STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 521, Charging Party, v. SANTA CLARA COUNTY SUPERIOR COURT, Respondent.	Case No. SF-CE-15-C PERB Decision No. 2394-C October 20, 2014

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 521; Lozano Smith by Sarah Levitan Kaatz, Attorney, for Santa Clara County Superior Court.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Service Employees International Union, Local 521 (SEIU) to the proposed decision (attached) of an administrative law judge (ALJ). The complaint, issued by PERB's Office of the General Counsel, alleged that the Santa Clara County Superior Court (Court) violated the Trial Court Employment Protection and Governance Act (Trial Court Act)[1] and PERB regulations[2] when it failed and refused to bargain in good faith over its decision to implement furloughs for SEIU bargaining unit members on court closure days. The complaint also alleged that the Court's conduct interfered with the rights of bargaining unit members to be represented by their exclusive representative and denied SEIU its right to

[1] The Trial Court Act is codified at Government Code section 71600 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.

represent its bargaining unit members. The ALJ concluded that the Court did not violate the Trial Court Act or PERB regulations because it had no duty to bargain the decision to implement furloughs under former Government Code section 68106[3] and that SEIU never made a demand to bargain over the effects of the furlough decision.

[3] Former Government Code section 68106 became inoperative by its own terms on July 1, 2010. All references to section 68106 in this decision are to the statute which became inoperative on July 1, 2010.

Former Government Code section 68106 stated:

> (a) The Legislature finds and declares that the current fiscal crisis, one of the most serious and dire ever to affect the state, threatens the continued operations of the judicial branch. This situation requires a unique response to effectively use judicial branch resources while protecting the public by ensuring that courts remain open and accessible and that the core functions of the judicial branch are maintained to the greatest extent possible.
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> (b) Notwithstanding any other law, the Judicial Council may provide that the courts be closed for the transaction of judicial business for one day per month and may adopt rules of court to implement this section, subject to the following conditions:
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> (1) If the Judicial Council has provided for the closure of courts pursuant to this section, the day so designated shall be treated as a holiday for purposes of performing any act requiring the transaction of judicial business, including, but not limited to, all of the following:
>
> (A) The transaction of judicial business under Section 134 of the Code of Civil Procedure.
>
> (B) The sitting or holding of a court under Section 136 of the Code of Civil Procedure.
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> (C) The computation of time under Sections 12 and 12a of the Code of Civil Procedure.
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> (D) The computation of time under all time-dependent provisions, including, but not limited to, Sections 825, 859b, 1050, 1191, 1382, and 1449 of the Penal Code, and Sections 313, 315, 631, 632, 637, 657, 702, 704, 708, and 777 of the Welfare and Institutions Code.
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> (2) A court may still receive papers for filing on a day designated for closure, but the time of filing of the papers shall be the next court day on which the court is open for the transaction

of judicial business. The receipt of papers pursuant to this subdivision shall not constitute opening of the court for any purpose. A day designated for closure under this section is not governed by Section 68108.

(3) The impact of the court closure shall be subject to subdivision (c) of Section 71634 and subdivision (c) of Section 71816. Notwithstanding any other law, any court closure or reduction in earnings as a result of this section shall not constitute a reduction in salary or service for the purpose of calculation of retirement benefits or other employment-related benefits for court employees otherwise eligible for those benefits. Nothing in this section shall relieve a trial court of its obligation to meet and confer concerning the impact of a court closure pursuant to Chapter 7 (commencing with Section 71600) and Chapter 7.5 (commencing with Section 71800) of Title 8 of the Government Code, and the trial courts, rather than the Judicial Council or Administrative Office of the Courts, shall remain responsible for meeting and conferring concerning that impact.

(4) A judge or justice may sign a form, to be prepared by the Administrative Office of the Courts, which shall provide that the judge or justice voluntarily agrees to irrevocably waive, in advance, on a monthly basis, an amount equal to 4.62 percent of the monthly salary otherwise payable to the judge or justice in the absence of a waiver. The Administrative Office of the Courts shall transmit the form to the Controller, county, or other entity paying the salary of the judge or justice, except that the form shall only be transmitted to the entity that pays the greatest portion of the salary if the judge or justice is paid by more than one entity. The entity receiving the form shall reduce the payment otherwise due to the judge or justice from that entity by an amount that takes into account the full effect of the 4.62 percent reduction of the total monthly salary of the judge or justice received from all entities. Notwithstanding any other law, a judge or justice who elects to sign the form under this section shall not be deemed by that act to be holding office for other than full-time service during the time covered by the voluntary waiver of salary, and that waiver shall not be deemed a reduction in salary or service for purposes of the calculation of any retirement benefits, supplemental judicial benefits provided pursuant to Section 68220, or other job-related benefits. Except as necessary for purposes of paragraph (5), a judge or justice who makes a waiver is not obligated to appear for work at the courthouse on any day that a court is closed under this section.

(5) A judicial officer shall be available for the signing of any necessary documents on an emergency basis during the time a court is closed under this section on the same basis as a judicial officer is available on Saturdays, Sundays, and judicial holidays, and any other time a court is closed.

(6) As a result of the closures authorized by this subdivision, court security shall not be required on any day in which courts are closed pursuant to this section.

(A) If a superior court has executed a memorandum of understanding as required by Section 69926 with a sheriff, county, or sheriff and county, the court and the sheriff, county, or sheriff and county shall negotiate in good faith a reduction of 4.62 percent in the compensation due to the sheriff because of the reduced amount of security resulting from the closure of the courts under this section. Nothing in this section shall prohibit a superior court and sheriff, county, or sheriff and county from negotiating additional savings due to voluntary court closures or other cost savings programs. If necessary, the court and sheriff, county, or sheriff and county shall amend the memorandum of understanding required under Section 69926 to reflect that reduction. Notwithstanding any other law or memorandum of understanding, if the court and sheriff are unable to reach an agreement within 30 days of the first court closure after good faith negotiations, the amount of compensation payable to the sheriff under the memorandum of understanding shall be reduced by an amount equal to 4.62 percent of those allowable costs authorized to be paid under paragraph (6) of subdivision (a) of Section 69927. The sheriff shall not reduce the level of service previously required under its memorandum of understanding on the days the court remains open due to this 4.62 percent reduction. Upon reaching an agreement, the court and sheriff may reconcile any prior payments based on the terms subsequently agreed upon by the court and sheriff.

(B) If a superior court and a sheriff, county, or sheriff and county, have not executed a memorandum of understanding as required by Section 69926, the sheriff shall continue to provide security services as required by the court, but the compensation payable to the sheriff shall be no more than the rate of the average monthly amount paid by the court to the sheriff in the 2008-09 fiscal year, reduced by 4.62 percent, to reflect the reduced level of security required as a result of the closure of the courts under this section.

(c) To the extent practicable, the impact of the court closure on the availability of courtrooms and court services shall be spread in a proportional manner that reflects the caseload of the court.

We have reviewed the entire record in this matter including the proposed decision, SEIU's exceptions and the Court's response thereto. The ALJ's proposed decision is well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board adopts the ALJ's proposed decision as the decision of the Board itself subject to our discussion below of SEIU's exceptions.

PROCEDURAL HISTORY

SEIU filed its initial unfair practice charge on August 17, 2009, alleging that the Court imposed furloughs on its bargaining unit members without bargaining in violation of Trial Court Act section 71634.2.[4] On September 2, 2009, the Court filed its position statement denying that it refused to bargain and asserting that SEIU's charge was prematurely filed since no furloughs had yet taken place.

On November 4, 2010, SEIU filed its first amended charge reiterating its allegations that the Court had failed to meet and confer in good faith regarding the imposition of furloughs

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> (d) This section shall become inoperative on July 1, 2010, and, as of January 1, 2011, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2011, deletes or extends the dates on which it becomes inoperative and is repealed.

[4] Trial Court Act section 71634.2 "Meet and confer requirements" states:

> (a) The trial court, or those representatives as it may designate, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment within the scope of representation, as defined in Section 71634, with representatives of the recognized employee organizations, as defined in Section 71611, and shall consider fully the presentations as are made by the recognized employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
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> (b) In fulfilling the requirements of subdivision (a), the court and the county may consult with each other, may negotiate jointly, and each may designate the other in writing as it agent on any matters within the scope of representation.

and also alleging that the Court failed to provide SEIU with information necessary and relevant to the discharge of its representational duties. On January 14, 2011, the Court filed its response to SEIU's first amended charge. The Court again denied that it failed to meet its obligations to provide notice or to meet and confer with SEIU over the furloughs. The Court also maintained that SEIU failed to make an effects bargaining demand and that it had provided SEIU with all of the documents it had requested.

On January 25, 2011, PERB's Office of the General Counsel issued a partial warning letter notifying SEIU that it had alleged insufficient facts to determine whether the Court had failed to provide any or all information pursuant to a valid request. On February 7, 2011, SEIU filed its second amended charge alleging with greater specificity which documents SEIU had requested and that the Court had failed to provide. On February 18, 2011, the Court filed its response denying that it did not provide SEIU with the documents specified in SEIU's second amended charge.

On March 2, 2011, PERB's Office of the General Counsel dismissed SEIU's allegations regarding the requests for information and issued a complaint alleging that the Court failed to bargain in good faith over its decision to implement furlough days for SEIU bargaining unit members. On March 22, 2011, the Court filed its answer denying: (1) that it took the position that it was not required to meet and confer over its decision to implement furloughs; (2) that it refused to bargain in good faith; (3) that it interfered with employee rights to representation; and (4) that it denied SEIU its right to represent its members.

Informal settlement conferences were held on April 4, and May 2, 2011. No settlement was reached. A formal hearing was scheduled for October 13, and 14, 2011, and subsequently rescheduled for December 15 and 16, 2011. On November 21, 2011, the Court filed an amended answer admitting that it took the position that it was not required to meet and confer

over its decision to implement furloughs, but denying that it had violated the Trial Court Act by doing so. On the same date, the Court filed a motion to vacate the hearing date based on the absence of disputed facts.[5]

On December 8, 2011, SEIU filed a motion to amend the complaint. The proposed amendment sought to change paragraph 3 of the complaint to:

> 3. 'On or about July 28, 2009, Respondent took a position that it was not required to meet and confer over its decision to implement furlough days for bargaining unit members, *and on each of the ten Court closure days between September 16, 2009 and June 16, 2010, Respondent implemented unpaid "furlough days" for employees.*'

(Changes to complaint underlined, emphasis in original.) On December 9, 2011, the Court filed its non-opposition to SEIU's motion to amend the complaint and filed a second amended answer admitting the allegations in amended paragraph 3 and denying that it had violated the Trial Court Act by so doing.

On January 30, 2012, SEIU filed its opening brief and a motion requesting that the ALJ take administrative notice of the contents of the entire unfair practice charge file, specifically: (1) the parties' November 20, 2002 to October 25, 2009, memorandum of understanding (MOU); and (2) Exhibit B of the Court's January 14, 2011, response to the first amended charge which consists of an e-mail exchange between SEIU and the Court's attorney and an attached notice to Court employees notifying them of the then impending court closures and furloughs. Also on January 30, 2012, the Court filed its opening brief.

On February 10, 2012, the Court filed its own motion requesting that the ALJ take administrative notice of the contents of the unfair practice charge file, specifically the Office of

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[5] PERB Regulation 32207 states:

> The parties may submit stipulated facts where appropriate to the Board agent. No hearing shall be required unless the parties dispute the facts in the case.

the General Counsel's March 2, 2011, partial dismissal letter. On February 13, 2012, the Court filed its opposition to the scope of SEIU's request for administrative notice. The Court objected to SEIU's request that the ALJ take notice of the entire file as overbroad, but did not object to the ALJ's taking notice of the parties' MOU.

On February 13, 2012, both SEIU and the Court filed their reply briefs. On February 14, 2012, SEIU filed its non-opposition to the Court's motion to take administrative notice. On March 28, 2012, the ALJ granted SEIU's motion to amend the complaint and the Court's request that the ALJ take administrative notice of the dismissal letter. The ALJ partially granted SEIU's request for administrative notice: the ALJ took notice of the parties' MOU, but did not take notice of the emails and attached furlough notice.

On September 17, 2012, the unfair practice charge was transferred to a different ALJ. On October 12, 2012, the second ALJ issued a proposed decision. On November 19, 2012, SEIU filed its statement of exceptions to the ALJ's proposed decision, a request for oral argument and a request for official notice.[6] On December 19, 2012, the Court filed its response and brief in opposition to SEIU's statement of exceptions and opposition to SEIU's request for official notice. On December 31, 2012, the parties were informed that the filings were complete.

FACTS

In the Summer of 2009, the Legislature enacted Government Code section 68106, which authorized the California Judicial Council (CJC)[7] to provide for court closures during one day each month. Section 68106(a) stated that California was facing a serious fiscal crisis which threatened "the continued operations of the judicial branch." The CJC anticipated a

[6] See discussion *infra*, p. 15.

[7] The CJC is the policymaking body of the California court system.

$360 million reduction in funding for court operations. CJC informed the Court that its funding would be reduced by $10.9 million for the 2009-2010 fiscal year. (Proposed Dec., p. 3.)

On July 28, 2009, SEIU and the Court met for a bargaining session regarding potential court closures. On or about July 29, 2009, citing cost savings, the CJC designated the third Wednesday of each month as a uniform statewide court closure day effective September 2009 through June 2010. A second bargaining session between SEIU and the Court was scheduled for August 13, 2009; however, SEIU cancelled this session. Also on August 13, 2009, after the cancelation of the bargaining session, the Court sent SEIU a proposed side-letter agreement via e-mail regarding the implementation of furloughs for court employees on the ten scheduled court closure days. (Proposed Dec., pp. 4-5.)

On August 14, 2009, the Court forwarded to SEIU an e-mail with an attached memorandum from Court Chief Executive Officer David Yamasaki (Yamasaki) that was to be issued to all Court staff on August 17, 2009, announcing the closure of the Court on the third Wednesday of each month and the furloughs of all Court employees on those court closure days. Yamasaki's memo noted that the impact of the furloughs was subject to the meet and confer process under the Trial Court Act.[8] The parties did not meet in another bargaining session. The first court closure and furlough occurred on September 16, 2009. A total of ten-court closure/furlough days were imposed between September 2009 and June 2010. (Proposed Dec., pp. 5-6.)

[8] In its answer, the Court admitted that it maintained the position throughout the process, that it was not obligated under section 68106 to bargain over the decision to implement furloughs during the court closure days.

PROPOSED DECISION

On October 12, 2012, the ALJ issued her proposed decision. In determining whether the Court had violated its duty to bargain, the ALJ identified the key question as whether section 68106 absolved the Court of its duty to bargain over the decision to furlough employees pursuant to its authority to close the Court under section 68106.

The ALJ noted SEIU's several arguments that section 68106 did not absolve the Court from bargaining over the furlough decision. According to SEIU: (1) section 68106 authorized the courts to close for the transaction of "judicial business" but left open the possibility that court employees could perform alternate work; (2) furloughs affect hours of employment, therefore the decision to mandate furloughs falls within scope of representation under the Trial Court Act and the Court had a duty to bargain the decision to impose them; and (3) it would violate the federal and state constitutions to interpret section 68106 in a manner that permits the unilateral implementation of furloughs despite the existence of a valid MOU that prohibits a unilateral reduction in hours of employment. The ALJ also noted the Court's counter-arguments that section 68106 clearly specified that only the impacts of the court closures were subject to bargaining and that the only business of the Court is "judicial business." (Proposed Dec., pp. 8-9.)

The ALJ then analyzed section 68106 in order to determine the legislative intent. According to the ALJ, the legislative intent of section 68106 is perfectly clear from the language of the statute:

> [T]he underlying objective of section 68106 was to immediately authorize limited court closures in order to save money so that the Judicial Branch could keep afloat.

(Proposed Dec., p. 10.) Based on this interpretation, the ALJ rejected SEIU's argument that section 68106 did not authorize the Court to implement furloughs on court closure days. The

ALJ determined SEIU's proposed interpretation of section 68106 was inconsistent with the Legislature's purpose, because the Court would realize no cost savings from closing the Court to the public while allowing employees to report to work. (Proposed Dec., p. 10.)

The ALJ determined that Government Code section 20969.1(c)[9] also supported the interpretation that:

> [T]he Legislature intended that employees would have forced absences without pay when the Judicial Council determined to exercise its authority under section 68106.

(Proposed Dec., p. 11, emphasis in original.) The ALJ determined that it would be unnecessary for the Legislature to carve out an exception for retirement and benefits had it not intended that the section 68106 court closures would result in furloughs and automatic pay reductions for trial court employees. (Proposed Dec., pp. 11-12.)

The ALJ rejected SEIU's argument that reference to Code of Civil Procedure (CCP) section 134[10] in section 68106 demonstrates legislative intent that trial court employees could

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[9] Government Code section 20969.1 specifies that trial court employees will receive credit for service and earnable compensation for all retirement purposes and benefit eligibility "that would have been credited had the employee not been subject to mandatory furloughs."

Subdivision (c) defines "mandatory furloughs" as "the time during which a trial court employee is directed to be absent from work without pay in the 2009-10 fiscal year on the day designated by the Judicial Council for closure of the courts as authorized in Section 68106."

[10] Code of Civil Procedure section 134 states:

> (a) Except as provided in subdivision (c), the courts shall be closed for the transaction of judicial business on judicial holidays for all but the following purposes:
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> (1) To give, upon their request, instructions to a jury when deliberating on their verdict.
>
> (2) To receive a verdict or discharge a jury.

perform alternate work on court closure days. The ALJ determined that the fact that the Legislature carved out special exceptions for various types of judicial business transactions that could be permitted when the courts otherwise would be closed did not demonstrate a legislative intent that the Court should be required to bargain over whether employees could perform alternate work during court closures. The ALJ determined that the reference to CCP section 134 established the same exceptions for the conduct of judicial business on closure days that could be made during any judicial holiday.

The ALJ determined that in section 68106 the Legislature "clearly intended to limit the Court's bargaining obligation only to the effects of court closures on subjects within the scope of representation." (Proposed Dec., p. 12.) Noting that "impact" and "decision" bargaining are well-known terms of art in labor law, the ALJ found it persuasive that section 68106(b)(3)

> (3) For the conduct of arraignments and the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.
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> (4) For the conduct of Saturday small claims court sessions pursuant to the Small Claims Act set forth in Chapter 5.5 (commencing with Section 116.110).
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> (b) Injunctions and writs of prohibition may be issued and served on any day.
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> (c) In any superior court, one or more departments of the court may remain open and in session for the transaction of any business that may come before the department in the exercise of the civil or criminal jurisdiction of the court, or both, on a judicial holiday or at any hours of the day or night, or both, as the judges of the court prescribe.
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> (d) The fact that a court is open on a judicial holiday shall not make that day a nonholiday for purposes of computing the time required for the conduct of any proceeding nor for the performance of any act. Any paper lodged with the court at a time when the court is open pursuant to subdivision (c), shall be filed by the court on the next day that is not a judicial holiday, if the document meets appropriate criteria for filing.

specifically mentions the obligation to bargain over the "impact" of court closures three different times and that:

> [T]here would be no clear purpose in repeatedly *limiting* the bargaining obligation only to impacts of court closures if the Legislature had actually intended to also require bargaining over the decision to furlough employees.

(Proposed Dec., p. 13, emphasis in original.)

Relying on her previous determination that section 68106 authorized the CJC to implement mandatory furloughs, the ALJ rejected SEIU's argument that unlike the explicit furlough plan in *Professional Engineers in California Government v. Arnold Schwarzenegger* (2010) 50 Cal.4th 989 (*Professional Engineers*), section 68106 did not contain a clear indication of the Legislature's intent to authorize furloughs. The ALJ also rejected SEIU's contention that just as the emergency exception in the Ralph C. Dills Act (Dills Act)[11] did not authorize the unilateral reduction of employees' hours of work and compensation, the emergency exception to the Trial Court Act (section 71634.1) did not authorize unilateral action in this case. The ALJ determined that:

> The Court in this case need not prove an emergency existed sufficient to invoke the protections of section 71634.1. Rather, the Legislature itself, by enacting section 68106 to deal with the fiscal crisis in the courts, provided the authority for the Court's unilateral action.

(Proposed Dec., p. 14.) Therefore, the ALJ concluded that the Court did not commit an unfair practice when it failed to bargain over the decision to impose furloughs during the 2009-2010 court closures.[12]

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[11] The Dills Act is codified at Government Code section 3512 et seq.

[12] The ALJ noted that PERB has consistently held that the Legislature is entitled to unilaterally modify the scope of bargaining without requiring collective bargaining. (See *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2210-S (*DPA III*); *State of California (Department of Personnel Administration)* (2010) PERB

Lastly, the ALJ also concluded that the Court did not fail and refuse to bargain in good faith over the effects of the court closures and implementation of furloughs. The ALJ noted that SEIU never made any effects bargaining demand; the Court scheduled meetings with SEIU to bargain over the effects of section 68106 and the furloughs; the Court presented at least one proposal; and the Court repeatedly stated in writing that it understood its obligation to bargain over the negotiable impacts of the court closures and was willing to do so. (Proposed Dec., p.15.)

EXCEPTIONS

SEIU takes six (6) exceptions to the ALJ's proposed decision. According to SEIU, the ALJ erred: (1) in concluding that section 68106 authorized the Court to impose furloughs without bargaining over the decision; (2) in concluding that section 68106 modified the scope of bargaining under the Trial Court Act; (3) in concluding that SEIU did not make an effects bargaining demand; (4) by failing to consider constitutional principles when interpreting sections 68106 and 71634; (5) by failing to find that the parties' MOU barred the Court from unilaterally implementing furloughs; and (6) by regarding comments made at a CJC meeting as legislative history.

In addition, SEIU submits a request for oral argument before the Board and a request for official notice. The Court takes no exceptions and requests that we affirm the ALJ's

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Decision No. 2152-S (*DPA II*) and *State of California (Department of Personnel Administration)* (2008) PERB Decision No. 1978-S [all three holding that the Dills Act does not limit the Legislature's authority to enact unilateral changes to terms and conditions of employment]; see also *Professional Engineers, supra,* 50 Cal.4th 989 [holding that nothing in the Dills Act precludes the Legislature from adopting a furlough plan through legislative enactment as one method of reducing the compensation of state employees when such cuts are found necessary and appropriate in light of the state's fiscal condition].)

proposed decision in its entirety. The Court opposes SEIU's request for official notice. The Court neither requests oral argument nor opposes SEIU's motion for oral argument.[13]

DISCUSSION

SEIU's Motion for Official Notice

SEIU requests that the Board take official notice of a document titled "Final Review of Hearing Officer's Report and Recommendation, *International Union of Operating Engineers, Stationary Local 39, AFL-CIO v. Placer County Superior Court*" (Placer County Final Review). The Placer County Final Review is the final decision by a panel of three Sacramento Superior Court judges. It is part of the contractually agreed-to grievance machinery between the Placer County Superior Court and the International Union of Operating Engineers, Stationary Local 39. The matter in the Placer County Final Review concerned a grievance filed by a union representing court employees in Placer County over furloughs implemented pursuant to Government Code section 68106.

SEIU acknowledges that under PERB Regulation 32300(b) its statement of exceptions may only refer to matters contained in the record of the case. However, SEIU argues that nothing prevents a party from submitting a request for official notice concurrent with its statement of exceptions. The Court, on the other hand, argues that SEIU's motion for official notice does not comport with PERB Regulation 32320(a)(2) which, the Court argues, limits the Board's authority only to issuing a decision based upon the record of hearing or re-opening the record for the taking of further evidence. Alternatively, the Court argues that the Placer County Final Review is irrelevant to the present case. As the Court notes, the Placer County

[13] SEIU's request for oral argument is denied. The Board historically denies requests for oral argument when an adequate record has been prepared, the parties have had an opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Los Angeles Community College District* (2009) PERB Decision No. 2059; *Monterey County Office of Education* (1991) PERB Decision No. 913.)

Final Review is part of a contractually-agreed upon, grievance resolution procedure and has no precedential value other than between the contracting parties.

PERB regulations do not specifically address the taking of official notice. With regard to the propriety of an ALJ's taking of official notice, the Board has applied the standards for the taking of judicial notice in a California court of law. (*City of Alhambra* (2010) PERB Decision No. 2139-M (*City of Alhambra*).)[14] The taking of judicial notice is governed by Evidence Code sections 451 and 452.

Evidence Code section 451 provides for the mandatory judicial notice of: (1) the U.S. and California Constitutions; (2) California City and County charters; (3) federal and California decisional law; (4) the regulations of federal and California agencies; (5) federal and California rules of pleading, practice and procedure; (6) the signification of English words and phrases; and (7) universally known facts.

Evidence Code section 452 provides for the optional judicial notice of: (1) the laws of another state or territory in the United States; (2) the resolutions and private acts of the U.S. Congress or California Legislature; (3) regulations and ordinances issued under federal authority or any public entity in the U.S.; (4) official acts of one of the branches of the federal government or any state government in the U.S.; (5) Court records of any California court, federal court, or any state court in the U.S.; (6) foreign law; and (7) commonly known or readily determinable facts.

Although the Placer County Final Review was conducted by three judges of the Sacramento Superior Court, the document is not a judicial decision and is not precedential authority. The Placer County Final Review is part of a contractually agreed-upon dispute

[14] The Board in *City of Alhambra, supra,* PERB Decision No. 2139-M, discussed the taking of "judicial notice." As a quasi-judicial, administrative agency, PERB does not take "judicial notice." The proper term for PERB is either "administrative notice" or "official notice."

resolution procedure involving different parties and a different labor agreement. Therefore, the Placer County Final Review is neither a judicial decision (Evid. Code, § 451(a)) nor an official act of the Sacramento County Court (Evid. Code, § 452(d)). The Placer County Final Review has no precedential value and is a private act binding only upon the contracting parties.

Alternatively, the Board could consider SEIU's request for official notice as a request to reopen the record under PERB Regulation 32320(a)(2) and remand the matter to the ALJ. As the Court points out, the standard applied by the Board when considering whether to reopen the record to take further evidence is the same standard applied to requests for reconsideration. (*Long Beach Community College District* (2009) PERB Decision No. 2002, p. 18, fn. 14 citing *San Mateo Community College District* (1985) PERB Decision No. 543 and *California State University* (1990) PERB Decision No. 799a-H.) PERB Regulation 32410 governs requests for reconsideration and limits such requests to claims that: (1) the Board's decision contained prejudicial errors of fact; or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. Requests for reconsideration based on newly discovered evidence, must be accompanied by a declaration under penalty of perjury establishing that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be considered; and (5) impacts or alters the decision of the previously decided case.

SEIU's request is accompanied by a declaration under penalty of perjury by SEIU's attorney stating: (1) that the document is a correct copy of the decision of a three-judge panel of the Sacramento County Superior Court; (2) the decision was served on her law firm on September 5, 2012; and (3) the document is an official act and record of the Sacramento

County Superior Court. We note that there was no hearing held in this case. The matter was submitted to the ALJ based on stipulated facts and was fully briefed as of February 13, 2012. SEIU submitted the request and declaration to PERB on November 19, 2012. Arguably, SEIU's request and declaration satisfies the first three requirements for a request for reconsideration and, therefore, also for a request to reopen the record. However, SEIU fails to establish that the Placer County Final Review is relevant to this case or would impact or alter the ALJ's proposed decision. Moreover, we disagree with SEIU's characterization of the Placer County Final Review as "an official act and record of the Superior Court of California, County of Sacramento." (SEIU Request for Official Notice, p. 2.)

As stated above, the Placer County Final Review is a private act that is part of the contractually agreed to grievance machinery between the Placer County Superior Court and the International Union of Operating Engineers. The parties in that case contracted to have their disputes resolved by sitting superior court judges does not render the decision an official act or record of the Sacramento County Superior Court. Therefore, the Board denies SEIU's motion for official notice on the grounds that it fails to comport with the standards for granting judicial notice under the Evidence Code and fails to comply with PERB's requirements for reopening the record under PERB Regulation 32300.

SEIU's First Exception

SEIU contends that the ALJ erred in concluding that section 68106 authorized the Court to impose furloughs without negotiating over that decision. SEIU maintains, rather, that section 68106 only authorized the CJC to institute court closures but did not authorize the imposition of furloughs. SEIU agrees with the ALJ that ascertaining the legislative intent is the paramount goal of statutory interpretation and that the meaning of a statute should be sought in the language of the statute itself. SEIU emphasizes the maxim of statutory

construction *expressio unius est exclusio alterius* (*expressio unius*)[15] which, according to SEIU, demonstrates the Legislature's intent to permit court closures under section 68106 while excluding furloughs.

As stated in section 68106(a):

> The Legislature finds and declares that the current fiscal crisis, one of the most serious and dire ever to affect the state, threatens the continued operations of the judicial branch. This situation requires a unique response to effectively use judicial branch resources while protecting the public by ensuring that courts remain open and accessible and that the core functions of the judicial branch are maintained to the greatest extent possible.

The Legislature then authorized the CJC to institute court closures for one day each month until July 1, 2010.[16]

There is no question that the overriding intent of section 68106 was to save money so that the judicial branch could continue to function. As the ALJ stated:

> The only meaningful way to immediately achieve the underlying money-saving goal of this legislation is to presume that employees were not to work and therefore not be paid on court closure days. [Fn. omitted.] Any other interpretation of the statute would render the provisions regarding "a unique response" to the "current fiscal crisis" essentially meaningless.

We agree with the ALJ that under SEIU's interpretation of section 68106 the Court would realize no cost savings and such an interpretation would defeat the clear intent of the statute.

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[15] "*Expressio unius*" is a maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. Under this maxim, if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded. (See Black's Law Dict. (6th ed. 1990) p. 581, col. 1-2 [internal citations omitted].)

[16] Section 68106(b)(1) subjected the court closures to certain conditions regarding the conduct of judicial business which would normally be conducted during a court holiday and provisions for the computation of time: viz. Code of Civil Procedure sections 134 (enumerating types of transactions which may be conducted during a judicial holiday) and section 136 (appointed or adjourned date falling on judicial holiday). Computation of time under sections 12 and 12a of the Code of Civil Procedure as well as the relevant sections of the Penal Code and Welfare and Institutions Code were deemed applicable during the closures.

In addition, as the ALJ noted, section 68106(b)(3) repeatedly mentions the Court's obligation to meet and confer with SEIU over the impact of the court closures. Impact or effects bargaining and decision bargaining are terms of art in labor law of which the Legislature is presumed to be aware. Thus, under the maxim of *expressio unius*, the ALJ properly determined that the Legislature purposely excluded the obligation to meet and confer over the decision to close the courts form section 68106.

We conclude with the ALJ that the Legislature intended in section 68106 to authorize the CJC to close courts and implement furloughs without bargaining over that decision. SEIU's first exception therefore lacks merit.

SEIU's Second Exception

SEIU also contends that the ALJ erred by concluding that section 68106 modified the scope of bargaining under the Trial Court Act. According to SEIU, "the ALJ concluded that the Legislature modified the scope of representation under the Trial Court Act by providing 'the authority for the Court's unilateral action.'" (SEIU Exceptions, p. 12.) The ALJ determined that both the California Supreme Court (*Professional Engineers, supra,* 50 Cal.4th 989) and previous PERB decisions (*DPA III, supra,* PERB Decision No. 2210-S and *DPA II, supra,* PERB Decision No. 2152-S) recognize the Legislature's right to modify the scope of bargaining through subsequent legislation. The ALJ determined that the Court, thus, did not have to rely on the emergency provision of the Trial Court Act (section 71634.1) in order to unilaterally reduce employees' hours of work and compensation, because the Legislature provided it with the authority to do so by enacting section 68106.

While SEIU is correct that furloughs are a reduction in hours and that generally a reduction in hours falls within scope of representation and is negotiable (*San Ysidro School District* (1997) PERB Decision No. 1198; *North Sacramento School District* (1981) PERB

Decision No. 193); SEIU has failed to address the ALJ's determination that the Legislature may modify the scope of bargaining and absolve a public employer of its duty to bargain over the decision to implement furloughs pursuant to authority granted to the employer by statute.

We conclude that the ALJ correctly determined that *Professional Engineers, supra,* 50 Cal.4th 989; *DPA III, supra,* PERB Decision No. 2210-S; and *DPA II, supra,* PERB Decision No. 2152-S acknowledge the Legislature's right to modify the scope of bargaining for public employees through subsequent legislation. Here, the Legislature modified the scope of bargaining by absolving the Court of the duty to bargain over the decision to impose furloughs when it enacted section 68106, and the Court did not commit an unfair practice when it failed to bargain over the decision to implement furloughs pursuant to section 68106.

SEIU's Third Exception

SEIU contends that the ALJ erred by determining that it did not make an effects bargaining demand. The ALJ determined:

> There is no evidence in the record that SEIU ever made a clear demand to bargain over the effects of the Court's decision to close courts and therefore impose furloughs. The record is clear that the Court scheduled meetings to discuss impacts, presented at least one proposal, and stated repeatedly in writing that it understood its obligation to bargain over negotiable impacts relating to the court closures and was ready to do so.

(Proposed Dec., p. 15.) SEIU has pointed to no evidence in the record to demonstrate that the ALJ's determination was erroneous.[17] Therefore SEIU's third exception lacks merit.

[17] The Board has long held that party seeking to meet and confer initiates the process by making a request therefor. The request need not be stated in particular terms, but must place the responding party on notice of the subject over which discussions are sought. (*Rio Hondo Community College District* (2013) PERB Decision No. 2313 (*Rio Hondo*); *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 (*Newman-Crows Landing*), citing, inter alia, *NLRB v. Columbian Enameling & Stamping Co.* (1939) 306 U.S. 292 and *Schreiber Freight Lines* (1973) 204 NLRB 1162.) Where an employer believes that the subject over which an employee organization desires to meet and confer exceeds the employer's duty to meet and confer, or an employer is otherwise in doubt as to its meet and confer obligation,

SEIU's Fourth Exception

SEIU contends that the ALJ erred by failing to consider SEIU's argument that section 68106 as implemented by the Court violates the federal and California Constitution's prohibition on the impairment of contracts. The ALJ determined: (1) that PERB's jurisdiction did not extend to the adjudication of alleged constitutional violations; and (2) that in any event, as to the MOU itself, section 68106 was not inconsistent with the parties' MOU because section 68106 designated court closure days as "holidays" and since the parties' MOU set forth the regular hours of court employees "as from 8:00 a.m. to 5:00 p.m., Monday through Friday, 'Court holidays excepted'." (Proposed Dec., p. 15, fn. 14.) Thus the ALJ determined that section 68106 did not violate the parties' MOU.

As to PERB's authority, it is well-settled that PERB does not have the authority to declare a statute unconstitutional. (*The Regents of the University of California* (1999) PERB Order No. Ad-293-H [PERB has no power: (1) to refuse to enforce a statute on the ground that it is unconstitutional unless an appellate court has made a determination that it is unconstitutional; (2) to declare a statute unconstitutional; or (3) to declare a statute unenforceable on the basis that federal law or regulations prohibit enforcement, unless an appellate court has determined that enforcement of such statute is prohibited by federal law or regulation]; *California State University, Hayward* (1991) PERB Decision No. 869-H [violations of the constitution must be taken up in another forum other than PERB].)[18] We

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the employer must seek clarification. (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, pp. 9-10.) (See *Rio Hondo*, pp.4-5.) With the ALJ we conclude that SEIU made no impact bargaining demand, but sought to meet and confer only over the decision itself. (*Newman-Crows Landing.*)

[18] Article 3.5 of the California Constitution provides:

conclude that the ALJ properly declined to determine whether section 68106 violated the California and federal constitutions' prohibitions against the impairment of contracts.

SEIU's Fifth Exception

SEIU's fifth exception contends that the ALJ erred by failing to acknowledge that the parties' MOU barred the Court from unilaterally implementing furloughs. As discussed with regard to SEIU's fourth exception, the ALJ determined that furloughs did not violate the parties' MOU because section 68106 designates court closure days as holidays and the parties' MOU makes an exception for regular employee hours on Court holidays. Section 11.3 of the parties' MOU provides, in part:

> Eight hours' work shall constitute a full day's work and forty hours' work shall constitute a full week's work unless otherwise provided by law, code or other agreement.

(Emphasis added.) We conclude that the parties' MOU does not bar and, in fact allows, the Court to alter the regular work day and work week as long as it does so under the authority of law or by agreement with SEIU. The Court implemented furloughs under the authority provided to it by section 68106. Therefore, we conclude that SEIU's fifth exception lacks merit.

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

SEIU's Sixth Exception

SEIU argues that the ALJ treated the Minutes of a July 29, 2009, CJC meeting as though it were legislative history. According to SEIU, the Minutes from the CJC meeting provide no insight into the thought processes of the legislators who enacted section 68106 and is irrelevant to an analysis of legislative intent.

The Minutes of the July 29, 2009, CJC meeting are part of the joint stipulated record. SEIU agreed that the ALJ could consider the Minutes in rendering her proposed decision. The ALJ described the events and comments made at the July 29, 2009, CJC meeting only in her "Findings of Fact." The CJC meeting and comments are part of the factual background in this case and were not mentioned in the ALJ's interpretation of section 68106. We conclude that SEIU's sixth exception lacks merit.

CONCLUSION

Based upon the entire record in the case, we conclude that the Court did not violate the Trial Court Act as alleged in the amended complaint.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-15-C are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Winslow joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 521, Charging Party, v. SANTA CLARA COUNTY SUPERIOR COURT, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-15-C PROPOSED DECISION (October 12, 2012)

Appearances: Weinberg, Roger & Rosenfeld by Vincent A. Harrington, Jr. and Kerianne R. Steele, Attorneys, for Service Employees International Union, Local 521; Lozano Smith by Sarah Levitan Katz, Attorney, for Santa Clara Superior Court.

Before Valerie Pike Racho, Administrative Law Judge.

PROCEDURAL HISTORY

Service Employees International Union, Local 521 (SEIU) filed an unfair practice charge against the Santa Clara County Superior Court (Court) under the Trial Court Employees Protection and Governance Act (Trial Court Act)[1] on August 17, 2009. On March 2, 2011, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the Court failed and refused to bargain in good faith regarding the decision to implement furlough days on the bargaining unit. This conduct is alleged to violate sections 71631, 71634.2, 71633, and 71635.1 of the Trial Court Act and PERB Regulation 32606(a), (b) and (c).[2]

[1] The Trial Court Act is codified at Government Code section 71600 et seq. Hereafter all statutory references are to the Government Code unless otherwise indicated.

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

On March 22, 2011, the Court filed its answer to the complaint, denying its material allegations.

Informal settlement conferences were held on April 4 and May 2, 2011, but the matter was not resolved.

On November 21, 2011, the Court filed an amended answer to the complaint to admit the allegation that it took the position that it was not required to meet and confer over its decision to implement furlough days for bargaining unit members.

On December 8, 2011, SEIU filed a motion to amend the complaint to allege that the Court also implemented ten unpaid furlough days for bargaining unit employees beginning on September 16, 2009. On December 9, 2011, the Court filed a second amended answer, admitting the added allegation.

In lieu of a formal hearing, the parties filed a joint stipulation of evidence consisting of six documents.

On February 10, 2012, the matter was submitted for decision upon receipt of final post-hearing briefs.[3] On September 17, 2012, the case was transferred to the undersigned for the issuance of a proposed decision.[4]

FINDINGS OF FACT

The Court is a "trial court" within the meaning of section 71601(k). SEIU is an "employee organization" within the meaning of section 71601(b)(1) and a "recognized employee organization" within the meaning of section 71601(h).

[3] The parties were permitted to file opening briefs and reply briefs in this case.

[4] Neither party objected to the transfer.

Background

The Judicial Branch of the State of California (State) suffered a major reduction in funding from the state in the 2009-2010 fiscal year during the state's unprecedented budget crisis of the time. The Judicial Council, which is the policymaking body for the courts, determines the share of state funding allocated to the state's trial courts. Heading into its June 29, 2009[5] meeting, the Judicial Council was expecting to reduce funding for court operations by $360 million. The Court was informed that its share of the reduction would amount to $10.9 million for the fiscal year.

Contemporaneously, the Legislature enacted Government Code section 68106 as urgency budget legislation authorizing the Judicial Council to close the trial courts for one day per month during which there would be no "transaction of judicial business." Section 68106(a), outlining the Legislature's intent, stated that "the current fiscal crisis, one of the most serious and dire ever to affect the state, threatens the continued operations of the judicial branch." The authority for closures stemmed from the need for "a unique response to effectively use judicial branch resources while protecting the public" and its need for access to the judicial branch. (*Ibid.*)

Several provisions of section 68106 are of note.[6] Section 68106(b)(1) provided that if the Judicial Council provided for court closures pursuant to the statute, "the day so designated shall be treated as a holiday for the purposes of performing any act requiring the transaction of judicial business." Section 68106(b)(3) provided:

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[5] All dates hereafter refer to calendar year 2009 unless stated otherwise.

[6] Subsection (d) provides that "[t]his section shall become inoperative on July 1, 2010, and, as of January 1, 2011, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2011, deletes or extends the dates on which it becomes inoperative and is repealed."

> The impact of the court closure shall be subject to subdivision (c) of Section 71634 and subdivision (c) of Section 71816. Notwithstanding any other law, any court closure or reduction in earnings as a result of this section shall not constitute a reduction in salary or service for the purpose of calculation of retirement benefits or other employment-related benefits for court employees otherwise eligible for those benefits. Nothing in this section shall relieve a trial court of its obligation to meet and confer concerning the impact of a court closure pursuant to Chapter 7 (commencing with Section 71600) and Chapter 7.5 (commencing with Section 71800) of Title 8 of the Government Code, and the trial courts, rather than the Judicial Council or Administrative Office of the Courts, shall remain responsible for meeting and conferring concerning that impact.

Section 68106(b)(4) provided that a judge or justice may sign a form for the purpose of voluntarily waiving monthly salary in the amount of 4.62 percent. Section 68106(b)(6) provided that court security would not be required on the days of the court closures. Subdivision (b)(6)(A) required good faith negotiations between the Court and the county sheriff or the county for the purpose of achieving a 4.62 percent reduction of the cost of an existing contract for security services on a monthly basis and, in the absence of agreement, a mechanism for the Court to reduce its outlay by that amount. Subdivision (b)(6)(B) authorized the same reduction of expenditure on a monthly basis where there was no existing agreement.

At the July 29 meeting, the Judicial Council, following the recommendation of the Executive and Planning Committee and the Administrative Office of the Courts (AOC), implemented this authority by designating the third Wednesday of each month as a uniform statewide closure day for all trial and appellate courts, effective September 2009 through June 2010, "for cost savings purposes." Accompanying this resolution was a directive to the AOC to gather information from the courts to determine the actual monetary savings achieved by the closures. At the same meeting, then-Chief Justice Ronald George announced he would be accepting the voluntary salary waiver "to acknowledge the sacrifice of court employees" and appealed to other judges and justices to do the same.

The Parties' Memorandum of Understanding[7]

SEIU and the Court were parties to a memorandum of understanding (MOU) at the time of the events in this dispute. Article 10 ("Pay Practices") and section 10.1 ("Salaries") references an appendix listing the wages for bargaining unit employees. Article 11 ("Hours of Work"), section 11.1 ("Workweek"), states that the work week shall consist of seven days, and regular work hours for employees unless otherwise specified are from 8:00 a.m. to 5:00 p.m., Monday through Friday, court holidays excepted.

The Parties' Attempts at Negotiations

On July 28, SEIU and the Court met for a meet and confer session. On behalf of the Court, Joseph Wiley informed SEIU that in light of section 68106 "no judicial business would be conducted and no employees would report for work" on the monthly closure days. A follow-up meeting scheduled for August 13, was canceled at the request of SEIU.

On August 13, Wiley wrote to Maggie Wong of SEIU expressing hope that the parties could meet on August 26 to continue meeting for purpose of "addressing the impact of the court closure decision." Wiley attached a proposal for a side letter agreement. The proposed agreement contained a number of provisions, including acknowledgement that employees would be furloughed one day each month without pay, that other forms of paid leave could not be substituted, and that employees' retirement benefits would not be affected.

On August 14, Wiley forwarded via e-mail a copy of a memorandum prepared for issuance to all staff by Court Chief Executive Officer David Yamasaki (Yamasaki), dated August 17, announcing the closure of the Court on the third Wednesday of each month along

[7] SEIU's request for administrative notice of the parties' memorandum of understanding having a term of November 20, 2002 through October 25, 2009 was granted.

with the "furlough [of] Court employees on the same days of the closure." Wiley stated that "[a]ll Court employees will be subject to the furlough" and that the decision was made "in response to the court closure statute." Yamasaki's memorandum to employees noted that "the impact of the furlough on employees is subject to a meet and confer process with the labor organizations and these meetings are ongoing." (Emphasis in original.)

On September 11, Yamasaki distributed to employees a question-and-answer guide regarding the court closures and resulting furloughs.

It is undisputed that between September 2009 and June 2010, the Court imposed 10 unpaid furlough days on unit employees on days when courts were closed.

ISSUE

Did the Court violate its duty to bargain by unilaterally implementing unpaid furlough days and refusing to bargain over that decision?

CONCLUSIONS OF LAW

In determining whether a party has violated section 71634.2, PERB utilizes either a "per se" or "totality of the conduct test," depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.)[8] Absent a valid defense, unilateral changes are considered "per se" violations if the exclusive representative establishes the following criteria by a preponderance of the evidence: (1) the employer breached or altered the parties' written agreement or past practice; (2) the action was taken before the employer notified the exclusive representative and gave it an opportunity to request negotiations; (3) the change was not merely an isolated breach of the contract or past practice, but amounted to a change in policy that had a generalized

[8] When interpreting the Trial Court Act, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Trial Court Act, § 71639.3; see also *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

effect or continuing impact upon terms and conditions of employment of bargaining unit employees; and (4) the change in policy concerned a matter within the scope of representation. (*Grant Joint Union High School District* (1982) PERB Decision No. 196; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

Even when an employer has no obligation to bargain over a particular decision, it must provide an exclusive representative with reasonable notice and opportunity to bargain over the effects of its decisions that have an impact on matters within the scope of representation. (*Oakland Unified School District* (1985) PERB Decision No. 540; *Santee Elementary School District* (2006) PERB Decision No. 1822.) In practice, this means that once a firm decision is made to enact a change to a non-negotiable subject, the employer must provide the exclusive representative with notice and a reasonable opportunity to negotiate prior to taking an action that impacts matters within the scope of representation. (*Mt. Diablo Unified School District* (1983) PERB Decision No. 373.) What amounts to a reasonable amount of time depends on the unique circumstances of each case. (*Victor Valley Union High School District* (1986) PERB Decision No. 565.) However, a union must make a clear demand to bargain over effects, rather than over the decision itself, and must also specifically identify the negotiable effects over which it desires to negotiate. Absent such an identification, the employer has no duty to bargain. (*Trustees of the California State University* (2009) PERB Decision No. 1876a-H; *State of California (Department of Corrections)* (2006) PERB Decision No. 1848-S; *Stanislaus County Department of Education* (1985) PERB Decision No. 556 (*Stanislaus*).) Persistently insisting that the employer must bargain over a decision, without also specifically demanding to bargain over any negotiable impacts of the decision, will amount to a waiver of a union's right to bargain over effects in the event that the underlying

decision is determined to be non-negotiable. (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223; *Stanislaus*.)

The key question in this case is whether section 68106 absolved the Court of its duty to bargain over the decision to furlough employees pursuant to its authority to close courts under the statute. In other words, did section 68106 itself authorize the Court to unilaterally furlough employees? SEIU argues that it did not. In SEIU's view, section 68106 merely contemplated that the Court was entitled to exercise its discretion under the statute to close courts for the transaction of "judicial business" and this necessarily left open the option that employees could perform alternate work when courts were closed to the public. SEIU argues that a court closure does not automatically equate to the furlough of employees, and thus, while section 68106 entitled the Court to unilaterally close courts for the conduct of traditional judicial business, it did not permit the Court to unilaterally decide that its employees would not perform any work on those days.[9] Instead, SEIU believes that furloughs were a possible impact of the decision to close courts under section 68106. Furthermore, because furloughs unavoidably affect hours of employment, SEIU contends the Court's decision to mandate furloughs falls within scope of representation under section 71634(b)(6), and therefore, the Court had a duty to bargain over its decision to impose them. Additionally, SEIU argues that should section 68106 be read in such a manner that permitted the Court's unilateral action, regardless of the existence of a valid MOU between the parties that prohibited unilateral

[9] In support of this argument, SEIU points to the language in section 68106(b)(1)(A) stating that the day so designated by the Judicial Council for court closure shall be treated as a holiday for the purposes of performing any act requiring the transaction of judicial business, including that under section 134 of the Code of Civil Procedure. That section of the code in turn provides that during judicial holidays, the courts shall be closed for the transaction of judicial business for all but a few enumerated exceptions, including, for example, giving jury instructions upon request, and issuing injunctions and writs of prohibition. (Cal. Code Civ. Proc., § 134.)

reductions in hours, such a result would be unconstitutional in that it would run afoul of the federal and California constitutions' prohibition on the impairment of contracts.

The Court takes a different view of section 68106. It argues that the statute clearly expressed at section 68106(b)(3) that only the impacts of court closures needed to be bargained over. The Court necessarily presumes that if courts are closed for the transaction of judicial business then employees do not report for work. This is so, according to the Court, because the only "business" performed by the courts is "judicial business," and this term cannot reasonably be construed to simply mean the work that is performed by employees during times when the public has access to the courts. Accordingly, the Court contends that it acted within the statutory authority proscribed under section 68106 when it determined to close courts on one Wednesday per month and prohibited employees from reporting to work on those days. The Court maintains that it stood ready to bargain over the effects of the court closures, but that SEIU never demanded to bargain over effects and never responded to the Court's proposals on the subject.

Interpretation of Section 68106[10]

The first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Dyna-Med, Inc. v. Fair Employment and Housing*

[10] As the expert agency established by the Legislature to administer the Trial Court Act, the Board has exclusive jurisdiction over conduct that arguably violates it. (See e.g., *San Diego Teachers Association v. Superior Court* (1979) 24 Ca1.3d 1, 20-21.) While PERB is not specifically charged with enforcing section 68106, the Board as a quasi-judicial agency may interpret this section to carry out its duty to administer the Trial Court Act. Thus, where arguably unlawful conduct implicates both this statute and the Trial Court Act, the Board may interpret the statute to determine whether the action constitutes an unfair practice. (See e.g., *Wilmar Union Elementary School District* (2000) PERB Decision No. 1371, p. 13; *Whisman Elementary School District* (1991) PERB Decision No. 868.) Accordingly, PERB is the agency charged by the Legislature with resolving disputes such at the one presented here.

Commission (1987) 43 Cal.3d 1379, 1386-1387.) The plain language of a statute is of paramount importance in its interpretation. As noted by the California Supreme Court:

> [u]nder well-established rules of statutory construction, we must ascertain the intent of the drafters so as to effectuate the purpose of the law. (Citation omitted.) Because the statutory language is generally the most reliable indicator of legislative intent, we first examine the words themselves, giving them their usual and ordinary meaning and construing them in context. (Citation omitted.) When statutory language is clear and unambiguous, "there is no need for construction and courts should not indulge in it." (Citations omitted.)

(*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268; see also *Casterson v. Superior Court of Santa Cruz County* (2002) 101 Cal.App.4th 177, 187.) Further, when ascertaining legislative intent, a court cannot "create exceptions, contravene plain meaning, insert what is omitted, omit what is inserted, or rewrite the statute." (*San Francisco Unified School District v. San Francisco Classroom Teachers Association* (1990) 222 Cal.App.3d 146, 149.)

Here, the Legislature's intent is perfectly clear from an examination of the language in section 68106(a): urgency legislation was enacted to deal with "one of the most serious and dire" fiscal crises ever to face the State of California, which in turn threatened the continued operations of the court system. Thus, the underlying objective of section 68106 was to immediately authorize limited court closures in order to save money so that the Judicial Branch could keep afloat. With this basic premise in mind, it is unclear what purpose this legislation would serve if SEIU's interpretation of the statute is credited. Namely, that the Legislature had really intended that the Court was merely authorized to close the courts to the public, but would be required to bargain over the decision to bar employees from actually working on those days. What cost savings, if any, would be realized by merely banning the public from entering court buildings? The only meaningful way to immediately achieve the underlying money-saving goal of this legislation is to presume that employees were not to work and

therefore not be paid on court closure days.[11] Any other interpretation of the statute would render the provisions regarding "a unique response" to "the current fiscal crisis" essentially meaningless, which is a result to be avoided. (*Henning v. Industrial Wage Commission* (1988) 46 Cal.3d 1262, 1278 [a court's ultimate resolution of statutory construction should not negate a clear and unambiguous legislative directive].)

Furthermore, as pointed out by the Court in its reply brief, the Legislature further elucidated the intent behind section 68106 in Government Code section 20969.1(c):

> For the purposes of this section, '*mandatory furloughs*' is limited to the time during which a *trial court employee* is directed to be *absent from work without pay* in the 2009-10 fiscal year on the day designated by the Judicial Council for closure of the courts as authorized in Section 68106.

(Emphasis supplied.) Accordingly, it appears that the Legislature intended that employees would have forced absences without pay when the Judicial Council determined to exercise its authority under section 68106. This interpretation is further bolstered by the language in section 68106(b)(3) stating that: "Notwithstanding any other law, any court closure *or reduction in earnings* as a result of this section shall not constitute a reduction in salary or service for the purpose of calculation of retirement benefits or other employment-related benefits for court employees otherwise eligible for those benefits." (Emphasis supplied.) There would be no need to carve out an exception for employees' retirement and other benefits

[11] Indeed, the statute provided that the services of independent contractors working in the courts (i.e., Sheriff officers providing court security services) would not be required on court closure days. (Gov. Code, § 68106(b)(6).) In light of that condition, the Legislature instructed the Court to enter into good faith negotiations with the Sheriff's department to reduce the amount of the contract by the equivalent of 4.62 percent per month, and a mechanism to unilaterally impose that reduction if necessary. (Gov. Code, § 68106(b)(6)(B).) Similarly, the statute provided a mechanism for judicial officers, who are not court employees, to voluntarily waive their rights to salary equivalent to one day per month. (Gov. Code, § 68106(b)(4).) Thus, it seems clear that the Legislature intended that when the courts were closed, no work was to be performed, even by those whom the Court does not directly employ (and thus do not fall within the coverage of the Trial Court Act).

if it was not presumed that court closures under 68106 would result in furloughs and therefore automatic pay reductions for employees.

SEIU's argument that employees could perform alternate work on court closure days by virtue of the reference in section 68106(b)(1)(A) to the Code of Civil Procedure section 134 is also unpersuasive. The fact that the Legislature has carved out *special* exceptions for various types of judicial business transactions that can be permitted to occur on judicial holidays, when the courts are otherwise ordinarily closed, and therefore, employees have a day off from work, does not demonstrate a legislative intent that the Court should be required to bargain over whether employees can perform "alternate" work during court closures. Rather, it simply demonstrates that under the mandatory employee furloughs required when the Judicial Council exercised its authority to close courts under section 68106, certain exceptions for the transaction of judicial business could be made, if necessary, as with any other judicial holiday when employees are normally off work.

The Legislature also clearly intended to limit the Court's bargaining obligation only to the effects of court closures on subjects within the scope of representation by the language in section 68106(b)(3). At three separate points in this section, the Legislature stated that nothing in section 68106 should be construed as relieving the Court[12] of its obligation to bargain over the *impact* of court closures. "Decision-bargaining" versus "impact-bargaining" are well-known terms of art in labor law, of which the Legislature is no doubt aware. (See, e.g., Zerger et al., California Public Sector Labor Relations (2012) Duty to Bargain, § 10.03[1].) SEIU argues that had the Legislature intended to exempt the Court from bargaining over the *decision* to furlough employees it would have clearly stated that within section 68106. However, this

[12] The statute specifically notes that it is the courts themselves, rather than the Judicial Council or the AOC, which is subject to the bargaining obligation. (Gov. Code, § 68106(b)(3).)

argument rests on the premise that court closures pursuant to section 68106 were not already intended by the Legislature to result in automatic employee furloughs. For the reasons discussed above, this argument has been rejected. Furthermore, there would be no clear purpose in repeatedly *limiting* the bargaining obligation only to impacts of court closures if the Legislature had actually intended to also require bargaining over the decision to furlough employees. (See *People v. Mancha* (1974) 39 Cal.App.3d 703, 713 ["where a statute enumerates things upon which it is to operate it is to be construed as excluding from its effect all those not expressly mentioned."])

The Legislature is Entitled to Modify the Scope of Bargaining

PERB has consistently held that the Legislature retains the authority to unilaterally modify terms and conditions of employment of public employees without requiring collective bargaining. (*State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2210-S (*DPA III*); *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2152-S (*DPA II*); see also *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2085-S (*DPA I*);; and *State of California (Department of Personnel Administration)* (2008) PERB Decision No. 1978-S.)

In *DPA II* and *DPA III*, the Board upheld the dismissals of unfair practice charges filed by two different public employee unions alleging that the State unlawfully implemented furloughs after the Governor had mandated such action by executive order. PERB, relying the decision of the California Supreme Court in *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989 (*Professional Engineers*) found that any bargaining obligation over the decision to implement furloughs was effectively eliminated when the Legislature ratified the Governor's furlough plan by adopting revisions to the Budget Acts of 2008 and 2009. (*DPA II* at p. 6; *DPA III* at p. 4.) In *Professional Engineers*, the Court found

that the emergency exception in the Ralph C. Dills Act[13] did not independently authorize the Governor's action in imposing furloughs, but that the Legislature's later approval of his plan authorized unilateral changes in terms and conditions of employment. The Court stated:

> [N]othing in the Dills Act precludes *the Legislature* from adopting such a furlough plan through a legislative enactment as one method of reducing the compensation of state employees when such cuts are found necessary and appropriate in light of the state's fiscal condition.

(*Professional Engineers* at p. 1048; emphasis in original.)

SEIU argues that *Professional Engineers* is distinguishable from the instant situation because in that case, the furlough plan was explicit, whereas here, section 68106 does not specifically use the word "furlough." As previously discussed, it has been concluded that the Legislature intended that employees would be furloughed when courts were closed pursuant to section 68106. Thus, SEIU's argument is unpersuasive. SEIU further argues that *Professional Engineers* actually stands for the proposition that the emergency exception in the Dills Act did not authorize unilateral reductions in employees' hours of work and compensation. Therefore, SEIU argues, the emergency exception in the Trial Court Act did not authorize the Court's unilateral action here. This argument misses the import of *Professional Engineers*. The Court in this case need not prove an emergency existed sufficient to invoke the protections of section 71634.1. Rather, the Legislature itself, by enacting section 68106 to deal with the fiscal crisis in the courts, provided the authority for the Court's unilateral action. Just as the Legislature initially enacted the Trial Court Act, setting forth the scope of representation and therefore determining the bargaining obligation of the Court, nothing precludes the Legislature from taking action to later modify the scope of bargaining, as it did by the enactment of section 68106. (*Professional Engineers* at p. 1005; *DPA III*; *DPA II*.) Thus, the Court did not

[13] The Ralph C. Dills Act (Dills Act) governs labor relations for the state and is codified at section 3512 et seq.

commit an unfair practice when it failed to bargain over the decision to impose furloughs during the period of court closures in 2009-2010.[14]

Duty to Bargain Effects

There is no evidence in the record that SEIU ever made a clear demand to bargain over the effects of the Court's decision to close courts and therefore impose furloughs. The record is clear that the Court scheduled meetings to discuss impacts, presented at least one proposal, and stated repeatedly in writing that it understood its obligation to bargain over negotiable impacts relating to the court closures and was ready to do so. This situation is factually similar to *Stanislaus*. In that case, the union alleged that the employer had a duty to bargain over the decision to turn over operations of one of the employer's facilities to an outside provider. The employer and union met to discuss impacts of the decision, but proposals by the employer over that subject were only met by the union demanding to bargain over the decision itself. The union never specifically demanded to bargain over effects nor presented any proposal regarding negotiable impacts. In its argument to the Administrative Law Judge (ALJ), the union focused entirely on the negotiability of the decision. PERB adopted the decision of the ALJ in that case, and found that under the circumstances, the employer had either discharged its effects bargaining obligation, or that the union had waived its right to bargain over effects. (*Id.*, ALJ's proposed dec. at pp. 26-27.)

[14] SEIU's argument that this interpretation of section 68106 results in unconstitutional impairment of contract has already been rejected by PERB under similar facts. In *DPA I*, the Board found that legislative action entitled to the state to unilaterally change the method of overtime calculation, despite contrary language in the applicable MOU. The union in that case argued that by so doing, the state violated the California Constitution's prohibition on impairment of contracts. PERB refused to consider this argument, finding that PERB lacks jurisdiction to consider alleged constitutional violations. (*Id.* at p. 9; citations omitted.) Therefore, there are no grounds to consider SEIU's argument in this regard. Furthermore, the parties' MOU at section 11.1 sets forth, for payroll purposes, regular hours of employees as from 8:00 a.m. to 5:00 p.m., Monday through Friday, "Court holidays excepted." Thus, since section 68106 designated court closure days as holidays, the resulting alteration to employees' hours fits within this section of the MOU.

In this case, SEIU has been entirely focused on its perceived right to bargain over the Court's decision to impose furloughs, characterizing furloughs as an impact of the decision to close the courts. Following SEIU's reasoning, the Court would then be required to bargain over the *decision* to impose an *impact*. Notwithstanding the fact that this rationale completely obliterates the distinction between decision and effects bargaining, it is simply incorrect. The relevant decision here was non-negotiable. Like the employer in *Stanislaus*, the Court stood ready to bargain over negotiable effects, and similar to the union in that case, SEIU failed to identify negotiable effects nor made a demand to bargain over effects. Thus, the Court cannot be found in this circumstance to have violated its duty to bargain in good faith.

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SF-CE-15-C, *SEIU Local 521 v. Santa Clara County Superior Court*, 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 Public Employment Relations Board (PERB or 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 95811-4124
(916) 322-8231
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, § 32300.)

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.)

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, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Valerie Pike Racho
Administrative Law Judge