

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



ORANGE COUNTY MEDICAL & DENTAL
ASSOCIATION,

Charging Party,

v.

COUNTY OF ORANGE,

Respondent.

ORANGE COUNTY EMPLOYEES
ASSOCIATION,

Intervenor.

Case No. LA-CE-899-M

PERB Decision No. 2478-M

April 8, 2016

Appearances: Lawrence Rosenzweig, Attorney, for Orange County Medical & Dental Association; Donald Drozd, Attorney, for Orange County Employees Association.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by Charging Party Orange County Medical & Dental Association (OCMDA) and Intervenor Orange County Employees Association (OCEA) to a proposed decision by an administrative law judge (ALJ) (attached). The complaint alleged that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA)¹ by denying OCMDA's petition to sever five classifications of professional health care employees from the

¹ The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Healthcare Professional Unit. OCMDA alleged that this conduct constituted a violation of MMBA section 3509, subdivision (b) and PERB Regulation 32603, subdivision (g).²

The ALJ concluded that the County violated MMBA section 3507.3 by denying the severance petition because the employees covered by the petition were all professionals and are entitled to be represented separately from non-professional employees. The existing unit represented by OCEA contained at least one classification the ALJ concluded was non-professional. As a remedy, the ALJ ordered the County to rescind its denial of the severance petition and to process the petition “and make a new determination as to the appropriateness of the proposed unit” consistent with the proposed decision. (Proposed dec., pp. 14-15.)

We have reviewed the entire record in this matter in light of the issues raised by the parties’ exceptions and responses. Based on our review, we conclude that the ALJ’s findings of fact are supported by the record, and we adopt them as the findings of the Board itself. The ALJ’s legal conclusions are well-reasoned and in accordance with applicable law, and we adopt them as the conclusions of the Board itself. We affirm and adopt the proposed decision and the remedy, subject to the following discussion of the exceptions filed by OCMDA and OCEA.

SUMMARY OF FACTS

The County’s Healthcare Professional Unit consists of professional employees providing mental health, community health, and direct physical healthcare on behalf of the County. At some point in time, OCEA became the exclusive representative of employees in

² PERB’s Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Regulation 32603, subdivision (g) provides that it shall be an unfair practice for a public agency to “violate MMBA or any local rule adopted pursuant to Government Code section 3507.”

the Healthcare Professional Unit. OCEA represents both professional and non-professional employees in the County and other public agencies, with non-professional employees constituting the larger of the two groups. The Healthcare Professional Unit includes doctors and dentists.

On November 12, 2012, OCMDA filed a petition seeking to sever five classifications from the Healthcare Professional Unit: Community Mental Health Psychiatrist, Dentist, Physician, Physician Specialist, and Public Health Medical Officer. The proposed bargaining unit would consist of approximately 50 to 55 doctors and 5 to 10 dentists.

The County processed OCMDA's petition in accordance with procedures set forth in the County's Employee Relations Resolution (ERR), and at no time did it assert any procedural deficiencies with the petition. Section 8.H. of the ERR sets forth the criteria for determining an appropriate bargaining unit as follows:

To minimize the fragmentation of units, the principal criterion for determining an appropriate representation unit shall be the largest feasible group of employees having a community of interest. In addition, the following criteria shall be considered.

- The effect of the proposed unit on the efficient operation of County services and sound employee relations.
- The history of employee relations in the unit and among other employees of the County.
- Whether management officials at the level of the unit have the power to agree or make effective recommendations to the Personnel Director or the Board with respect to wages, hours and other terms and conditions of employment.
- Professional employees shall not be denied the right to be represented separately from non-professional employees by a professional employee organization consisting of such professional employees.

- The effect on the existing classification structure of dividing a single class among two or more units.

(ERR Section 8.H., p. 6; emphasis added.)

On April 25, 2013, the County denied OCMDA's petition, concluding that the principle disfavoring fragmentation of bargaining units outweighed the purported guarantee to professional employees the right to be represented separately from non-professional employees. The denial stated in part:

Accordingly, after a careful review of the facts as well as the requisite criteria to be used in making a determination to form a new bargaining unit, it is the Human Resource Services department's decision that the current County Healthcare Professional Unit satisfies the mandates of ERR of Section 8.H. OCMDA's proposed alternative of carving out the six medical classifications that consist of only 67 positions would be inconsistent with the principal criteria for the establishment of appropriate representation units, most likely expose the County to further fragmentation of stable, well established bargaining units, and result in significant increased costs of administration.

OCMDA appealed the denial of its petition to the County's Board of Supervisors, which affirmed the denial of OCMDA's petition. This unfair practice charge ensued, and a complaint issued on February 24, 2015, alleging that the County's denial of OCMDA's severance petition was inconsistent with the County's local rule and constituted an unfair practice under MMBA section 3509, subdivision (b) and PERB Regulation 32603, subdivision (g).

PROPOSED DECISION

The ALJ began his analysis by noting the limits of PERB's role in evaluating a public agency's unit determination, which is to ascertain if the determination was reasonable. PERB is not to substitute its judgment for that of the local agency. (*City of Glendale* (2007) PERB Order No. Ad-361-M; *County of Riverside* (2010) PERB Decision No. 2119-M, p. 13.)

The ALJ found that the existing Healthcare Professional Unit included at least one non-professional classification, the Health Education Assistant. Therefore, the existing unit does not consist solely of professional employees. Based on the plain meaning of MMBA section 3507.3, the ALJ concluded that the County's denial of OCMDA's severance petition was unreasonable because it violated the right of doctors and dentists to be represented separately from non-professional employees. At the same time, the ALJ concluded the County's action violated its ERR which incorporates MMBA section 3507.3, which provides in pertinent part:

Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of those professional employees. . . .

“Professional employees,” for purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists.

(Proposed dec., pp. 8-9.)

The ALJ rejected two other arguments made by the OCMDA, viz., that *Alameda County Assistant Public Defenders Association v. County of Alameda* (1973) 33 Cal.App.3d 825 (*Alameda*) grants physicians and dentists the absolute right to be represented apart from the other professionals in the Healthcare Professional Unit; and that the County's denial of the OCMDA severance petition violated MMBA section 3507.3 because OCEA is not a “professional employee organization” within the meaning of MMBA section 3507.3. According to the ALJ, *Alameda* does not support OCMDA's claim, because the court made clear that MMBA section 3507.3 *does not* automatically grant professionals the right to be represented apart from other professional groups. Rather, according to the ALJ, a

determination as to whether a specific group of professionals should be in a separate bargaining unit from other professionals is a factual determination based on whether the proposed unit is appropriate.

As to OCMDA's argument that doctors and dentists are entitled to be represented separately "by a professional employee organization consisting of those professional employees" (MMBA, § 3507.3), and that OCEA was not such an employee organization because it had non-professionals as members, the ALJ noted that MMBA section 3507.3 does not define "professional employee organization." He noted that OCEA is an "employee organization" within the meaning of MMBA section 3501, subdivision (a), and represents a sizeable number of professional and non-professional employees in the County and other public agencies. Because nothing in the record suggested that OCEA is incapable of adequately representing professional employees, the ALJ rejected OCMDA's assertion that doctors and dentists could not be represented by OCEA.

Finally, OCMDA argued that the County's denial of its severance petition violated MMBA section 3507.3, because the Healthcare Professional Unit includes non-professional employees. In support of its argument, it pointed to the class descriptions for the Hazardous Waste Specialist and the Health Education Assistant, the only two class descriptions in the record. With regard to the Hazardous Waste Specialist, the class description requires a bachelor's degree in life, physical, or environmental health science with a minimum of 30 semester units in chemistry, physics, microbiology or biology. Based on the educational requirements alone, according to the ALJ, the Hazardous Waste Specialist falls squarely within the definition of a professional under MMBA section 3507.3, which specifically includes physical, chemical, and biological scientists as professionals.

However, the class description for Health Education Assistant describes the incumbent as a “subprofessional” who assists professional employees in the performance of their duties. A “subprofessional” is defined as “functioning or qualified to function below the professional level but distinctly above the clerical or labor level and usually under the supervision of a professionally trained person.” (“Subprofessional.” Merriam-Webster Online Dictionary (2015) <http://www.Merriam-Webster.com> (as of 27, Oct. 2015).) By definition, according to the ALJ, the Health Education Assistant is not a professional employee. Furthermore, the class description does not contain a minimum educational requirement for the position that suggests the need for professional training. It only requires two years of relevant experience. Although college semester units and attendance at trainings and seminars can count as experience, the class description does not describe any specific recognized course of instruction that must be completed in order to be hired for the position. Therefore, according to the ALJ, the Healthcare Professional Unit contains at least one classification of non-professional employees and does not consist solely of professional employees.

The ALJ also concluded that the County violated the ERR, which incorporates MMBA section 3507.3 as a criterion that must be used when determining an appropriate unit. While Section 8.H. of the ERR does state that the “principal criterion for determining an appropriate representation unit shall be the largest feasible group of employees having a community of interest,” it does not state that avoiding fragmentation is the only criterion to be considered or that it supersedes all other criteria. At least in this instance, according to the ALJ, interpreting Section 8.H. in that manner would violate employee rights under the MMBA and make that section of the ERR unreasonable and unenforceable. The ALJ concluded that the County’s

denial of OCMDA's petition was unreasonable because it denied doctors and dentists the right to be represented separately from non-professional employees.

The ALJ ordered the County to rescind its denial of OCMDA's November 12, 2012 severance petition, and to process the petition in a manner consistent with MMBA section 3507.3. When processing OCMDA's petition, the ALJ ordered the County to make a new determination as to the appropriateness of the proposed unit in light of the conclusions of law set forth in his proposed decision, including that professional employees shall not be denied the right to be represented separately from non-professional employees under MMBA section 3507.3.

OCMDA'S EXCEPTIONS

OCMDA's main objection to the proposed decision is that it failed to grant the severance petition and failed to determine that the petitioned for unit was appropriate. OCMDA also asserts that the ALJ erred in failing to conclude that OCEA is not a "professional employee organization." Given that OCEA has members who are not professional employees, it cannot be considered a professional organization within the meaning of MMBA section 3507.3, according to OCMDA.

OCMDA also asserts that the proposed decision wrongly left to the County the decision whether the petitioned-for unit was appropriate, since the County has already decided that the unit is not appropriate despite the language of MMBA section 3507.3 and Section 8.H. of the ERR.

OCEA'S EXCEPTIONS

OCEA asserts that the ALJ erred in finding that the "healthcare education assistant" is not a professional employee and, therefore, that the existing Healthcare Professional Unit

contained at least one classification of non-professional employees. Based on this alleged factual error, OCEA asserts that the ALJ wrongly concluded that the County's denial of OCMDA's petition violated the MMBA and ERR Section 8.H. In other words, OCEA argues that the doctors and dentists already were in a professional unit and denying the severance petition did not deny them rights contained in MMBA section 3507.3.

According to OCEA, *County of Orange* (2010) PERB Decision No. 2138-M affirmed the reasonableness and appropriateness of the process to determine severance issues set forth in the County's ERR, and that the Board of Supervisors' proper denial of OCMDA's petition under that process was a final decision, implying that *County of Orange* is the law of this case. OCEA also argues that under *Alameda, supra*, 33 Cal.App.3d 825, OCMDA is not entitled by statute to a bargaining unit separate from other healthcare professionals.

DISCUSSION

It is beyond dispute that MMBA section 3507.3 entitles professional employees to be "represented separately from nonprofessional employees by a professional employee organization consisting of those professional employees." (*Modesto Irrigation District* (2005) PERB Decision No. 1768-M, quoting MMBA section 3507.3 at p. 5.) Thus, the first issue to be addressed in determining whether the County's denial of the severance petition violated MMBA section 3507.3 is whether the Healthcare Professional Unit consists solely of professional employees.

The ALJ's finding that the Healthcare Education Assistant is not a professional classification is supported by the record. The class description denominates this as a "subprofessional," there is no minimal educational requirement, and there is no recognized course of instruction that must be completed as a qualification for employment. For all the

reasons considered by the ALJ, we affirm his finding that the Healthcare Professional Unit was not comprised solely of professionals. We therefore deny OCEA's exception to that finding.

Nor do we agree with OCEA that *County of Orange, supra*, PERB Decision No. 2138-M is determinative or controlling of the disposition of the instant severance petition. *County of Orange* held: 1) in the absence of a specific local rule providing for a severance petition, it was reasonable and appropriate for the County to process such a petition under its rules for unit modification; and 2) giving the county board of supervisors the final decision in representation matters under local rules is not unlawful.³ These conclusions regarding a petition filed first by a group of employees and then by an employee organization other than OCMDA are not controlling or dispositive here, especially since the earlier severance petition was dismissed on procedural grounds and not because the proposed unit was allegedly inappropriate.

OCEA also argues that OCMDA is not entitled by statute to a bargaining unit separate from other health care professionals, relying on *Alameda, supra*, 33 Cal.App.3d 825. As we explain below, we agree with the ALJ that *Alameda* is not dispositive of the issue in this case. The narrow issue here is whether the County violated MMBA section 3507.3 by denying the physicians and dentists their right to be represented in a unit separately from nonprofessionals. The question of what is the most appropriate unit (i.e., one comprised of all the other professionals) is not before us.

³ *County of Orange* upheld the County's dismissal of the severance petition because employees, rather than an employee organization, had filed the petition and the local rules require employee organizations to file unit modification petitions. Additionally, the Union of American Physicians and Dentists (which ultimately filed a petition) was not a registered "employee organization" within the meaning of the local rules.

Turning to OCMDA's exceptions, we agree with the ALJ's proposed remedy ordering the County to rescind its denial of the severance petition but stopping short of ordering the severance petition be granted. Neither do we believe the ALJ erred by refraining from making an affirmative unit determination regarding the contours of a professional unit. Our conclusion rests, in part, on our reading of MMBA sections 3507 and 3509, which together allocate the authority to determine appropriate bargaining units to a public agency that has adopted local rules concerning representation, provided those determinations conform with the statutory mandates of MMBA section 3507.3.⁴ In particular, MMBA section 3507.1(a) states: "Unit

⁴ MMBA section 3507 provides in relevant part:

(a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter. The rules and regulations may include provisions for all of the following:

(1) Verifying that an organization does in fact represent employees of the public agency.

[(1) . . . (1)]

(3) Recognition of employee organizations.

(4) Exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself or herself as provided in Section 3502.

MMBA section 3509, describing the authority of PERB over the administration of the MMBA, provides in relevant part:

(a) The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter and shall include the authority as set forth in subdivisions (b) and (c). Included among the appropriate powers of the board are the power to order elections, to conduct any election the board

determinations and representation elections shall be determined and processed in accordance with rules adopted by a public agency in accordance with this chapter.” PERB Regulation 61000 also limits PERB’s authority with respect to representation matters where a local agency has adopted its own rules regarding representation issues.⁵ (*County of Orange, supra*, PERB Decision No. 2138-M; *County of Siskiyou/Siskiyou County Superior Court* (2010) PERB Decision No. 2113-M.)

In limiting the remedy to ordering the County to rescind its denial of the severance petition and to process the petition in a manner consistent with MMBA section 3507.3, the ALJ followed PERB precedent. For example, in *County of Riverside* (2012) PERB Decision No. 2280-M, the employer violated the MMBA by illegally requiring a proof of support for a unit modification petition. It was ordered to rescind the denial and process the petition in accordance with PERB’s order. See also *County of Riverside* (2011) PERB Decision No. 2163-M. In *County of Ventura* (2009) PERB Decision No. 2067-M, the employer refused to process a request for recognition claiming that it was not the employer of the medical professionals the union sought to represent. PERB held the employer was a joint employer with private contractors and was obligated to treat the employees as public employees. The

orders, and to adopt rules to apply in areas where a public agency has no rule.

(Emphasis added.)

⁵ PERB Regulation 61000 provides in pertinent part:

[T]he Board will conduct representation proceedings . . . under MMBA in accordance with the applicable provisions of this Chapter *only where a public agency has not adopted local rules in accordance with MMBA section 3507.*

(Emphasis added.)

Board ordered the County to process the request for recognition in accordance with local rules, but did not order a representation election.

Similar to those cases, the ALJ in the present case left for the County to decide whether the petitioned-for unit was appropriate, so long as the decision was consistent with the MMBA and the County's ERR.

We affirm this decision, recognizing that PERB's role in representation issues under MMBA is limited where local rules have been adopted. The County has adopted criteria for unit determination and it should be allowed to apply those criteria to determine if the petitioned-for unit of professional employees is appropriate. (*City of Lodi (2010) PERB Decision No. 2142-M* [severance petitioner has the burden of showing the proposed unit is appropriate.]

OCMDA argues that the record contained facts supporting its claim that the physicians and dentists have a separate community of interest from the employees in the Healthcare Professional Unit. Under the holding of *Alameda, supra*, 33 Cal.App.3d 825, OCMDA claims that it is entitled to a determination by PERB that the unit proposed in the severance petition is the appropriate bargaining unit. We disagree that *Alameda* requires this result.

The only issue before us is whether the County violated MMBA and its local rules by denying the professional employees included in OCMDA's severance petition the right to be represented separately from non-professional employees. We conclude that the County did deny that right. However, for reasons discussed earlier, in the current procedural context, it is not PERB's province to determine the contours of an appropriate professional unit. We leave that to the County to decide in accordance with its ERR Section 8.H., provided that it may not create a unit that forces physicians and dentists or any other professional classification into a

unit containing non-professional employees when they have petitioned for representation separate from that unit.⁶

Alameda, supra, 33 Cal.App.3d 825, decided before PERB was given jurisdiction over the MMBA, held that deputy public defenders were entitled to be in a separate unit from other professional employees because they had a distinct community of interest with each other but not with the miscellaneous group of professionals, including librarians, auditors, planners, and agricultural inspectors. As the court viewed the issue before it: “The question to be decided then becomes whether requiring all professional employees, regardless of type, to be in one organization for the administration of employer-employee relations is reasonable and appropriate.” (*Alameda, supra*, 33 Cal.App.3d at p. 831; emphasis added.) The court specifically noted: “[The express terms of MMBA section 3507.3] do not grant [public defenders] the right to be represented apart from other professional groups.” (*Alameda, supra*.) Rather, the public defenders were entitled to a separate unit pursuant to MMBA section 3507, subdivision (a)(4), providing for exclusive recognition of an employee organization selected to represent employees in “an appropriate unit.”

We agree with the ALJ that *Alameda, supra*, 33 Cal.App.3d 825 does not inform the question presented in this case—whether the physicians and dentists are entitled to be severed from the larger mixed unit of professionals and non-professionals pursuant to MMBA section 3507.3. Nor does *Alameda* suggest that PERB, as opposed to the County, is required to determine in the first instance the appropriateness of a bargaining unit that may result as a result of the OCMDA’s severance petition.

⁶ This does not preclude professional employees from voluntarily being part of a mixed bargaining unit that includes non-professionals.

Lastly, the OCMDA excepts to the ALJ's analysis of OCMDA's argument that its members are absolutely entitled to be represented by a "professional employee organization consisting of those professional employees" within the meaning of MMBA section 3507.3 and that OCEA is not a "professional employee organization." The ALJ noted that the term "professional employee organization" is not defined in the MMBA, but also noted that OCEA is an "employee organization" within the meaning of MMBA section 3501, subdivision (a) and has experience in and is capable of representing professional employees.

We need not resolve this issue at this time. This case originated with OCMDA requesting that physicians and dentists be severed from the Healthcare Professionals Unit. In its petition to the County, OCMDA stated: "It is [the employees'] further contention that they have a legal right to a separate bargaining unit and to be represented by OCMDA." (Proposed dec., p. 5.) This decision determines that the County's denial of the severance petition violated the MMBA. As to what employee organization represents an appropriate unit, we must leave to the County to determine in accordance with its ERR, subject to review by PERB pursuant to MMBA section 3509, subdivision (g). MMBA section 3507 leaves to the local public agency, not PERB, to establish rules regarding the recognition of employee organizations and the establishment of an exclusive representative of an appropriate bargaining unit. This decision establishes that physicians and dentists are entitled to be represented separately from a bargaining unit that contains non-professional employees. If the OCMDA believes that the County has denied professional employees the right to be represented by a "professional employee organization consisting of those professional employees," it is free to file an unfair practice charge when the issue is ripe. (MMBA, § 3507.3.)

ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA or Act), Government Code section 3509, subdivision (b), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivision (g), by denying the severance petition that the Orange County Medical & Dental Association (OCMDA) filed on November 12, 2012.

Pursuant to MMBA section 3509, subdivision (b), it is hereby ORDERED that the County, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Applying the rules of the County's Employee Relations Resolution regarding severance petitions unreasonably to deny professional employees the right to be represented separately from non-professional employees.

2. Denying OCMDA the right to represent County employees.

3. Interfering with the right of County employees to be represented by the employee organization of their own choosing.

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

1. Rescind the County's April 25, 2013 denial of OCMDA's November 12, 2012 severance petition and its subsequent January 28, 2014 affirmation of the denial.

2. Within ten (10) working days of the service of a final decision in this matter, process OCMDA's November 12, 2012 severance petition and make a new determination as to the appropriateness of the proposed unit with a reasonable interpretation of

the County's Employee Relations Resolution and in a manner consistent with MMBA section 3507.3.

3. Within ten (10) working days of the service of a final decision in this matter, post copies of the Notice attached hereto as an Appendix at all locations in the County where notices to employees in the Healthcare Professional Unit are posted. The Notice must be signed by an authorized agent of the County, indicating that it 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. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the County's Healthcare Professional Unit. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

4. Written notice of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The County shall provide reports in writing, as directed by the General Counsel or her designee. All reports regarding compliance with this Order shall be concurrently served on OCMDA.

Chair Martinez and Member Banks joined in this Decision.



**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. LA-CE-899-M, *Orange County Medical & Dental Association v. County of Orange*, in which all parties had the right to participate, it has been found that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., and PERB Regulations, by denying a severance petition that the Orange County Medical & Dental Association (OCMDA) filed on November 12, 2012.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Applying the rules of the County's Employee Relations Resolution regarding severance petitions unreasonably to deny professional employees the right to be represented separately from non-professional employees.
2. Denying OCMDA the right to represent County employees.
3. Interfering with the right of County employees to be represented by the employee organization of their own choosing.

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

1. Rescind the County's April 25, 2013 denial of OCMDA's November 12, 2012 severance petition and its subsequent January 28, 2014 affirmation of the denial.
2. Within ten (10) working days of the service of a final decision in this matter, process OCMDA's November 12, 2012 severance petition and make a new determination as to the appropriateness of the proposed unit with a reasonable interpretation of the County's Employee Relations Resolution and in a manner consistent with MMBA section 3507.3.

Dated: _____

COUNTY OF ORANGE

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

ORANGE COUNTY MEDICAL & DENTAL
ASSOCIATION,

Charging Party,

v.

COUNTY OF ORANGE,

Respondent.

ORANGE COUNTY EMPLOYEES
ASSOCIATION,

Intervenor.

UNFAIR PRACTICE
CASE NO. LA-CE-899-M

PROPOSED DECISION
(October 30, 2015)

Appearances: Lawrence Rosenzweig, Attorney, for Orange County Medical & Dental Association; Mark R. Howe and Teri L. Maksoudian, Attorneys, for County of Orange; Donald Drozd, Attorney, for Orange County Employees Association.

Before Kent Morizawa, Administrative Law Judge.

In this case, an employee organization alleges that a public employer denied its severance petition in violation of the Meyers-Milias-Brown Act (MMBA) and PERB Regulations.¹ The employer denies any violation.

PROCEDURAL HISTORY

On February 7, 2014, the Orange County Medical & Dental Association (OCMDA) filed an unfair practice charge against the County of Orange (County). On April 4, 2014, the Orange County Employees Association (OCEA) filed an application to be joined as a party to

¹ MMBA is codified at Government Code section 3500 et seq., and PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

the case. Having received no objection from OCMDA or the County, OCEA's application was granted on May 1, 2014. On February 24, 2015, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the County violated MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivision (g), when its Board of Supervisors denied OCMDA's severance petition.

On March 13, 2015, the County answered the complaint denying any violation of the MMBA or PERB Regulations and setting forth its affirmative defenses. On April 29, 2015, the parties participated in an informal settlement conference, but the matter was not resolved.

Formal hearing was held on August 17, 2015, and the matter was submitted for proposed decision with the receipt of post-hearing briefs on October 16, 2015.

FINDINGS OF FACT

The Parties

OCMDA is an employee organization within the meaning of MMBA section 3501, subdivision (a).

OCEA is an exclusive representative of an appropriate unit of employees within the meaning of PERB Regulation 32016, subdivision (b), and therefore a recognized employee organization within the meaning of MMBA section 3501, subdivision (b).

The County is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a).

Background

The County's Healthcare Professional Unit consists of roughly 1,100 employees in 69 classifications. The unit was formed in 2001 when employees in several nursing classifications made it known that they wished to leave the County's General Unit and form

their own bargaining unit. OCEA represented these employees and met with the County to negotiate on their behalf for the formation of a new bargaining unit. These negotiations led to the creation of the Healthcare Professional Unit, which was meant to be comprised of professional employees providing mental health, community health, and direct physical healthcare on behalf of the County. At some point in time, OCEA became the exclusive representative of the employees in the Healthcare Professional Unit. OCEA represents both professional and non-professional employees in the County and other public agencies, with non-professional employees constituting the larger of the two groups.

The Healthcare Professional Unit includes doctors and dentists. George Pascarzi works as a child psychiatrist for the County and is also the Vice President of OCMDA. Membership in OCMDA is limited to County psychiatrists, doctors, and dentists. Pascarzi testified that he comes into contact with a number of classifications in the Healthcare Professional Unit, including behavioral health nurse, clinical social worker, marriage family therapist, pharmacist, and public health nurse. Pascarzi is licensed by the California Medical Board and is subject to discipline by that board. He must renew his license every two years and show completion of continuing education units when he does so. He is able to prescribe medication, as can dentists and some nurse practitioners.

Armen Minasyan works as a dentist in the County's correctional facilities. He testified that the only classifications in the Healthcare Professional Unit that he comes into contact with are other dentists, dental assistants, physicians, nurses, and pharmacists. He is licensed by the California Dental Board and is subject to discipline by that board. He must renew his license every three years and show completion of continuing education units when he does so.

The impetus for the efforts of the doctors and dentists to sever from the Healthcare Professional Unit came in 2007. At that time, OCEA was negotiating a wage increase for all of the employees it represented in the County. In response to OCEA's request, the County hired an outside firm to conduct a market study for the wages of every employee classification in the County. At the conclusion of the study, the outside firm made recommendations as to whether the wages for a particular classification were in line with market rates. During this process, the salaries of psychiatrists and psychologists were compared to each other, which OCEA admitted was an error. However, OCEA did not want the discrepancy to derail the across-the-board wage increases it had achieved for other classifications, including those that were significantly outside of the market rate. Instead, it received a commitment from the County to revisit the issue after the new memorandum of understanding (MOU) was finalized. However, following the 2008 market crash and subsequent economic downturn, the issue remains unvisited. Several doctors and dentists were dissatisfied with OCEA's response to the error in the market study and desired to leave the Healthcare Professional Unit and form their own bargaining unit.

On October 17, 2008, the Union of American Physicians & Dentists (UAPD) filed a severance petition with the County seeking to sever the following five classifications from the Healthcare Professional Unit: Community Mental Health Psychiatrist, Physician, Physician Specialist, Public Health Medical Officer I, and Dentist. (*County of Orange* (2010) PERB Decision No. 2138-M.) The County denied the petition on the basis that the petition failed to comply with the County's Employee Relations Resolution (ERR), and the Board upheld the County's denial. (*Ibid.*)

On October 13, 2011, OCMDA filed a request to sever doctors and dentists from the Healthcare Professional Unit. (*County of Orange* (2012) PERB Decision No. 2294-M, warning letter at p. 2.) The County again denied the petition on the basis that OCMDA failed to comply with the County's ERR when it filed its petition, and the Board upheld the County's denial. (*Ibid.*)

Current Petition

On November 12, 2012, OCMDA filed a petition seeking to sever the following five classifications from the Healthcare Professional Unit: Community Mental Health Psychiatrist, Dentist, Physician, Physician Specialist, and Public Health Medical Officer.² OCMDA's petition states:

It is the employees of the requested unit's contention that they have been misrepresented by OCEA for the past 16 years. It is their further contention that they have a legal right to a separate bargaining unit and to be represented by OCMDA. This will ultimately allow Orange County adults with serious and persistent mental illnesses and children with serious emotional disturbances to have access to safe, effective and compliant psychiatric care, and safe, effective and compliant medical/dental care.

The new bargaining unit would consist of approximately 50 to 55 doctors and 5 to 10 dentists.

The County processed OCMDA's petition in accordance with procedures set forth in the ERR, and at no time did it assert any procedural deficiencies with the petition. Section 8.H. of the ERR sets forth the criteria for determining an appropriate bargaining unit as follows:

To minimize the fragmentation of units, the principal criterion for determining an appropriate representation unit shall be the largest

² The petition states that OCMDA also seeks to sever the Dental Officer classification from the Supervisory Management Unit. However, there was no testimony or evidence regarding this classification, and it will not be addressed in this decision.

feasible group of employees having a community of interest. In addition, the following criteria shall be considered.

- The effect of the proposed unit on the efficient operation of County services and sound employee relations.
- The history of employee relations in the unit and among other employees of the County.
- Whether management officials at the level of the unit have the power to agree or make effective recommendations to the Personnel Director or the Board with respect to wages, hours and other terms and conditions of employment.
- Professional employees shall not be denied the right to be represented separately from non-professional employees by a professional employee organization consisting of such professional employees.
- The effect on the existing classification structure of dividing a single class among two or more units.

On April 25, 2013, the County denied OCMDA's petition, setting forth its rationale as follows:

ERR Section 8.H. dictates that the principal criterion for determining the size/composition of an appropriate bargaining unit shall be the largest feasible group of employees having a community of interest. The primary purpose of this criterion is to avoid unnecessary fragmentation of units that would result in an unmanageable and cost inefficient impact on the County's Employer/Employee Relations program. In addition, PERB's checklists for processing bargaining unit severance requests, determining community of interest, and evaluating representation history were also reviewed.

In researching the history of the current [Healthcare Professional Unit], it was formed in 2001 to include related job series classifications that perform healthcare duties that require employees to possess specialized healthcare skills, some of which also require specific professional licensure or certification. This bargaining unit has typically experienced a stable and effective relationship with the County. This conclusion is demonstrated by the successful negotiation of four successor MOUs which include unique pay or benefits such as licensure differential and board

certification specialty pays and paid leave to obtain continuing education credit and attend professional conferences.

Accordingly, after a careful review of the facts as well as the requisite criteria to be used in making a determination to form a new bargaining unit, it is the Human Resource Service department's decision that the current County Healthcare Professional Unit satisfies the mandates of ERR Section 8.H. OCMDA's proposed alternative of carving out the six medical classifications that consist of only 67 positions would be inconsistent with the principal criteria for the establishment of appropriate representation units, most likely expose the County to further fragmentation of stable, well established bargaining units, and result in significant increased costs of administration.

OCMDA appealed the denial of its petition to the County's Board of Supervisors. After receiving written briefing and oral argument, the Board of Supervisors affirmed the denial of OCMDA's petition its meeting of January 28, 2014.

ISSUE

Did the County violate its ERR and the MMBA when it denied OCMDA's severance petition?

CONCLUSIONS OF LAW

The MMBA permits local public agencies to "adopt reasonable rules and regulations" for the administration of employer-employee relations, including procedures for determining exclusive recognition of employee organizations and "appropriate" units of employees for collective bargaining purposes. (MMBA, § 3507, subd. (a)(4).) MMBA section 3509, subdivision (c) allows PERB to "enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections." Accordingly, an employee organization may challenge a public agency's determination made pursuant to its

local rules through the unfair practice procedure before PERB. (See *County of Riverside* (2010) PERB Decision No. 2119-M (*Riverside*).)³

When evaluating a public agency's unit determination under its local rules, PERB's inquiry is whether the agency's determination was reasonable. (*City of Glendale* (2007) PERB Order No. Ad-361-M; *Alameda County Assistant Public Defenders Assn. v. County of Alameda* (1973) 33 Cal.App.3d 825, 830 (*Alameda*).) A local government employer is not required to determine "the *ultimate* unit or *most* appropriate unit." (*Alameda, supra*, 33 Cal.App.3d at 830 (emphasis in original).) Accordingly, "if reasonable minds could differ over the appropriateness of the determination, PERB should not substitute its judgment for that of the local agency." (*Riverside, supra*, PERB Decision No. 2119-M at p. 13, citing *Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338. (*San Mateo*)) The party challenging a public agency's unit determination bears the burden of demonstrating that the decision was unreasonable. (*San Mateo, supra*, 48 Cal.App.3d at pp.338.)

The reasonableness of the County's denial of OCMDA's petition turns on the scope of the representational rights afforded by MMBA section 3507.3 to doctors and dentists as professional employees. MMBA section 3507.3 states:

Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of those professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional

³ In *International Federation of Professional and Technical Engineers, Local 21 v. City and County of San Francisco* (2000) 79 Cal.App.4th 1300, 1310-1311, the court held that only the State Mediation and Conciliation Service has jurisdiction to determine the appropriateness of a unit of professionals. However, in 2001, the Legislature granted PERB jurisdiction over the MMBA, including evaluating a public agency's unit determinations. Therefore, the court's holding in that case is of limited application now and does not bar PERB's jurisdiction over this matter.

employees, upon request of any of the parties, the dispute shall be submitted to the California State Mediation and Conciliation Service for mediation or for recommendation for resolving the dispute.

“Professional employees,” for purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists.

Section 8.H of the County’s ERR incorporates the first sentence of MMBA section 3507.3 as a criterion to be used in determining an appropriate unit.

In *Alameda, supra*, 33 Cal.App.3d 82, the court explored the contours of MMBA section 3507.3 and the rights it grants to professional employees. There, the county established a bargaining unit consisting of all non-health-related professional employees, including librarians, planners, and attorneys in the public defender’s office. (*Id.* at 828.) Relying on MMBA section 3507.3, the Public Defenders Association sought to represent the attorneys in the public defender’s office in a bargaining unit separate from the other non-health-related professionals, but the county denied the petition. (*Ibid.*) Although the court reversed the county’s decision, its decision did not rely on MMBA section 3507.3 and specifically stated, “[The express terms of MMBA section 3507.3] do not grant [the Public Defenders Association] the right to be represented apart from other professional groups.” (*Ibid.*) Rather, the right of the attorneys to be in a separate bargaining unit flowed from MMBA section 3507, subdivision (a)(4),⁴ which requires employees to be placed in “an appropriate unit.” (*Ibid.*) The court then found that the attorneys in the public defender’s office possessed a distinct

⁴ The Court of Appeal’s decision references MMBA section 3507, subdivision (d), which was amended in 2003 to become current MMBA section 3507, subdivision (a)(4). (Stats. 2003, ch. 215, §3.)

community of interest with each other and that it was incongruous to group them with a miscellaneous group of professionals with whom they had little, if any, community of interest, such as auditors, planners, agricultural inspectors, and librarians. (*Ibid.*) On that basis, it held that the attorneys in the public defender's office were entitled to be in their own bargaining unit separate from the other non-health-related professionals. (*Ibid.*)

OCMDA relies on *Alameda* to argue that MMBA section 3507.3 grants physicians the absolute right to be represented apart from other professionals in the Healthcare Professional Unit. However, *Alameda* cuts directly against OCMDA's argument. The court made clear that MMBA section 3507.3 *does not* automatically grant professionals the right to be represented apart from other professional groups. Rather, a determination as to whether a specific group of professionals should be in a separate bargaining unit from other professionals is a factual determination based on whether the proposed unit is appropriate.

OCMDA also argues that the County's denial of its severance petition violated MMBA section 3507.3 because OCEA is not a professional employee organization. MMBA section 3507.3 does not define "professional employee organization." However, OCEA is an "employee organization" within the meaning of MMBA section 3501, subdivision (a), and represents a sizeable number of professional and non-professional employees in the County and other public agencies. OCMDA asserts that OCEA cannot be a professional employee organization because it represents more non-professional employees than professional employees. However, nothing in the record suggests that OCEA or any other employee organization that represents more non-professional employees than professional employees is incapable of adequately representing professional employees. To the contrary, the evidence shows that OCEA has successfully negotiated wage increases and other benefits for the

professional employees it represents in the County, including those OCMDA seeks to sever from the Healthcare Professional Unit.

Finally, OCMDA argues that the County's denial of its severance petition violated MMBA section 3507.3 because the Healthcare Professional Unit includes non-professional employees. In support of its argument, it points to the class descriptions for the Hazardous Waste Specialist and the Health Education Assistant, the only two class descriptions in the record. With regard to the Hazardous Waste Specialist, the class description requires a bachelor's degree in life, physical, or environmental health science with a minimum of 30 semester units in chemistry, physics, microbiology or biology. Based on the educational requirements alone, the Hazardous Waste Specialist falls squarely within the definition of a professional under MMBA section 3507.3, which specifically articulates physical, chemical, and biological scientists as professionals. With regard to the Health Education Assistant, the class description describes the incumbent as a "subprofessional" who assists professional employees in the performance of their duties. A "subprofessional" is defined as "functioning or qualified to function below the professional level but distinctly above the clerical or labor level and usually under the supervision of a professionally trained person."

("Subprofessional." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 27 Oct. 2015.) By definition, the Health Education Assistant is not a professional employee. Furthermore, the class description does not contain a minimum educational requirement for the position that suggests the need for professional training. It only requires two years of relevant experience. Although college semester units and attendance at trainings and seminars can count as experience, the class description does not describe any specific recognized course of instruction that must be completed in order to be hired for the position. Accordingly, the

Healthcare Professional Unit contains at least one classification of non-professional employees and does not consist solely of professional employees.⁵

The County's denial of OCMDA's petition was unreasonable because it violated the doctors and dentists' right under MMBA section 3507.3 to be represented separately from non-professional employees. It also violated the County's ERR, which incorporates MMBA section 3507.3 as a criterion that must be used when determining an appropriate unit. While Section 8.H of the ERR does state that the "principal criterion for determining an appropriate representation unit shall be the largest feasible group of employees having a community of interest," it does not state that avoiding fragmentation is the only criterion to be considered or that it supersedes all other criteria. At least in this instance, interpreting Section 8.H in that manner would violate employee rights under the MMBA and make that section of the ERR unreasonable and unenforceable. (See *Internat. Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d. 191, 197-198 [local rules and regulations adopted by a public agency must be consistent with the purposes and provisions of the MMBA].) Accordingly, the County's denial of OCMDA's petition was unreasonable because it denied doctors and dentists the right to be represented separately from non-professional employees.

⁵ The County's April 25, 2013 denial of OCMDA's petition suggests that the unit contains more non-professional classifications when it states that the unit includes "classifications that perform healthcare duties that require employees to possess specialized healthcare skills, *some of which also require specific professional licensure or certification.*" (Emphasis added.)

PROPOSED REMEDY

Pursuant to Government Code sections 3509, subdivision (a), and section 3541.3, subdivision (i), PERB 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.

In this case, the County violated the MMBA by denying OCMDA's petition to sever doctors and dentists from the Healthcare Professional Unit. It is the ordinary remedy in such cases to order the County to cease and desist from continuing to engage in such conduct. (*City of Torrance* (2008) PERB Decision No. 1971-M.) It is also appropriate that the County be ordered to rescind its denial of OCMDA's November 12, 2012 severance petition and to process the petition in a manner consistent with the County's ERR. (*County of Riverside* (2012) PERB Decision No. 2280-M; *County of Riverside* (2011) PERB Decision No. 2163-M; *County of Ventura* (2009) PERB Decision No. 2067-M.) When processing OCMDA's petition, the County is ordered to make a new determination as to the appropriateness of the proposed unit in light of the conclusions of law set forth in this Proposed Decision, including that professional employees shall not be denied the right to be represented separately from non-professional employees under MMBA section 3507.3.

Finally, it is appropriate that the County be ordered to post a notice incorporating the terms of the order at all locations in the County where notices to employees in the Healthcare Professional Unit are posted. Posting such a notice, signed by the authorized representative of the County, will provide employees with notice that the County acted in an unlawful manner, that it is required to cease and desist from such activity, and that it will comply with the order.

It effectuates the purposes of the MMBA that employees be informed of the resolution of this controversy. (*Omnitrans* (2010) PERB Decision No. 2143-M.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA or Act), Government Code section 3509, subdivision (b), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivision (g) (Cal. Code Regs., tit. 8, sec. 31001 et seq.), by denying the severance petition that the Orange County Medical & Dental Association (OCMDA) filed on November 12, 2012.

Pursuant to MMBA section 3509, subdivision (b), it is hereby ORDERED that the County, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Applying the rules of the County's Employee Relations Resolution regarding severance petitions unreasonably to deny professional employees the right to be represented separately from non-professional employees.
2. Denying OCMDA the right to represent County employees.
3. Interfering with the right of County employees to be represented by the employee organization of their own choosing.

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

1. Rescind the April 25, 2013 denial of OCMDA's November 12, 2012 severance petition and subsequent January 28, 2014 affirmation of the denial.
2. Within 10 working days of the service of a final decision in this matter, process OCMDA's November 12, 2012 severance petition and make a new determination as to

the appropriateness of the proposed unit with a reasonable interpretation of the County's Employee Relations Resolution and in a manner consistent with MMBA section 3507.3.

3. Within 10 working days of the service of a final decision in this matter, post copies of the Notice attached hereto as an Appendix at all locations in the County where notices to employees in the Healthcare Professional Unit are posted. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 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.

4. Written notice of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The County shall provide reports in writing, as directed by the General Counsel or her designee. All reports regarding compliance with this Order shall be concurrently served on OCMDA.

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 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 California Code of Regulations, title 8, section 32135, subdivision (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).)