There is no challenge here to the reasonableness of the County's rules as they were in effect during the relevant period.[6] Rather, it is the Union's contention that the County

[6] In its post-hearing brief, the Union for the first time asserts that PERB should set aside as "an unreasonable local rule" the 2002 amendment to section 2.79.105 of the Ordinance

did not apply the rules in accord with their literal meaning, thereby violating the rules and interfering with the section 3502 right of employees to form, join and participate in the activities of an employee organization.

The Union argues that under section 2.79.105 of the County Ordinance, as it existed when the Union filed its petition for unit modification on December 4, 2001, an MOU could not exceed a three-year term. Nevertheless, the Union continues, the MOU that the County entered with IUOE on August 31, 2001, was for a term of five years. Section 2.79.105 reflects an unambiguous intent to limit the maximum term of any multi-year agreement to three years and thus, the Union asserts, the County's agreement with IUOE cannot stand as a bar to a unit modification. The Union rejects the argument that the contract bar provision of the Ordinance is applicable in the first three years of a five-year agreement, describing such an interpretation as contrary to all rules of statutory construction. The Union makes no claim that the MOU is invalid between the parties. However, the Union concludes, because a contract longer than three years was specifically prohibited by the Ordinance, an agreement of five years cannot stand as a contract bar to the Union's unit modification petition.

The Union argues further that in refusing to permit modification of the Operations and Maintenance Unit, the County has violated the prohibition against placement of employees subject to different impasse procedures in the same bargaining unit. The Union points to section 2.79.080(f) of the Ordinance which sets out such a restriction in the unit determination criteria. The Union argues that although the ordinance purports to restrict to the County executive authority to seek a unit modification because of differing impasse procedures, the Union cannot be banned from insisting on enforcement of the Ordinance.

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that established a five-year contract bar. The question of the reasonableness of the County's 2002 amendment to the Ordinance was not litigated and will not be considered here.

The County rejects these arguments, asserting that its contract bar rule was patterned after the contract bar rule enforced by the National Labor Relations Board (NLRB). Under NLRB cases, the County argues, a contract bar will block a decertification for up to three years, depending upon the length of the contract. Where a contract is for more than three years, the County continues, the NLRB does not find the contract bar invalid but will enforce it only during the first three years. The County argues that continuously since 1972 it has had in place a three-year contract bar that was intended to parallel the practice of the NLRB. This is apparent, the County argues, from the way the County rule is written, from the necessary assumption that the County was aware of how the NLRB applied the rule, from the way the County has historically applied the rule and from the expectation of both the County and the unions representing County employees as demonstrated by their entry into agreements of longer than three years. The County argues that PERB cases interpreting other California labor relations statutes can be harmonized with NLRB practice except where the PERB decisions are rooted in unique statutory language not applicable here.

The County describes as "make weight" the argument that the Union has a right to seek a unit modification on the grounds that the employees it seeks to represent are covered by a different impasse procedure from other employees in the Operations and Maintenance Unit. By the express terms of section 2.79.111, the County argues, only the County executive has the authority to seek a unit modification for the purpose of separating employees subject to different procedures. Moreover, the County continues, the statute that purports to create interest arbitration for police and firefighters is under legal attack and until that litigation is resolved, the County concludes, there is no basis for a unit modification. The County argues that it will not take action to sever employees from existing units absent greater legal certainty that there is a need to do so.

Contract Bar

The MMBA sets no maximum length for the term of an MOU and it contains no provision that establishes a contract bar as a limitation on the exercise of employee choice in the selection of an exclusive representative.[7] Such rules as are applicable here are to be found only in the County Ordinance. In the interpretation of the Ordinance, the County looks for guidance to the practices of the NLRB.

Like the MMBA, the National Labor Relations Act contains no contract bar in the text of the statute. As one court noted:

> . . . . The rule does not find its source in the express language of the statute, nor is it judicially compelled. Rather, the [NLRB] has formulated the rule and thus has the principal discretion to waive or apply it in order to effectuate its policy underpinnings. . . . . [NLRB v. Circle A&W Products Co. (9th Cir. 1981) 647 F.2d 924, 926 [107 LRRM 2923, 2924].]

Accordingly, the NLRB over the years has changed the rule significantly. Originally, the NLRB allowed the length of the contract bar to vary from industry to industry (Cushman's Sons (1950) 88 NLRB 121 [25 LRRM 1296]). Then, after setting the maximum length of the contract bar at a uniform two years (Pacific Coast Association of Pulp and Paper Manufacturers (1958) 121 NLRB 990 [42 LRRM 1477] (Pacific Coast)), the NLRB increased the maximum length to three years (General Cable Corporation (1962) 139 NLRB 1123 [51 LRRM 1444] (General Cable).) As the NLRB currently applies the rule, the maximum length of a contact bar remains at three years. A contract of more than three years is not illegal

[7] It could be argued that the failure of the Legislature to place a contract bar in the text of the MMBA demonstrates a legislative intent that there be no contract bar rule at the local government level. (See Service Employees International Union v. City of Santa Barbara (1981) 125 Cal.App.3d 459, 467-468 [178 Cal.Rptr. 89].)

and it is fully effective as a contract bar, but only during the first three years. (Vanity Fair Mills, Inc., Clarke Mills Division (1981) 256 NLRB 1104 [107 LRRM 1331].)

The County's contract bar rule differs in one significant respect from that of the NLRB. The County rule was legislatively written by the Sacramento County Board of Supervisors in section 2.79.105 of the local Ordinance. As a legislative enactment, it is not subject to discretionary application "to waive or apply it in order to effectuate its policy underpinnings." (NLRB v. Circle A&W Products Co., supra., 647 F.2d 924.) Rather, as the County states in its brief, interpretation of the Ordinance must be approached as with a statute in an effort to ascertain the intent of the legislative body so as to effectuate the purposes of the law. (County of Madera v. Superior Court (1974) 39 Cal.App.3d 665, 668 [114 Cal.Rptr. 283].)

> . . . . In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. . . . [Dyna-Med, Inc. v. Fair Employment and Housing Com. (1987) 43 Cal.3d 1379, 1386-1387 [241 Cal.Rptr. 67].]

The goal of a contract bar is to promote stability in labor-management relations while at the same time ensuring that employees retain free choice to remove or change an exclusive representative within some reasonable period. Section 2.79.105 of the County Ordinance achieves this goal by barring decertification or unit modification petitions during the existence of a multi-year contract, except for a window period at specified times. As written during the

relevant period, section 2.79.105(b) provided that "[s]uch memorandums shall not exceed a three-year term."

The County reads section 2.79.105(b) to be a mere codification of the NLRB policy that an MOU of longer than three years will not be effective to bar an election beyond the third year. The County argues that it has consistently applied the Ordinance in this manner for 30 years, although it presented no evidence of any prior occasion involving an attempt to modify a unit within the first three years of an MOU with a term of more than three years.

However, as the Union observes in its brief, the County did not adopt the language used in NLRB decisions in writing its contract bar. NLRB decisions explicitly state that contracts having fixed terms longer than three years "will be treated for contract bar purposes as three-year agreements and will preclude an election for only their initial three years." (General Cable, 51 LRRM at 1445.) Rather than write a contract bar in language substantially similar to that employed in NLRB decisions, the County chose in the local Ordinance to set the maximum term of labor agreements at three years.[8] The obvious implication is that by employing language that differs from that used by the NLRB the authors of the County Ordinance intended a different purpose.

I conclude that the County's interpretation does not give to the language of section 2.79.105(b) "its usual, ordinary import" and accord significance, "if possible, to every word." (Dyna-Med, Inc. v. Fair Employment and Housing Com., supra, 43 Cal.3d 1379.) Although,

[8] Nor did the County choose to model its contract bar after several of the California statutes that contain contract bars. See section 3577(b)(1) of the Higher Education Employer-Employee Relations Act; Labor Code Section 1156.7(b) of the Agricultural Labor Relations Act and Public Utilities Code Section 125521, pertaining to a transit board. As the Union points out in its brief, each of these contract bars is written in language that makes a clear distinction between the duration of a collective bargaining agreement and the maximum period that an agreement may act as a bar to an election.

the County would read the Ordinance as if it stated that "MOUs longer than three years shall be effective to bar an election only for the first three years," what the Ordinance actually states is that MOUs shall not "exceed a three-year term."

Section 2.79.105 has two parts that must be seen as a whole for the purpose of interpreting the intent of its authors. Subsection (a) prohibits a decertification or unit modification petition from being filed when a multi-year MOU extends beyond the calendar year in which an election might otherwise be held. Subsection (b) provides that "such" MOUs, meaning those that would prohibit a decertification or unit modification, "shall not exceed a three-year term." Read together, the two subsections create a contract bar but limit its effect only to those MOUs that do not "exceed a three-year term." If an MOU is longer than three years, it might be binding on the parties but it would not serve as an election bar.

This conclusion is consistent with the holding of the PERB in San Juan Unified School District (1995) PERB Decision No. 1082 (San Juan). In San Juan, the Board was required to interpret section 3544.7, the contract bar provision of the Educational Employment Relations Act (EERA).[9] Section 3544.7 prohibits an election while there "is currently in effect a lawful written agreement" between a public school employer and an exclusive representative of its employees. Section 3540.1(h) states in relevant part that a collective bargaining agreement

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[9] The EERA is codified at section 3540 et seq. Section 3544.7 reads in relevant part as follows:

> (b) No election shall be held and the petition shall be dismissed whenever either of the following exist:
>
> (1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement.

"may be for a period not to exceed three years." Citing an earlier Board decision,[10] the hearing officer in San Juan concluded that "a contract more than three years in duration is an illegal agreement." Because the parties in San Juan had entered an agreement of 38 months, the hearing officer concluded that the agreement was illegal and therefore did not serve as a bar to an election. The Board did not specifically adopt the conclusion that an agreement that exceeded 36 months was illegal, but it did agree "that under EERA a written agreement that exceeds 36 months does not provide a contract bar against representation petitions."

The County, however, would limit San Juan solely to a holding that the contract bar was not applicable in the last two months of a 38-month contract. In the County's view, nothing in the case suggests that the contract bar would not have been effective for the first 36 months of the contract's life.

The exact language of the Board's holding in San Juan reads:

> As a threshold decision, the hearing officer ruled that the 38-month collective bargaining agreement between the District and CSEA did not bar the Teamsters' severance petition. We agree with the hearing officer that under EERA a written agreement that exceeds 36 months does not provide a contract bar against representation petitions.

Nowhere in this language is there any hint of a conclusion that the Board would have recognized the effectiveness of the contract bar during its first 36 months. Rather, I interpret San Juan as treating contracts of longer than three years the same as the Board treats contracts of indefinite duration, i.e., that they may be binding on the parties but will not serve as a contract bar for any period of time. (See, State of California (Department of Personnel Administration) (1989) PERB Order No. Ad-191-S; see also, Pacific Coast at 42 LRRM 1478-1479.)

[10] San Benito Joint Union High School District (1984) PERB Decision No. 406.

For these reasons, I conclude that the County interfered with rights protected by section 3502[11] when on December 18, 2001, it rejected the Union's unit modification and certification petition. The County's action was a violation of section 2.79.105 of the County Ordinance as written at that time because it granted status as a contract bar to a contract longer than three years in length. The County thereby committed an unfair practice under section 3509(b) and PERB Regulation 32603(g).

Impasse Procedure

In 2000, the Legislature enacted and the Governor signed into law provision for binding interest arbitration to resolve collective bargaining impasses involving police and firefighters. (See Code of Civil Procedure section 1299 et seq.) In response to this change, the County revised the Ordinance to add section 2.79.080, which prohibits employees not covered by the same impasse procedure from being in the same bargaining unit, and section 2.79.111, which gives the County Executive authority to seek a unit modification to separate employees subject to different impasse procedures.

However, the County has not attempted to modify its bargaining units to separate employees on the basis of differing impasse resolution procedures. The statute granting interest arbitration to police and firefighter units was soon attacked in court and in April of 2002 it was held to be in violation of the California Constitution. (County of Riverside v.

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[11] Section 3502 provides that:

> Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.

Superior Court (2002) 97 Cal.App. 4th 1103 [118 Cal.Rptr.2d 854] (County of Riverside)), petition for review granted, July 17, 2002.) In the face of the legal uncertainty surrounding the statute, Mr. Lakich considered as premature any effort to modify the units because of potentially differing impasse procedures.

The Union argues that County of Riverside is stayed while on appeal and has no legal effect. Therefore, the Union argues, until and unless the interest arbitration provision set out in Code of Civil Procedure sections 1299-1299.9 is invalidated by the Supreme Court, the County is not at liberty to ignore its own Ordinance or wait for some indeterminate time for a final judicial decision. The Union rejects any suggestion that the impasse procedure cannot be imposed until the County's agreement with IUOE expires, arguing that mid-contract bargaining over proposed County changes in working conditions could easily lead to a necessary resort to employment of impasse resolution procedures.

I do not share the Union's view. Given the legal uncertainty about the enforceability of Code of Civil Procedure sections 1299-1299.9, I do not believe it can accurately be said that at this time County employees in the Operations and Maintenance Unit are subject to two different impasse resolution procedures. Whether employees in the Operations and Maintenance Unit are subject to different impasse procedures will not be known until the California Supreme Court issues its decision in the County of Riverside case. Because of the legal uncertainty, I do not find that the County violated section 2.79.080 of the County Ordinance by failing to seek a unit modification to remove firefighters from the Operations and Maintenance Unit.

Accordingly, I will dismiss the allegation that the County refused to seek or allow modification of the Operations and Maintenance Unit to remove firefighter classifications because they are subject to a different impasse procedure from other unit employees.

REMEDY

Pursuant to section 3509(a), the PERB under section 3541.3(i) is given the power:

> To investigate unfair practice charges or alleged violations of this chapter, and take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

This includes the authority under section 3509(b) to process as an unfair practice charge any complaint alleging a violation of "any rules and regulations adopted by a public agency pursuant to Section 3507."

Here, the County gave status as a contract bar to an MOU longer than three years. The County thereby violated its own local Ordinance, adopted by the County pursuant to section 3507 of the MMBA. By this action the County also violated MMBA section 3509 and PERB Regulation 32603(g) and interfered with employee rights protected under section 3502. The ordinary remedy in an interference case is an order directing the offending party to cease and desist from its interference in protected rights. Such a remedy will be granted here.

It is further appropriate that the County be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the County, will provide employees with notice that the County has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the MMBA that employees be informed of the resolution of this controversy and the County's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the County of Sacramento (County) violated Government Code section

3509 and 3502, provisions of the Meyers-Milias-Brown Act (MMBA) and Public Employment Relations Board (PERB or Board) Regulation 32603(g). (Cal. Code Regs., tit. 8, sec. 31001 et seq.) The County violated the MMBA by giving status as a contract bar to a Memorandum of Understanding (MOU) longer than three years. Because the County's action violated section 2.79.105 of the local Employee Relations Ordinance, adopted by the County pursuant to section 3507 of the MMBA, the County violated MMBA section 3509 and PERB Regulation 32603(g) and interfered with employee rights protected under section 3502.

Pursuant to sections 3509(a) and 3541.3(i) of the Government Code, it hereby is ORDERED that the County, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to accept and process in accord with County rules the petition for modification of the County's Operations and Maintenance Unit filed by the Sacramento County Aircraft Rescue and Firefighters Association (Union) on December 4, 2001.

2. Interfering with employee rights by refusing to accept and process in accord with County rules the Union's petition for modification of the County's Operations and Maintenance Unit.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Within twenty (20) workdays of the service of a final decision in this matter, accept and process in accord with County rules the petition for modification of the County's Operations and Maintenance Unit filed by the Sacramento County Aircraft Rescue and Firefighters Association (Union) on December 4, 2001.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to certificated employees customarily are posted,

copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that the County will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the PERB in accord with the director's instructions.

All other allegations in the complaint and the companion unfair practice charge are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 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, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Ronald E. Blubaugh
Administrative Law Judge