



STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF FRESNO,

Employer,

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 521,

Exclusive Representative.

Case No. SA-IM-136-M

Administrative Appeal

PERB Order No. Ad-414-M

June 17, 2014

Appearances: Catherine E. Basham and Amanda Ruiz, Attorneys, County Counsel, for County of Fresno; Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 521.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the County of Fresno (County) from an administrative determination (attached) made by the Office of the General Counsel that concluded factfinding procedures defined in the Meyers-Milius-Brown Act (MMBA) section 3505.4¹ and PERB Regulation 32802² applied to the bargaining impasse between the County and Service Employees International Union, Local 521 (SEIU).³ The bargaining dispute concerned two

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

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

³ Statutory references are to the Government Code unless otherwise noted. MMBA section 3505.4 establishes a non-binding factfinding procedure for resolving post-impasse bargaining disputes that may be invoked by the representative employee organization after mediation efforts, if available, have failed to produce a settlement.

County proposals regarding the number of employees working 12-hour shifts at the county jail and the addition of specialized assignments at the jail.

Based on our recent decision *County of Contra Costa* (2014) PERB Decision No. Ad-410-M (*Contra Costa*), in which we held that the factfinding procedures set forth in MMBA sections 3505.4 through 3505.7 apply to bargaining disputes over all matters within the scope of representation, we affirm the administrative determination.⁴

PROCEDURAL HISTORY

SEIU filed its request for factfinding on October 30, 2013, pursuant to MMBA section 3505.4 claiming that the parties declared impasse on October 28, 2013. The parties had met and conferred on three occasions prior to this date, and the County began to implement its proposals regarding jail staffing.

The County objected to SEIU's request for factfinding on three separate grounds. First, it asserted that the request was premature because no written notice of impasse had been issued by either party.

Second, the County argued that PERB was bound by a ruling by the superior court in *County of Riverside v. Public Employment Relations Board* (2013) Case No. RIC 1305661 (*Riverside*), which enjoined PERB from approving any request for factfinding in any bargaining dispute other than for a new or successor comprehensive memorandum of understanding (MOU). Thus, argued the County, PERB is prohibited from processing SEIU's request for factfinding in this case.

⁴ PERB Regulation 32315 does not provide for oral argument on review of an administrative determination. Oral argument may only be requested upon exceptions being filed to a proposed decision. Therefore, SEIU's request for oral argument is denied.

Lastly, the County asserted that the legislative history of Assembly Bill (AB) 646 definitively shows the Legislature intended to limit factfinding procedures only to “collective bargaining agreements or MOUs.” (County’s November 1, 2013 Letter to PERB, p. 2.)

In response, SEIU asserted that *Riverside* does not bar PERB from processing its factfinding request in this case because the superior court ruling is not final and therefore the doctrine of res judicata does not apply in this case.⁵ Addressing the merits, SEIU argued that AB 646 was intended to apply to bargaining disputes such as the one presented by this case.

ADMINISTRATIVE DETERMINATION

The Office of the General Counsel rejected the County’s objections to factfinding, concluding that AB 646 applies to all bargaining disputes concerning matters within the scope of representation, and that such a reading comports with PERB’s decisions interpreting similar language under the Educational Employment Relations Act (EERA).⁶

The Office of the General Counsel further concluded that the County’s implementation of its proposals “is deemed to be or to include a ‘written notice of declaration of impasse’ within the meaning of section 3505.4.” (Admin. Determination, p. 12.)⁷

⁵ The doctrines of res judicata, or “claim preclusion” hold that a final judgment on the merits is a complete bar to further litigation on the same cause of action or defense by the same parties or those in privity with them. (7 Witkin California Procedure, Judgment, §§ 334 to 482 (5th ed. 2008).) The related doctrine of collateral estoppel or “issue preclusion,” bars the parties from relitigating issues actually determined against them in an action in a subsequent cause of action. (7 Witkin, *id.* §§ 413-451.)

⁶ EERA is codified at Government Code section 3540 et seq.

⁷ The County did not object to this conclusion in its appeal. The issue is therefore not before us and we do not consider it.

Finally, the Office of the General Counsel rejected the County's assertion that res judicata or collateral estoppel precluded the Board from acting on SEIU's request for appointment of a factfinding panel because no final decision had issued in *Riverside*.

Having concluded that the factfinding procedures set forth in MMBA section 3505.4 were applicable to this dispute, the Office of General Counsel ordered each party to select its factfinding panel member and notify the Office of the General Counsel of the selection by November 19, 2013.

The County filed a timely appeal from this administrative determination.

THE COUNTY'S APPEAL

The County asserts three reasons for overturning the administrative determination. It claims that PERB does not have jurisdiction to review the Office of the General Counsel's determination that factfinding should occur because in this case, SEIU filed an unfair practice charge alleging that the County "improperly failed to engage in fact finding prior to creating a specialized assignment and increasing the number of 12-hour shifts for correctional officers." (County's Appeal, p. 5.) Therefore, the appropriateness of factfinding should be determined only after the full evidentiary process of an unfair practice proceeding, according to the County. It claims that the administrative determination is an advisory opinion, and by implication, a decision affirming the administrative determination would also be advisory in nature.

Second, the County renews its argument that PERB is enjoined and estopped from ordering factfinding by the superior court's decision in *Riverside*.

Finally, the County argues that AB 646 was not intended to apply to all impasses in bargaining disputes, but only to those reached in the course of negotiating new or successor comprehensive MOUs.

SEIU’S RESPONSE

SEIU contends in response to the County’s appeal that the County conflates statutory impasse procedures with unfair practice proceedings, and that nothing precludes it from simultaneously pursuing its claim made in its unfair practice charge—that the County violated the MMBA by unilaterally implementing a unilateral change in negotiable terms and conditions of employment before exhausting impasse procedures—and requesting factfinding under MMBA section 3505.4.

SEIU also argues that the order by the superior court in *Riverside* does not enjoin or estop PERB from processing factfinding requests on “single issue” bargaining disputes because the superior court order is on appeal and therefore not final.

As to the intent of AB 646, SEIU asserts that it was intended to apply to all bargaining disputes, and not just those arising from the negotiation of new or successor MOUs.

DISCUSSION

1. The Board’s Jurisdiction to Administer Factfinding Under the MMBA

The County makes two claims in its objection to PERB’s jurisdiction. It first asserts that MMBA section 3509(b) provides that alleged violations of the MMBA shall be processed as unfair practices charges, implying that PERB may not “enforce” the MMBA by any means other than an unfair practice charge.

We addressed this claim in our recent decision in *Contra Costa, supra*, PERB Order No. Ad-410-M, pp. 12-13, fn. 8, where we noted the difference between an administrative

determination that orders the parties to participate in factfinding and a complaint that alleges a violation of the MMBA. We further explained in *City of Redondo Beach* (2014) PERB Order No. Ad-409-M, p. 5 that MMBA section 3509 is not the source of PERB's authority to appoint a factfinding panel. That authority derives from MMBA section 3505.4, and is not predicated on an alleged violation of the MMBA. As in *Contra Costa, supra*, PERB Order No. Ad-410-M, the County's appeal of the administrative determination will not result in any determination that the County violated the MMBA.

Secondly, the County argues that a determination in this administrative appeal could result in a determination of the County's liability in the unfair practice charge filed by SEIU alleging that the County unilaterally changed negotiable terms and conditions of employment before exhausting required impasse procedures.⁸ The County urges the Board to declare the administrative determination void as an invalid advisory opinion. According to the County, the only situation in which this Board may determine whether factfinding applies to the parties' bargaining dispute is in the context of unfair practice proceedings. The County asserts that the administrative determination directing the parties to participate in factfinding "bypasses" the unfair practice adjudication process and would constitute an advisory opinion. We disagree.

⁸ We take administrative notice of the agency's file in Unfair Practice Case No. SA-CE-846-M. PERB issued a complaint based on this charge on November 26, 2013 and a formal hearing is scheduled for July 2014. The complaint alleges that the County increased the number of 12-hour shifts available to corrections officers and created two new specialty assignments that are exempt from seniority-based bidding procedures without providing SEIU an opportunity to meet and confer over the decision and/or the effects of these changes in policy. The complaint further alleges that between October 30, 2013 (when SEIU requested factfinding) and November 14, 2013 (when the administrative determination issued), the County engaged in the unilateral conduct described above, which constitutes a failure and refusal to participate in factfinding procedures in good faith.

As we explained in *Contra Costa, supra*, PERB Order No. Ad-410-M, pp. 11-12, PERB has jurisdiction to determine whether the provisions of MMBA section 3505.4 apply to a particular factfinding request and PERB Regulation 32802(c) empowers the Board to notify the parties whether a request for factfinding has met the requirements of subsection (a)(1) or (2) of PERB Regulation 32802. Such a determination is necessarily made on a case-by-case basis after a review of the request itself and an assessment of the timelines, and, as in this case, after determining whether factfinding applies to the dispute between the parties. The administrative determination in this case was based on a review of the facts and an analysis of the law and it resulted in a direction to the parties to implement the next steps in the factfinding process. In sum, there was nothing “advisory” about the administrative determination.

Nor is a ruling by the Board itself on the County’s appeal of the administrative determination an advisory opinion.⁹ The County has appealed the administrative determination, presumably seeking an order from the Board itself overturning the administrative determination and absolving it of the duty to participate in factfinding. Such an order would not be theoretical or advisory, since it would resolve an actual, concrete dispute between the parties. Depending on the outcome of the appeal, an order would require either an affirmative act on the part of the County to participate in factfinding, or would direct the Office of the General Counsel to rescind its order to the parties to take the next steps in the factfinding process. We conclude, therefore that our decision resolving the County’s appeal is not an advisory opinion.

⁹ PERB does not render advisory opinions, but instead exercises its adjudicatory function through decisions resolving actual controversies between the parties concerning findings of facts and/or conclusions of law. (*Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506, pp. 27-28, and cases cited therein.)

Our resolution of the issue presented by the County's appeal—whether the MMBA factfinding procedure applies to the two County proposals in dispute between the parties—conceivably overlaps with an issue in the unfair practice case, but does not prejudice nor determine the ultimate outcome in the unfair practice case. Our determination that factfinding applies to the bargaining dispute that is also the subject of the unfair practice complaint does not assess or decide any potential defenses the County may interpose to the unfair practice complaint. That task lies initially with the administrative law judge.

The issue before us in the instant case is simply whether the Office of the General Counsel correctly determined that the factfinding process applied to this bargaining dispute. The outcome of this case will be an order directing the parties to select their respective members of the factfinding panel and proceed to factfinding, a process that assists the parties in reaching agreement pursuant to the factfinding panel's recommended terms of settlement. The recommended terms of settlement are not binding on the parties. Unlike a remedy in an unfair practice proceeding, which could result in an order to rescind unilateral changes if the employer is determined to have violated the MMBA, an order resolving the issues raised by this appeal does not dictate a particular outcome to the underlying bargaining dispute.

In sum, both unfair practice litigation and this appeal may deal with the issue of whether the County was obligated to participate in factfinding. But our determination in this case that it was obligated to do so does not necessarily determine the outcome of the unfair practice proceeding. PERB's determination of the issues presented in this case is therefore not an advisory opinion that the County implies would interfere with the unfair practice case.

2. Effect of Superior Court's Decision in *Riverside*

The County's claims on this point have been addressed by *Contra Costa, supra*, PERB Order No. Ad-410-M, pp. 13-14. It is well-settled that doctrines of res judicata and collateral estoppel do not apply until and unless a court decision is final. (7 Witkin Calif. Procedure, 5th ed. (2008) Judgment, § 364.) PERB has appealed the superior court's ruling in *Riverside*, so these doctrines, even if they were applicable to this case, do not preclude this Board from ordering the parties to participate in factfinding.

Likewise, the County's assertion that PERB is bound by the superior court's injunction and issuance of a writ of mandate is rejected, because an appeal of the issuance of a writ of mandate and of an injunction automatically stays those orders. (Code of Civil Proc., § 916; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189-190; *Private Investors v. Homestake Mining Co.* (1936) 11 Cal.App.2d 488.)¹⁰

3. Factfinding Procedures Apply to All Bargaining Disputes Over Negotiable Matters

As did the employer in *Contra Costa, supra*, PERB Order No. Ad-410-M, the County here argues that the legislative history of AB 646 indicates that it was intended to apply only to impasses in negotiations for new or successor MOUs, and not to impasses in bargaining over mid-term reopeners, or the effects of non-mandatory subjects of bargaining, such layoffs, or other single-issue disputes. The County also points to the placement of factfinding requirements in the sections of the MMBA dealing with negotiations of MOUs as evidence of the Legislature's intent to limit the scope of factfinding under the MMBA. It further argues

¹⁰ In *Riverside*, the county filed a petition in the Court of Appeal for a writ of supersedeas seeking to lift the automatic stay of the superior court's order. The writ was summarily denied by the Court of Appeal on January 14, 2014.

that the eight criteria set forth in MMBA sec. 3505.4 that the factfinding panel is directed to consider in arriving at their findings and recommendations primarily concern factors relating to wages. Since none of the criteria would allegedly be relevant to the negotiations regarding the issues that divide the parties in this case, factfinding cannot apply to this dispute, according to the County.

All of these contentions were addressed and resolved in *Contra Costa, supra*, PERB Order No. Ad-410-M. In that case we determined that the plain meaning of AB 646 did not limit factfinding procedures only to impasses in negotiations for comprehensive MOUs. (*Contra Costa*, p. 32.) Nevertheless, we reviewed the legislative history of AB 646, and rejected the employer's claim, repeated in this case, that comments by the author of AB 646 were dispositive that the bill was intended only for disputes over comprehensive MOUs. It is well-settled that a single legislator's comments, even the author's, cannot be relied on for legislative history because they do not necessarily represent the intent of the Legislature as a whole. (*Contra Costa*, p. 34.) We also reviewed various summaries of AB 646 as it moved through the Legislature, noting changes in those summaries from describing factfinding as a procedure parties may engage in "if they are unable to reach a collective bargaining agreement," to permitting factfinding "if a mediator is unable to reach a settlement" or a "settlement of a labor dispute." (*Contra Costa*, pp. 34-35, emphasis in original.)

We also considered in *Contra Costa, supra*, PERB Order No. Ad-410-M, the contention that the placement of the language of AB 646 following the portion of the MMBA section 3505 concerning the duty to meet and confer in good faith meant that AB 646 applies only to comprehensive MOUs. (*Contra Costa*, pp. 37-42.) We rejected that argument, concluding:

It is logical for the Legislature to have codified AB 646 within this part of the MMBA because the leading provision, MMBA section 3505, establishes the duty to meet and confer in good faith, and subsequent provisions prescribe certain procedures concerning bargaining. We do not find that the codification of AB 646 within that part of the MMBA that describes bargaining generally indicates the Legislature's intent to confine factfinding only to comprehensive MOU negotiations, especially where other subsections of MMBA section 3505 do not limit negotiations only to such comprehensive agreements.

Contra Costa, supra, PERB Order No. Ad-410-M also addressed the County's argument that the enumeration in MMBA section 3505.4(c) of eight criteria that the factfinding panel must consider supports its view that factfinding applies only to comprehensive MOUs. (*Contra Costa*, pp. 42-44.) We noted that these are virtually the same criteria enumerated in EERA, and it is well-established that under EERA, factfinding has been applied to single-issue disputes, mid-term negotiations and effects bargaining. Common sense does not require that each of these criteria be applied in every bargaining dispute. Depending on the dispute, some criteria may be more relevant than others.

Finally, the County contends that PERB's reliance on EERA for any conclusion that factfinding applies to all bargaining disputes is misplaced because there are three main differences between EERA and the MMBA factfinding procedures that require the narrow construction of AB 646 that the County urges. The County points out that under the MMBA, only the employee organization may invoke factfinding, whereas under EERA, either party may invoke it and the procedure commences only after PERB determines that the parties are at an impasse.¹¹ According to the County, the fact that only employee organizations may invoke

¹¹ EERA section 3548 provides that either party may declare impasse and request the appointment of a mediator. If the board determines that an impasse exists, it appoints a mediator. EERA section 3548.1 provides: "If a mediator is unable to effect settlement of the

factfinding, combined with the lack of PERB oversight in the determination of whether there is actually an impasse “greatly increases the likelihood that the process will be abused by employee representatives who seek only to delay.” (County’s Appeal, p. 14.)

It is not for PERB to speculate about the policy choices made by the Legislature. We do note however, that the Legislature is presumed to have known when AB 646 was passed that PERB applied the impasse resolution procedures under EERA to single-issue bargaining disputes, mid-term contract negotiations and effects bargaining disputes. (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1018; *Cooper v. Unemployment Ins. Appeals Bd.* (1981) 118 Cal.App.3d 166, 170.) Had the Legislature intended that AB 646 apply to a narrower range of bargaining disputes than PERB had previously sanctioned, it could have easily drafted language saying so. As for the County’s speculation that the legislative choice made by the Legislature will cause employee organizations to abuse the process and cause delay, this is a policy argument best addressed to the Legislature.

The second distinction between EERA and the MMBA factfinding procedure cited by the County is the fact that under EERA, the factfinding panel chair is appointed by PERB at no cost to the parties, whereas the costs of factfinding are split between the public agency and employee organization under the MMBA. According to the County, “It is inconceivable that the Legislature intended public agencies to expend their limited resources—taxpayer funding—engaging in factfinding over the effects of a management right or single issue negotiations at the whim of an employee organization.” (County’s Appeal, p. 14.) Again, this is an argument best addressed to the Legislature, rather than PERB. We note that because the costs are split between the parties under the MMBA, the employee organizations may be

controversy . . . and declares that factfinding is appropriate to the resolution of the impasse, either party may . . . request that their differences be submitted to a factfinding panel.”

constrained by similar economic forces as employers. Unions undoubtedly will be forced to pick and choose the disputes they take to factfinding, as they do not have limitless funds to spend on factfinding panels without regard to the importance of the dispute to their members.

Finally, the County argues that the differences between EERA and the MMBA on public disclosure of bargaining proposals requires that we find that MMBA factfinding is limited only to bargaining disputes over comprehensive MOUs. Under EERA, bargaining proposals of both parties must be presented at a public meeting of the public employer before negotiations may commence. (EERA, § 3547.) The requirement in EERA section 3548.3 that the factfinding report is to be made public by the employer before it makes any decision regarding the report is therefore “consistent with the rest of the EERA impasse procedures,” according to the County. In contrast, there is no requirement under the MMBA for public employers to “sunshine” either their proposals or agreements, according to the County. “Public employers . . . are only required under the Brown Act . . . to place on the agenda and take a public vote on contracts, including memoranda of understanding or collective bargaining agreements. There is no requirement for a public meeting on proposals or negotiations over single issues that do not result in contracts or negotiations on the impact of decisions outside the scope of bargaining.” (County Appeal, p. 14.) If factfinding is applicable to disputes other than initial or successor MOUs, then public employers would be required by MMBA section 3505.7 to hold public hearings on a factfinding report before they implement their last, best and final offer (LBFO) over, for example, the effects of layoff, before it can “move forward with action that it has an unmistakable right to take.” (County Appeal, p. 15.)

We reject this argument for several reasons. As an initial matter, we determined in *Contra Costa, supra*, PERB Order No. Ad-410-M that the term “MOU” does not refer only to

a comprehensive collective bargaining agreement that typically addresses all subjects the parties bargained over and is in effect for a set duration of time. As we explained in

Contra Costa, pp. 23-24:

The duty to bargain in good faith applies to any matter within the scope of representation and is not confined to negotiations that result in a comprehensive MOU for a certain duration

[¶]

. . . . Under the MMBA, an MOU is the end product of meeting and conferring on matters within the scope of representation if a tentative agreement is adopted by the governing body of the public agency. (MMBA, § 3505.1.) In other words, an ‘MOU’ signifies a written agreement on any matter within the scope of representation. It can address a single subject, the effect of a decision within the managerial prerogative, mid-term negotiations, or side letters of agreement, etc.

Thus, whenever a tentative agreement on any negotiable subject is reached by the parties, MMBA section 3505.1 obligates the public agency to vote to accept or reject such agreement at a duly noticed public meeting. The purpose of any public meeting is to inform the public of official actions taken by the governing board of the public entity and presumably to receive input from the public before official action is taken (Brown Act at Gov. Code, § 54954.3; *Chaffee v. San Francisco Library Commission* (2004) 115 Cal.App.4th 461 [Brown Act is intended to facilitate public participation in all phases of local government decision-making]). Therefore, when the County places a tentative agreement with an employee representative organization on its agenda for a “duly noticed public meeting,” it presumably makes the tentative agreement available to the public so that the public may meaningfully comment on the tentative agreement.

The obligation under MMBA section 3505.7 is no more onerous or time-consuming than what is already required when the parties reach a tentative agreement

without resort to impasse resolution procedures. The County need only wait 10 days after the factfinding panel's recommendations have been submitted to the parties before holding a public meeting regarding the impasse before it may implement its LBFO. Given the Legislature's choice favoring public disclosure of tentative agreements and matters regarding the impasse, delaying implementation of an LBFO for ten days in order to keep the public informed is not an onerous requirement.

Factfinding imposes a new process on the parties in MMBA jurisdictions, a process that is intended to assist the parties in reaching agreement, a goal which is firmly established as one of the purposes of the MMBA—to provide a “reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment.” (MMBA, § 3500.) That this process may delay a public agency from imposing its LBFO the day after it determines the parties are at impasse is something the Legislature no doubt considered in passing AB 646. Any claim that this legislative policy choice will waste public funds or impede the functioning of local governments is thus best addressed to the Legislature.

For all of these reasons, we affirm the administrative determination.

ORDER

The administrative determination of the Office of the General Counsel that the factfinding procedures set forth in the Meyers-Milias-Brown Act (MMBA) section 3505.4 et seq., are applicable to the dispute in this case is hereby AFFIRMED. Service Employees International Union, Local 521's request for factfinding satisfies the

requirements of MMBA section 3505.4 and PERB Regulation 32805(a)(2) and the matter is REMANDED to the Office of the General Counsel for further processing pursuant to PERB Regulation 32804.

Chair Martinez and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8385
Fax: (916) 327-6377



November 14, 2013

Catherine E. Basham, Senior Deputy County Counsel
County of Fresno
2220 Tulare Street, Suite 500
Fresno, CA 93721-2128

Kerianne R. Steele, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

Re: *County of Fresno and Service Employees International Union Local 521*
Case No. SA-IM-136-M
Administrative Determination

Dear Interested Parties:

On October 30, 2013, Service Employees International Union Local 521 (SEIU or Union) filed a request for factfinding (Request) with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Miliias-Brown Act (MMBA) and PERB Regulation 32802.¹ In that request, SEIU asserted that the County of Fresno (County) and the Union have been unable to effect a settlement in their current negotiations.² SEIU's Request provides that impasse was declared on "October 28, 2013."³

¹ The MMBA is codified at Government Code section 3500 et seq. and all future references are to the Government Code unless otherwise noted. PERB Regulations are codified at California Code of Regulations, title 8, section 31000 et seq. and will be referred to as PERB Regulations hereafter. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

² In its initial Request, SEIU merely described the "type of dispute" with the County as "meet and confer." Subsequent correspondence from the parties clarified that the "dispute" in question, involves the parties' negotiations over the County's two proposals to alter certain terms set forth in an addendum to the parties' expired Memorandum of Understanding (MOU) for Bargaining Unit 2, which includes all Correctional Officers employed by the County in the Jail, Probation Department, and Juvenile detention facilities (Unit 2). Specifically, the County's two proposals were to: (1) increase the number of employees working 12-hour shifts at the County Jail; and (2) add two specialized assignments in the County Jail that are exempt from the seniority-based bidding procedure.

³ As will be discussed in greater detail below, the parties do not dispute that the County has not provided SEIU with a written notice of a declaration of impasse. SEIU contends

After SEIU filed its Request, the County was given an opportunity to state its position. On November 1, 2013, the County notified the undersigned Board agent that it would be opposing the Request, and would be filing a written statement to that effect. By letter dated November 1, 2013, the County opposed SEIU's Request and asserted that the Request was insufficient to meet the statutory requirements for factfinding. The County requested that PERB deny the Request. On November 5, 2013, SEIU filed a responsive letter in support of its Request and a Request for Judicial Notice disputing the County's position statement.

On November 6, 2013, PERB approved SEIU's Request and informed the parties in an e-mail message that the determination would be subsequently memorialized in writing.

Brief Factual Background

The parties' MOU expired on October 30, 2011 and on December 6, 2011, the County imposed its last, best and final offer (LBFO).

During the parties' negotiations in 2012, the parties did ultimately submit their dispute to a factfinding panel. On or about June 4, 2013, the County imposed its LBFO from those negotiations.

The current round of negotiations commenced on or about September 6, 2013, when the County proposed to create two new specialized assignments for Correctional Officers in the County Jail that would be exempt from the seniority-based bidding procedure described in an addendum to the parties' expired MOU. In or around September 2013, the County also proposed to increase the number of twelve-hour (12-hour) shifts in the County Jail.⁴

The parties met and conferred on three occasions: October 16, 25, and 28, 2013.⁵ The Union submitted documentary evidence attached to the sworn declaration of Tom Abshere that indicates that the County has begun—or is in the process of—implementing both proposals. The Union has submitted information that on or about October 28, 2013, the County posted a new announcement on its Job Line for a "Booking/Records Unit" assignment — one of the newly created specialized assignments that was the subject of the parties' 2013 negotiations. Also, on October 28, 2013, the County sent an e-mail message to all employees in the County

however, that the County's unilateral implementation of both proposals on or about October 28, 2013, equates to an "impasse" in the parties' negotiations ["It must be inferred from the County's unilateral conduct that the County is declaring 'impasse' in the meet and confer process"].

⁴ The Union also asserts that the County unilaterally increased the number of twelve-hour shifts prior to September 2013 from 210 to 244.

⁵ There is no dispute that during these negotiations, the County only agreed to negotiate the impacts of the creation of the two specialized assignments, but not the decision itself.

Jail regarding the Correctional Officers' December 9, 2013 bid for assignments. The attachment to the e-mail message contains a number of twelve-hour shifts (270), that far exceeds the number set forth in the parties' addendum to the expired contract (210).⁶

The Parties' Respective Positions

A. The County's Position

The County objects to the Petition based on several different grounds. It asserts that the Request is premature since no written notice of impasse has been issued by either party. The County notes in pertinent part as follows, "The Request states that impasse was declared on October 28, 2013, but no copy of a written notice of impasse is provided. The County has neither issued a notice of a declaration of impasse nor received such a notice from SEIU. As this prerequisite has not been met, SEIU's Request must be denied as premature."

The County also argues that approval of SEIU's request is "barred" based on a tentative ruling from the pending litigation in Riverside County Superior Court entitled *County of Riverside v. PERB; SEIU, Local 721*, Case No. RIC 1305661. The County states in pertinent part, that "[t]he Court ruled on September 13, 2013, that the clear intent of the legislature in adopting AB 646 was to address the negotiations for new or successor MOUs. The Court further found that PERB's interpretation of AB 646 to apply to negotiations over matters other than new or successor MOUs to be 'clearly erroneous.' . . . Thus SEIU is precluded from requesting fact-finding in this matter and PERB is precluded from granting such a request."

Finally, the County asserts that the legislative history of Assembly Bill 646 (AB 646)⁷ conclusively demonstrates that SEIU's Request is "outside the purview of the fact-finding process." In particular, the County relies upon comments made by Assembly Member Toni Akins, the author of AB 646. The County references an undated comment by Assembly Member Akins:

Although the MMBA requires employers and employees to bargain in good faith, some municipalities and agencies choose not to adhere to this principle and instead attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer when negotiations for collective bargaining agreements fail. (Emphasis added.)

⁶ The Union has filed two unfair practice charges (UPC Nos. SA-CE-841-M, SA-CE-846-M) with respect to the County's alleged unlawful unilateral action regarding the specialized assignments and shift schedules. Although this determination does not make any findings with respect to those charges, it does appear from the undisputed information provided by SEIU, that the County has begun the process of implementing both proposals and that, therefore, the parties are at impasse in their negotiations.

⁷ AB 646 (Statutes 2011, Chapter 680), is codified at Government Code sections 3505.4, 3505.5, and 3505.7.

(County's November 1, 2013 Letter, p. 2.) Similarly, the County relies on an Assembly Floor analysis dated September 1, 2011, at Page 3, which states:

According to the author, "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. [...] The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful. [...] (Emphasis added.)

(*Ibid.*) The County notes in part, "it is inconceivable that the Legislature intended the public employer to use taxpayer dollars participating [*sic*] in this fact-finding process for anything other than negotiations over collective bargaining agreements or MOUs."

B. SEIU's Position

SEIU asserts that the parties met on three occasions, but the County "failed and refused to present a written notice of a declaration of impasse to SEIU Local 521. . . . Instead, shortly after the conclusion of the parties' October 28, 2013 meet and confer session, the County proceeded to unilaterally implement its two proposed changes to Correctional Officers' working conditions. . . . It must be inferred from the County's unilateral conduct that the County is declaring "impasse" in the meet and confer process."

The Union also provides five reasons why the *County of Riverside* case is not relevant to its factfinding demand: (1) the trial court in the *County of Riverside* case has made only an oral ruling on the record and has not issued a final written order with "res judicata" effect; (2) PERB's timeline to request reconsideration or file an appeal in the *County of Riverside* case has not expired yet; (3) an order from a County of Riverside Superior Court judge "does not dictate law or policy for the rest of the state"; (4) SEIU Local 721, the Real Party in Interest in the *County of Riverside* case, is not the same entity as SEIU Local 521; and (5) the trial court judge's ruling is clearly erroneous and will likely be vacated on appeal.

Finally, the Union asserts that AB 646 was meant to encompass the types of issues that the parties were negotiating over in this case: the County's proposal to add two specialized assignments that are exempt from the seniority-based bidding process and multiple new twelve-hour shift proposals.⁸

⁸ The Union's Request for Judicial Notice is granted solely for purposes of this Administrative Determination. (*Compton Community College District* (1988) PERB Decision No. 704; *Antelope Valley Community College District* (1979) PERB Decision No. 97.)

Discussion

A. AB 646 Factfinding is the Final Step in an Orderly Process Designed to Resolve Any Impasse That Arises From Negotiations Over Matters Within the Scope of Representation Under the MMBA.

1. The Duty to Bargain to Impasse Over Matters Within the Scope of Representation Under the MMBA

Essentially, the County contends that the factfinding requirements under the MMBA apply only to impasses stemming from negotiations for a new or successor MOU, and do not apply to impasses resulting from isolated or separate issues arising from any other types of negotiations. However, when read together, MMBA sections 3505.7, 3505.4, and 3505.5,⁹ demonstrate that the Legislature had each and every impasse dispute in mind when drafting this legislation.

a. The Courts, PERB and NLRB's Interpretation of the Terms "Collective Bargaining" and "Collective Bargaining Agreement"

PERB and NLRB decisions have made clear that collective bargaining is a *continuing process* that is not restricted to one comprehensive agreement or one single period of bargaining.

⁹ Section 3505.7 states, in relevant part:

After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. (Emphasis added.)

Section 3505.4 provides:

If the *dispute* was not submitted to mediation, an employee organization may request that the parties' *differences* be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.... (Emphasis added.)

Section 3505.5, subdivision (a) provides, in relevant part:

If the *dispute* is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt. (Emphasis added.)

California's public sector collective bargaining statutes are largely modeled after the federal National Labor Relations Act (NLRA) (29 U.S.C. § 151, et seq.). (*Long Beach Community College District* (2003) PERB Decision No. 1564; *City of San Jose* (2010) PERB Decision No. 2141-M.) Accordingly, when interpreting the MMBA, courts and PERB have appropriately taken guidance from the express language of the NLRA, as well as from cases interpreting the NLRA. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 615-617 [*Fire Fighters Union*].) For instance, the Supreme Court has noted that the phrase in the MMBA's meet and confer requirement regarding "wages, hours, and other terms and conditions of employment" was taken directly from section 8(d) of the NLRA concerning the "the obligation to bargain collectively," which states in relevant part:

For the purposes of this section, to *bargain collectively* is the performance of the mutual obligation of the employer and the representative of the employees to *meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder*, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . .

(29 U.S.C. § 158(d), emphasis added, *Fire Fighters Union, supra*, at p. 617.)

As the express language of the NLRA makes clear, the obligation to bargain collectively is not just limited to the "negotiation of an agreement." Rather, such an obligation also encompasses meeting with respect to any wages, hours, and other terms and conditions of employment, as well as concerning questions or disputes that may arise within the agreement. In the words of the United States Supreme Court:

Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.

(*Conley v. Gibson* (1957) 355 U.S. 41, 46, overruled in part on other grounds; see also, *National Labor Relations Board v. Acme Indus. Co.* (1967) 385 U.S. 432, 435-436.)

More importantly, courts have described a "collective bargaining agreement" as "the framework within which the process of collective bargaining may be carried on." (*J.I. Case Co. v. National Labor Relations Board* (7th Cir. 1958) 253 F.2d 149, 153.) In *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, the California Supreme Court observed that a collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate It calls into being a new common law - the common law of the particular industry." (*Id.* at p. 177, quoting *United Steelworkers v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 578 [*Warrior & Gulf Co.*].)

These cases are clear, collective bargaining means more than negotiations for a new or successor MOU—as the County asserts—it means negotiations for all disputes within the scope of representation.

b. The MMBA's Meet-and Confer Obligations

Under the MMBA, the duty to meet and confer in good faith “means that the parties must genuinely seek to reach agreement, but the MMBA does not require that an agreement result in every instance, and it recognizes that a public employer has the ultimate power to reject employee proposals on any particular issue.” (*International Assoc. of Fire Fighters, Local 188, AFL-CIO v. City of Richmond* (2011) 51 Cal.4th 259, 271 [*City of Richmond*].) The duty to meet and confer in good faith extends to all matters within the scope of representation, which is defined as “all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment,” but does not include “consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.” (§ 3504.) “The duty to bargain requires the public agency to refrain from making unilateral changes in employees’ wages and working conditions until the employer and employee association have bargained to impasse” (*Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1083-1084, quoting *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537.)

Although the MMBA uses the term “impasse,” it does not define that term, unlike other statutes within PERB’s jurisdiction. For instance, the Educational Employment Relations Act (§ 3540 et seq. [EERA]) defines “impasse” to mean “the parties to a *dispute* over matters within the scope of representation have reached a point in meeting and negotiating at which their *differences* in positions are so substantial or prolonged that future meetings would be futile.” (§ 3540.1, subd. (f), emphasis added.)¹⁰ Thus, PERB has held that an impasse in bargaining exists where the “parties have considered each other’s proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile.” (*Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124.)

Given the longstanding acceptance of the concept of impasse as a term of art central to labor relations, the Board has held that the definition of impasse under EERA, as interpreted by PERB, is the appropriate standard under the MMBA as well. (*Fire Fighters Union, supra*, 12 Cal.3d 608; *City & County of San Francisco* (2009) PERB Decision No. 2041-M.) The definition of impasse does not limit the types of “disputes” or “differences” that the parties

¹⁰ Similarly, under the Higher Education Employer-Employee Relations Act (§ 3560 et seq. [HEERA]), impasse is defined to mean that “the parties have reached a point in meeting and conferring at which their differences in positions are such that further meetings would be futile.” (§ 3562, subd. (j).)

may have to just those for a new or successor MOU. In fact, nowhere in the statutory or decisional law definitions of impasse do the terms “agreement” or “collective bargaining” appear.

c. The MMBA Does Not Expressly Limit Factfinding Solely to Impasses Over Negotiations for an MOU

The MMBA, when construed as a whole, simply does not limit the applicability of its factfinding provisions solely to disputes arising from negotiations for an MOU. Section 3505.4, provides that an “employee organization may request that the parties’ differences be submitted to a factfinding panel” following mediation, or if the “dispute” is not submitted to mediation, then the employee organization may request that the parties “differences be submitted to a factfinding panel...” (§ 3505.4, subd. (a).) There is no language in the statute that limits the types of “differences” or “disputes” that may be submitted to a factfinding panel.

As added by AB 646, moreover, section 3505.5 provides that if the “dispute” is not settled within a set time, the factfinding panel “shall make findings of fact and recommended terms of settlement, which shall be advisory only.” (§ 3505.5, subd. (a).) Again, there is no language in that statute limiting the parties’ “dispute,” which can be submitted to a factfinding panel, to negotiations for an MOU, or any other “type” of negotiations. Section 3505.7 further provides that after any applicable impasse procedures have been exhausted, and written findings of fact and recommended terms of settlement have been submitted to the parties and made public, a public agency may implement its last, best, and final offer, but is not permitted to implement an MOU. (§ 3505.7.)

Thus, once an employee organization requests the parties’ “differences” be submitted to factfinding, and the procedural aspects of the factfinding sections are met, then participation in factfinding is mandatory. The plain language of the factfinding sections do not distinguish or limit the types of disputes that arise in collective bargaining negotiations that may be submitted to factfinding. If the Legislature intended to limit the types of disputes or differences that could be submitted to a factfinding panel only to those arising during negotiations for an MOU, it could have done so explicitly. It did not. Accordingly, when the MMBA’s statutory scheme is viewed as a whole, the County’s interpretation of the factfinding provisions as applying only to negotiations for an MOU is simply not a correct interpretation of the statute.

Finally, as noted above, it is well-settled that public employers who are subject to the MMBA and other collective bargaining statutes administered by PERB may not make a unilateral change in a negotiable subject until all applicable impasse procedures have been exhausted, as impasse procedures are part of the collective bargaining process. (*Moreno Valley Unified School District v. PERB* (1983) 142 Cal.App.3d 191, 199-200 [*Moreno Valley*]; *Temple City Unified School District* (1990) PERB Decision No. 841, p. 11; see also § 3506.5, subd. (e).) According to the County’s interpretation that MMBA factfinding applies only to impasse over negotiations for a complete MOU, this would necessarily mean that single employment issues would be excluded from the statutory impasse procedures, and would thus allow the public agency to impose its will on employees if the parties cannot reach agreement. Unlike “main

table” negotiations for a new or successor MOU, employers often have control over the timing of “single” subjects, such as layoffs or the creation of a new position. If PERB were to accept the County’s position that only new or successor MOUs are subject to factfinding, an employer could splinter subjects within the scope of representation into multiple “single” issues, in order to intentionally avoid factfinding.

This interpretation is contrary to the intent of AB 646, which was enacted to prevent public agencies from rushing through the motions of the meet-and-confer process to unilaterally impose the agency’s goals and agenda before exhausting available impasse procedures. Moreover, the County’s claim that the MMBA does not authorize factfinding other than for negotiations for an MOU cannot be squared with the MMBA’s stated purposes “to promote full communication between public employers and employees,” and “to improve personnel management and employer-employee relations.” (§ 3500.) Allowing the County to take unilateral action concerning the parties’ employment relationship without exhausting the MMBA’s impasse procedures simply because the parties’ dispute does not arise during negotiations for an MOU, does not further, but would rather frustrate, the MMBA’s purpose of promoting full communications between the parties and improving employer-employee relations.

- d. PERB Has Interpreted Statutory Impasse Procedures Under EERA and HEERA to Apply to a Wide Variety of Collective Bargaining Negotiations, and Not Just Those for an MOU

The County’s assertion that MMBA factfinding provisions are limited only to those negotiations for an MOU that reach impasse is contrary to the language and judicial interpretation of factfinding provisions found in the other collective bargaining statutes that PERB administers. It is well-settled that statutes should be construed in harmony with other statutes on the same general subject. (*Building Material & Construction Teamsters’ Union v. Farrell* (1986) 41 Cal.3d 651, 665.) Moreover, when interpreting the MMBA, PERB appropriately takes guidance from cases interpreting not only the NLRA, but also other collective bargaining statutes that PERB administers with provisions similar to those of the MMBA. (*Fire Fighters Union, supra*, 12 Cal.3d 608.)

EERA and HEERA contain provisions governing impasse resolution that are similar, though not identical, to those in the MMBA. (Compare §§ 3548-3548.8 [EERA], with §§ 3590-3594 [HEERA], and §§ 3505.4-3505.7 [MMBA].) Under long-standing case law, PERB and the courts have interpreted the impasse provisions under EERA and HEERA as applying to negotiations other than just those for an MOU. Under this body of related law, to which our Supreme Court has directed the courts to look for reliable guidance when they are called upon to interpret the latter statute (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 605-607 & fn. 3), it is clear that public employers are prohibited from making a unilateral change on a matter subject to *impacts* and *effects* bargaining until all applicable impasse procedures have been exhausted.

For example, in *Moreno Valley Unified School Dist.* (1982) PERB Decision No. 206, the Board upheld a hearing officer's determination that, among other things, the District violated section 3543.5, subdivision (e), by failing to participate in impasse procedures in good faith, and by making unilateral changes prior to the exhaustion of the statutory impasse procedures under EERA, as to proposals to eliminate teaching and staff positions. (*Id.* at pp. 1-2, 11-12.) The District subsequently filed a writ of mandate challenging the Board's decision. In *Moreno Valley, supra*, 142 Cal.App.3d 191, the Court of Appeal upheld PERB's determination that the school district committed an unfair labor practice under EERA by unilaterally implementing changes in employment conditions before exhausting statutory impasse procedures, including failing to participate in good faith in impasse procedures regarding the "effects" of the school district's decision to eliminate certain teaching and staff positions. (*Id.* at pp. 200, 202-205.) The court stated that "[s]ince 'impasse' under EERA's statutory scheme denotes a continuation of the labor management dispute resolution process . . . the Board reasonably interpreted the statute in finding a per se violation of the statutory duty of employers to participate in good faith in the impasse procedures." (*Id.* at p. 200.)

In *Redwoods Community College District* (1996) PERB Decision No. 1141 (*Redwoods*), the Board determined that EERA's statutory impasse procedures applied to the parties' negotiations over hours of security officers, which were conducted *separate and apart* from the parties' negotiations for a successor MOU. In that regard, the parties negotiated a contract provision covering workweeks and work schedules, which provided for negotiations between the employer and the employee representative regarding any change in hours. (*Ibid.*) That provision further stated that if negotiations were unsuccessful, the parties would submit the dispute to mediation. (*Ibid.*) The provision also stated that the dispute "shall not be submitted to a fact-finding panel under the provisions of the [EERA]." (*Ibid.*) The Board held that the parties could not waive EERA's statutory impasse procedures, *noting that until the impasse procedures are completed, the employer may not make a unilateral change in a negotiable subject.* (*Ibid.*; see also, *California State University* (1990) PERB Decision No. 799-H [a HEERA case, where the parties participated in mediation and factfinding concerning negotiations over increased parking fees].)

Thus, as PERB has properly interpreted and applied the impasse procedures under EERA and HEERA to negotiations other than just those for an MOU, PERB's similar interpretation regarding impasse procedures under the MMBA is also proper, and should be applied to factfinding requests made under sections 3505.4, 3505.5 and 3505.7.

2. MMBA Factfinding Process and Procedure

- a. The MMBA Factfinding Provisions Adopted by the Legislature Under AB 646, and Implemented by Duly Adopted PERB Regulations

As noted above, in 2011, the Legislature for the first time established a structured impasse procedure, applicable statewide, for the MMBA, by enacting factfinding provisions pursuant to

AB 646.¹¹ The statute provided that only unions could invoke the MMBA's factfinding provisions. While AB 646 imposed new obligations on MMBA employers, it also provided them with a more orderly and expeditious process for resolving impasse disputes, with enhanced certainty as to when—i.e., upon completion of the statutorily mandated factfinding procedures—they could impose their “LBFO” on the subject of the parties' negotiations. (§ 3505.7.) Also in 2011, PERB promulgated emergency regulations for administering the MMBA factfinding process. (Cal. Code Regs., tit. 8, §§ 32802, 32804.)

In 2012, the Legislature amended MMBA section 3504.5, pursuant to Assembly Bill 1606 (Statutes 2012, Chapter 314, effective January 1, 2013 [AB 1606]), in part to expressly codify the procedures PERB had adopted by emergency and, later, final regulations implementing AB 646. The Legislature deemed the 2012 amendments as technical and clarifying of existing law. (*Ibid.*)

Previously PERB Regulation 32802, subdivision (e), prohibited an appeal of a determination of the sufficiency of a factfinding request. Effective October 1, 2013, PERB's regulations have been modified to delete subdivision (e), and now permit an appeal by either party to the Board itself by any party aggrieved by a factfinding determination.

It is also noted that although the use of PERB's form, titled “MMBA Factfinding Request” is not required, the form, under Type of Dispute, lists as examples all of the following: “initial contract, successor contract, reopeners, effects of layoff, other.”

b. A Written Declaration of Impasse

Both MMBA section 3505.4, subdivision (a), as amended by AB 646, and PERB Regulation 32802, subdivision (a)(2), as adopted by PERB to administer the new factfinding procedure required by AB 646, provide that if the dispute was not submitted to mediation,¹² an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.

¹¹ The legislative history does not evidence the Legislature's intent to provide that negotiations for a new or successor MOU are the *only* types of disputes that can be submitted to factfinding. If the Legislature had wanted to exclude factfinding for all disputes other than for an MOU, it could have expressly included a provision to that effect, but failed to do so. Moreover, generally, the statements of the author of legislation are not determinative of legislative intent as there is no guarantee that others in the Legislature shared the same view. (*San Mateo City School District v. Public Employment Relations Board* (1983) 33 Cal.3d 850, 863.)

¹² There is no evidence in this case indicating that the parties utilized, or intend to utilize, mediation to resolve the current dispute.

As noted previously, it appears from undisputed testimony and documentary evidence in the record of this case that the County has gone forward with the implementation of its two proposals. For present purposes, this evidence is deemed to be or to include a “written notice of declaration of impasse” within the meaning of section 3505.4. It is, in any event, clear from undisputed testimony and documentary evidence in the record that the parties are, in fact, at impasse in their current negotiations.

B. Res Judicata/Collateral Estoppel Do Not Apply in This Matter

The County cites the decision of *Boekin v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, in support of its assertion that SEIU is “barred” from filing the instant Request under the doctrine of “res judicata.” In that case, the Supreme Court noted,

As generally understood, ‘[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy.’ . . . The doctrine ‘has a double aspect.’ . . . ‘In its primary aspect,’ commonly known as claim preclusion, it ‘operates as a bar to the maintenance of a second suit *between the same parties* on the same cause of action.’ . . . ‘In its secondary aspect,’ commonly known as collateral estoppel, ‘[t]he prior judgment . . . “operates” in ‘a second suit . . . based on a different cause of action . . . “as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.” . . . ‘The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.’”

(*Id.* at pp. 797-798, emphasis in the original.) None of the required elements for “res judicata” or “collateral estoppel” appear to have been met in this case because: as of today’s date, no “final judgment” has been issued in *County of Riverside v. PERB; SEIU, Local 721* (Case No. RIC 1305661); SEIU, Local 521 is a separate and distinct entity from SEIU, Local 721, and therefore the parties are not the same; and since the County has imposed the terms of its LBFO two years in a row, it is unclear from the record whether SEIU and the County were negotiating terms of a successor agreement or side/single issues.¹³

¹³ PERB makes no determination as to whether the parties were in fact engaged in “successor” negotiations. Rather, PERB does not make such determinations with respect to the subject matter of a factfinding.

Determination

Applying the precedent discussed above, PERB concludes that the factfinding procedures set forth in MMBA section 3505.4 et seq. are applicable under the particular facts of this case.

Given the specific facts of this case, PERB determines that SEIU's Request satisfies the requirements of MMBA section 3505.4 and PERB Regulation 32802, subdivision (a)(2). Therefore, SEIU's Request will be processed by PERB.

Next Steps

Each party must select its factfinding panel member and notify this office in writing of his/her name, title, address and telephone number no later than November 19, 2013.¹⁴ Service and proof of service are required.

The résumés of seven factfinders, drawn from the PERB Panel of Neutrals, are being provided to the parties via electronic mail.¹⁵ The parties may mutually agree upon one of the seven, or may select any person they choose, whether included on the PERB Panel of Neutrals or not. In no case, however, will the Board be responsible for the costs of the chairperson.

If the parties select a chair, the parties should confirm the availability of the neutral, prior to informing PERB of the selection.

Unless the parties notify PERB, on or before November 19, 2013, that they have mutually agreed upon a person to chair their factfinding panel, PERB will appoint one of these seven individuals to serve as chairperson.

Right to Appeal

Pursuant to PERB Regulations, the County may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid.*)

¹⁴ This deadline, and any other referenced, may be extended by mutual agreement of the parties.

¹⁵ The seven neutrals whose résumés are being provided are: Ron Hoh, Jerilou Cossack, John LaRocco, Catherine Harris, John Moseley, William Gould, and Katherine Thomson.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is: Public Employment Relations Board
 Attention: Appeals Assistant
 1031 18th Street
 Sacramento, CA 95811-4124
 (916) 322-8231
 FAX: (916) 327-7960

If the County appeals this determination, the Union may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Sincerely,

Wendi L. Ross
Deputy General Counsel