STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SEIU LOCAL 1021, Charging Party, v. COUNTY OF CALAVERAS, Respondent. CALAVERAS COUNTY PUBLIC SAFETY EMPLOYEES ASSOCIATION, Joined Party/Intervener.	Case No. SA-CE-596-M PERB Decision No. 2252-M April 18, 2012

Appearances: Weinberg, Roger & Rosenfeld by Matthew J. Gauger, Attorney, for SEIU Local 1021; Liebert, Cassidy & Whitmore by Arlin B. Kachalia, Attorney, for County of Calaveras; Goyette & Associates by Eric R. Azevedo, Attorney, for Calaveras County Public Safety Employees Association.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by SEIU Local 1021 (SEIU) to a decision of a PERB administrative law judge (ALJ) (attached) dismissing an unfair practice charge. The complaint issued by PERB's Office of the General Counsel alleged that the County of Calaveras (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by approving a mixed unit of peace officer and non-peace officer classifications requested in a severance petition filed by the Calaveras County Public Safety Employees Association (CCPSEA) and by unilaterally selecting a neutral third party representative in violation of its own local rules

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

adopted pursuant to MMBA section 3507. The ALJ determined that the County did not apply its local rules in a manner inconsistent with the MMBA and its past practice and dismissed the complaint and underlying charge.

The Board has reviewed the proposed decision and the record in light of SEIU's exceptions and supporting brief, the County's and CCPSEA's responses, and the relevant law. Based on this review, the Board adopts the ALJ's proposed decision as its own, subject to the following discussion.

DISCUSSION

SEIU excepts to the ALJ's determinations that the County did not violate the MMBA when it (1) approved a severance petition filed by CCPSEA for a bargaining unit containing both limited term peace officers and non-peace officers; and (2) employed retired California State Mediation and Conciliation Service (CSMCS) mediator Shirley Campbell (Campbell) to supervise the election over SEIU's objection.

Mixed Unit

MMBA section 3507(a), authorizes a local public agency to "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." A local agency may not, however, adopt rules and regulations that would frustrate the declared policies and purposes of the MMBA. (*Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 502 (*Huntington Beach*).) Where a local rule adopted by a local agency conflicts with the MMBA and its fundamental purposes, enforcement of such a rule will be denied. (*City and County of San Francisco v. Stationery Engineers Local 39* (2009) PERB Decision No. 2041-M, *citing International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 196-206 (*City of Gridley*).) Thus, the scope of authority

to supplement provisions of the statute must be "consistent with, and effectuate the declared purposes of, the statute as a whole." (*City of Gridley* at p. 202.)

Section 9 of the County's employer-employee relations ordinance (EERO) provides, in relevant part:

> Peace officers and limited term peace officers must be represented in separate units composed solely of such peace officers. These units shall not be represented by an organization that, directly or indirectly, is subordinate to any other employee organization which includes non-peace officers.

SEIU contends that the County violated the MMBA by approving CCPSEA's severance petition that created a bargaining unit containing both limited term peace officers and non-peace officers, in violation of section 9 of the EERO. SEIU acknowledges that the Miscellaneous unit has been a mixed unit of peace officers and non-peace officers since at least 1998. SEIU contends, however, that while the mixed unit represented by SEIU was permissible under MMBA section 3507.1(b) notwithstanding the language of EERO section 9 prohibiting such units, the County violated the MMBA when it approved the petitioned-for mixed unit requested by CCPSEA.

MMBA section 3508(a) allows peace officer employees to select representation in peace-officer only bargaining units, and provides:

> (a) The governing body of a public agency may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws or local ordinances, and may by resolution or ordinance adopted after a public hearing, limit or prohibit the right of employees in these positions or classes of positions to form, join, or participate in employee organizations where it is in the public interest to do so. <u>However, the governing body may not prohibit the right of its employees who are full-time "peace officers,"</u> as that term is defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, <u>to join or participate in employee organizations which are composed solely of those peace officers,</u> which concern themselves solely and exclusively with the wages,

> hours, working conditions, welfare programs, and advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization.

(Emphasis added.)

Thus, while MMBA section 3508(a) grants peace officers the affirmative right to join or participate in peace officer-only units, nothing in that section requires peace officers to exercise this right nor prohibits them from being in mixed units if they so choose. Moreover, MMBA section 3508(d) prohibits a public agency from restricting the right of employees to join and participate in the activities of employee organizations, and provides: "The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by a public agency on any grounds other than those set forth in this section." Thus, EERO section 9, which limits the ability of peace officer employees to select representation in a mixed unit with non-peace officer employees, is inconsistent with MMBA section 3508(a) and (d).

Ordinarily, the party attacking a local rule bears the burden of proof to establish that the rule is unreasonable. (*Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338.) In this case, however, no party has asserted directly that EERO section 9 constitutes an unreasonable local rule under the MMBA. Instead, unlike in the usual case, SEIU seeks to enforce the letter of the local rule, while the County asserts essentially that the manner in which it has applied its rule is reasonable and consistent with the MMBA. Given that EERO section 9 conflicts directly with the provisions of MMBA section 3508 granting peace officers the right to select representation in a mixed unit with non-peace officer employees, we conclude that enforcement of the express provisions of that rule would frustrate the declared policies and purposes of the MMBA and conflict with its fundamental purposes. (*Huntington Beach*; *City of Gridley*.) Accordingly, we conclude that EERO section 9 is an

unreasonable local rule that cannot be enforced to preclude the mixed unit requested by CCPSEA.

SEIU also contends that the County violated MMBA section 3507.1(a) and (b) because it failed to follow its own ordinance. Section 3507.1 provides, in relevant part:

> (a) Unit determinations and representation elections shall be determined and processed in accordance with rules adopted by a public agency in accordance with this chapter. In a representation election, a majority of the votes cast by the employees in the appropriate bargaining unit shall be required.
>
> (b) Notwithstanding subdivision (a) and rules adopted by a public agency pursuant to Section 3507, a bargaining unit in effect as of the effective date of this section shall continue in effect unless changed under the rules adopted by a public agency pursuant to Section 3507.

According to SEIU, the mixed unit of peace officer and non-peace officer employees represented by SEIU since 2005[2] was permissible under Section 3507.1(b) because that same mixed unit, represented first by Operating Engineers Local 3 and then by the Calaveras County Employee Association (CCEA), existed prior to the effective date of the statute, January 1, 2000. SEIU contends, however, that, under the rules adopted by the County pursuant to Section 3507.1(a), the mixed unit requested by CCPSEA is no longer permissible because section 9 of the EERO categorically prohibits such units.

We disagree. Section 3507.1(a) required the County to follow its local rules in processing the severance petition. Those rules include EERO section 9, which on its face appears to prohibit a mixed unit of peace officer and non-peace officer employees and, as stated above, is an unreasonable local rule. Section 3507.1(b) allows a preexisting bargaining unit in effect as of the effective date of Section 3507.1 unless changed under rules adopted by

[2] The record refers to decertification petitions filed by SEIU Locals 535 and 4988. While not entirely clear, it appears that charging party SEIU Local 1021 is the successor to those entities for purposes of representing the Miscellaneous bargaining unit at issue in this case.

the public agency pursuant to Section 3507. In this case, the bargaining unit representative changed at least twice since the effective date of Section 3507.1: first in 2003 when CCEA became the exclusive representative for the Miscellaneous unit, and then in 2005 when SEIU filed a decertification petition and won a decertification election ousting CCEA. In both instances, the County permitted the mixed composition of the unit to continue when the representation changed, notwithstanding the language of EERO section 9, and SEIU certainly had no objection to the mixed unit in 2005. Thus, it is clear that the County has had a longstanding practice of permitting a mixed unit of peace officer and non-peace officer employees, notwithstanding the language contained in EERO section 9, and that it allowed the bargaining unit representative to change pursuant to that practice.

SEIU further contends that, although EERO section 9 did not prohibit the SEIU mixed unit, the unit requested by CCPSEA violates section 9 because CCPSEA sought to sever a portion of the pre-existing unit and create a new unit, rather than continue to represent the entire unit. In essence, SEIU argues that Section 3507.1(b) has the effect of "grandfathering" in a bargaining unit that fails to comply with an agency's local rules in cases involving decertification of the bargaining representative under rules adopted by the agency, but not in cases involving modification of the unit through severance. SEIU has provided no authority, and we have found none, for the proposition that Section 3507.1(b) applies to cases involving a change in bargaining representative, but not to severance petitions processed under the local agency's rules.

We also reject SEIU's argument that the Board's decision in *County of Placer* (2004) PERB Decision No. 1630-M compels a different result. In that case, the Board held that the local agency was entitled to enforce a provision in a memorandum of understanding that arguably had not been enforced previously. (See also *Marysville Joint Unified School District*

(1983) PERB Decision No. 314 ["The mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that, ipso facto, it is forever precluded from doing so."].) In this case, the County does not seek to enforce its local rule in a manner contrary to its past practice; instead, it has construed section 9 to permit a mixed unit of peace officers and non-peace officers, just as it has in the past.

For all of the reasons set forth above and in the ALJ's proposed decision, we conclude that the County did not violate the MMBA when it approved the mixed unit requested by CCPSEA.

Election Supervisor

SEIU contends that the County violated EERO section 7 of its local rules when it selected retired mediator Campbell from CSMCS to supervise the election. Section 7 provides:

> The Employee Relations Officer shall follow the procedures of Government Code section 3507.1(c) for placing contested matters under Section 6 in care of a neutral third party to conduct secret ballot elections, if necessary.

The ALJ determined that County EERO section 7 did not require the use of MMBA section 3507.1(c) procedures in this case, finding that it has not been necessary for the County to invoke MMBA section 3507.1(c) because of its history in selecting CSMCS to supervise elections under the EERO. We agree. EERO section 7 provides for the use of a neutral third party to supervise contested elections. While section 7 also directs the employment relations officer to utilize the procedures set forth in MMBA section 3507.1(c) "if necessary," the parties have not interpreted this provision to require mutual selection of the neutral third party. Instead, the parties' past practice has been to go directly to CSMCS to obtain the neutral third party. Thus, it was not necessary to invoke Section 3507.1(c), given this past practice. In this case, CSMCS declined to supervise the election after SEIU objected, leading the County to select Campbell, the same individual who had performed this function previously while

employed by CSMCS. SEIU does not contend that Campbell did not perform her duties in a neutral manner, or that her participation tainted the outcome of the election in any way. Therefore, we find no basis to overturn the ALJ's determination that the County did not violate section 7 when it selected Campbell as the neutral third party to supervise the election.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-596-M are hereby DISMISSED.

Chair Martinez and Member Huguenin joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, Charging Party, v. COUNTY OF CALAVERAS, Respondent. CALAVERAS COUNTY PUBLIC SAFETY EMPLOYEES ASSOCIATION, Joined Party/Intervener.	UNFAIR PRACTICE CASE NO. SA-CE-596-M PROPOSED DECISION (5/25/2011)

Appearances: Weinberg, Roger & Rosenfeld by Matthew J. Gauger, Attorney, for Service Employees International Union Local 1021; Liebert Cassidy Whitmore by Arlin B. Kachalia, Attorney, for County of Calaveras; Goyette & Associates by Eric R. Azevedo, Attorney, for Calaveras County Public Safety Employees Association.

Before Christine A. Bologna, Acting Chief Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges that a public agency violated two local rules by approving a severance petition and selecting a neutral to conduct a representation election. The employer denies committing any unfair practices.

On April 20, 2009, Charging Party Service Employees International Union Local 1021 (SEIU or Union) filed an unfair practice charge (charge) against the County of Calaveras (County); on September 24, SEIU filed an amended charge. On February 22, 2010, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued an

unfair practice complaint (complaint)[1] alleging that the County acted inconsistently with two local rules/sections of its Employer-Employee Relations Ordinance (EERO) by: (1) approving a petition to sever a bargaining unit of Public Safety employees, which included peace officers and non-peace officers, from the General Miscellaneous Unit represented by the Union on March 24, 2009, and (2) twice replacing the third party neutral representative/election supervisor for the election in the severance petition without discussions with SEIU in April and May 2009, in violation of Government Code sections 3507.1(a) and 3509(b) of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32603(g).[2]

On March 18, 2010, Respondent County answered the complaint, admitting three allegations, denying all substantive allegations and any violations of law, and asserting affirmative defenses.

On March 22, 2010, the Calaveras County Public Safety Employees Association (CCPSEA or Association) filed an application for intervention/joinder as a real party in interest. On April 13, the County filed its non-opposition to and support of the application. On April 19, SEIU filed its opposition to the application.

An informal settlement conference was conducted on April 28, 2010, but the dispute was not resolved.

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[1] On February 22, 2010, the PERB General Counsel/Board agent issued a partial dismissal, dismissing five additional claims in the amended charge for failure to state a prima facie case. SEIU did not appeal the partial dismissal to the Board.

[2] Unless otherwise indicated, all statutory references are to the Government Code. The MMBA is codified at section 3500 et seq. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

On October 27, 2010, the County filed a motion to continue the hearing. The motion was granted during an October 28 telephone conference call in which all parties participated. Also on October 28, the application of CCPSEA for intervention/joinder was granted because the Association and its severance petition were specifically alleged in the complaint.

On November 2, 2010, the County amended its answer, admitting two allegations and adding affirmative defenses.

On December 2, 2010, formal hearing was held in Sacramento. On March 15, 2011, the case was submitted for decision following receipt of post-hearing briefs.

FINDINGS OF FACT

Jurisdiction

The County admits that it is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a). The County further admits that SEIU is the exclusive representative of an appropriate unit of employees within the meaning of PERB Regulation 32016(b).

EERO

The County EERO was adopted in 1976; it was amended in August 2001 and on July 31, 2002. Article II, sections 4 through 12 govern representation proceedings. To be formally acknowledged as an exclusive representative, an employee organization files a petition setting forth certain information and documentation (section 4). The County Employee Relations Officer responds in writing to the petition (section 5). Other employee organizations may file competing/challenging petitions within a 30-day open period (section 6).

Section 7 provides:

> The Employee Relations Officer shall follow the procedures of Government Code section 3507.1(c)[3] for placing contested matters under Section 6 in care of a neutral third party to conduct secret ballot elections, if necessary.

Decertification petitions may be filed in March of any year following the first full year of recognition, or during the 30-day window period between 90 and 120 days before the termination of the existing memorandum of understanding (MOU) of less than three years duration. A secret ballot election is conducted pursuant to EERO section 7 (section 8).

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[3] MMBA section 3507.1(c) provides:

> A public agency shall grant exclusive or majority recognition to an employee organization based on a signed petition, authorization cards, or union membership cards showing that a majority of the employees in an appropriate bargaining unit desire the representation, unless another labor organization has previously been lawfully recognized as exclusive or majority representative of all or part of the same unit. Exclusive or majority representation shall be determined by a neutral third party selected by the public agency and the employee organization who shall review the signed petition, authorization cards, or union membership cards to verify the exclusive or majority status of the employee organization. In the event the public agency and the employee organization cannot agree on a neutral third party, the Division of Conciliation of the Department of Industrial Relations shall be the neutral third party and shall verify the exclusive or majority status of the employee organization. In the event that the neutral third party determines, based on a signed petition, authorization cards, or union membership cards, that a second labor organization has the support of at least 30 percent of the employees in the unit in which recognition is sought, the neutral third party shall order an election to establish which labor organization, if any, has majority status.

Section 9 provides, in relevant part[4]:

> Peace officers and limited term peace officers must be represented in separate units composed solely of such peace officers. These units shall not be represented by an organization that, directly or indirectly, is subordinate to any other employee organization which includes non-peace officers.

EERO section 10 establishes a unit modification procedure in which petitions may be filed during the section 8 window period. Section 11 sets forth a severance procedure; the timing, form, and processing of these petitions are the same as unit modification petitions. An employee organization may appeal the Employee Relations Officer's unit determination decision or decision on a representation petition by requesting mediation by the California State Mediation and Conciliation Service (CSMCS), and/or seeking review by the County Board of Supervisors. The Board of Supervisors may refer the dispute to arbitration. The decision of the Board of Supervisors is final and binding (section 12).

Miscellaneous Unit

In 1972, the County Board of Supervisors approved a General Miscellaneous Unit (Miscellaneous or Unit 7). International Union of Operating Engineers, Local 3 (IUOE) was the exclusive representative for the bargaining unit when Francine Osborn (Osborn), Director of Risk Management and Human Resources/Employee Relations Officer, began County

[4] EERO section 9 also sets forth policy and standards for determining appropriate units. These are the effect of the proposed unit on efficient operations of the County, and effective representation of employees based on community of interest considerations, which include similarity of work performed, qualifications required and general working conditions; history of representation; consistency with County organizational patterns; effect of different impasse resolution procedures; fragmentation of job classifications (class) and unit proliferation; and effect on the class structure. An appropriate unit is the broadest feasible grouping of positions sharing an identifiable community of interest.

employment in 1998.[5] In 2003, the Calaveras County Employee Association (CCEA) became the exclusive representative for Unit 7.[6]

On March 30, 2005,[7] SEIU Local 535 filed a petition to decertify CCEA and be recognized as exclusive representative for the Miscellaneous unit.[8] On March 31, CSMCS Mediator Shirley Campbell (Campbell) certified that the 30 percent proof of support required by the County EERO had been met. On June 28, SEIU Local 4988 filed a recognition/decertification petition in Unit 7. On June 30, the Union sought certification as exclusive representative based on sufficient proof of support. On August 15, CSMCS Mediator Campbell forwarded election notices for posting at County worksites. After a secret ballot election on September 6 and 8, CSMCS certified election results that Miscellaneous unit members voted to change their exclusive representative from CCEA to SEIU. On October 3, the County Board of Supervisors formally recognized SEIU as the exclusive representative for the Miscellaneous unit.

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[5] In 1998, there were three bargaining units of County employees: Miscellaneous; Deputy Sheriffs, represented by the Deputy Sheriffs Association; and Sheriffs' Management, represented by Goyette and Associates.

[6] Osborn did not remember if CCEA decertified IUOE, but they "must have." Osborn has participated in three County representation petitions: IUOE when she started with the County; SEIU in 2005, *infra*; and CCPSEA in 2007, *infra*.

[7] CCEA President Jeannie Middleton (Middleton) was on leave when the decertification petitions were filed. When she returned to work, SEIU had replaced CCEA as exclusive representative in the unit.

[8] Unit 7 included the limited term peace officer job classes of Deputy Probation Officer I, II, and III, and the non-peace officer classes of Correctional Corporal, Correctional Officer/Matron, and Correctional Sergeant.

CCPSEA Petition[9]

On August 15, 2007, the "newly formed" CCPSEA filed a recognition/decertification petition for 24 job classes of 60 employees[10] in the Miscellaneous unit with Employee Relations Officer Osborn. On August 29, CCPSEA requested to change the petition to a unit modification petition, and submitted a community of interest analysis under County EERO Article II, section 9 standards.

On September 10, 2007, a meeting on the proposed unit modification/severance petition was convened by County Employee Relations Officer Osborn. CSMCS Mediator Campbell attended, as did CCPSEA representatives. Although invited, SEIU representatives did not attend, but expressed the Union's opposition to the petition verbally to Osborn.[11]

On November 13, 2007, Employee Relations Officer Osborn approved the unit modification/severance petition for a new bargaining unit containing 24 job classes of 72 employees based on an identifiable community of interest and effective service to the County and the public. Osborn notified Gabler and CCPSEA Labor Relations Representative Luce Beltran (Beltran)[12] of appeal rights under EERO section 12.

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[9] The parties submitted a joint stipulation of facts for hearing, and joint exhibits. One Union and three County witnesses testified. County and SEIU exhibits were received in evidence.

[10] The job classes included the limited term peace officer Deputy Probation Officers I, II, and III, and the non-peace officer Correctional Corporals, Correctional Officers/Matrons, and Correctional Sergeants. The petition stated that Middleton was the CCPSEA President.

[11] A September 7, 2007 letter from SEIU counsel informed Osborn that the Union would meet with her and the mediator on September 10 "concerning the time, place, and manner of the pending agency shop petition/election," but would "not discuss any pending decertification or unit modification petitions." The agency fee election was held on October 3. CSMCS Mediator Campbell certified the secret ballot election results approving agency fees for the Miscellaneous unit. On October 30, SEIU Field Representative David Gabler (Gabler) requested implementation of the agency shop deductions.

[12] Beltran is employed by Goyette and Associates.

On November 16, 2007, SEIU representative Gabler appealed Employee Relations Officer Osborn's decision granting the CCPSEA petition and requested mediation by CSMCS Mediator Campbell.[13] Campbell conducted a mediation with all parties on January 17, 2008. A second mediation was scheduled on January 30, but SEIU cancelled that morning. In February, March, and April 2008, attempts were made to schedule subsequent mediations. On April 9, SEIU Worksite Organizer Mike Fouch (Fouch) wrote to Campbell requesting the status of mediation; this letter was copied to Beltran for CCPSEA, and Osborn for the County. On April 14, Osborn informed Fouch and Beltran that the parties were at impasse, mediation was terminated, and her decision on the unit modification/severance petition stood unless appealed. On April 15, Campbell advised Fouch, Beltran, and Osborn that her last contact with the parties resulted in abandonment of mediation.

On May 7, 2008, SEIU counsel appealed the grant of the unit modification/severance petition to the County Board of Supervisors. On May 30, the County deemed the appeal untimely and would not process it. SEIU and the County exchanged correspondence over the timeliness of the appeal in June and July.

On September 10, 2008, CSMCS notified all parties that an election would be conducted on the unit modification/severance petition. A meeting was held on September 12 to discuss election rules, and the election was scheduled for October 9.

On September 12, 2008, SEIU filed a charge alleging, in relevant part, that the County failed to process its appeal of the decision granting the petition in violation of EERO section 12; an amended charge was filed on September 30 (PERB Case No. SA-CE-552-M). The October 9 election was not conducted because the charge was pending. On October 15,

[13] Gabler's letter "rejected the incorrect characterization" of the September 10, 2007 meeting, contending that its' purpose was to discuss the pending agency shop election.

the PERB General Counsel/Board agent issued a complaint.[14] At the November 7 informal settlement conference, the parties agreed to a resolution allowing SEIU to re-file its appeal with the County Board of Supervisors within two weeks. The Union did not re-file the appeal. At the January 30, 2009 formal hearing, the parties settled the dispute; SEIU would file its appeal within two weeks, and withdrew the underlying charge on the record.[15] The Union thereafter requested an additional week to file the appeal which the County granted.

On March 17, 2009, SEIU counsel submitted public comment and objections to the unit modification/severance petition to the County Board of Supervisors. On March 24, the Board of Supervisors denied the Union's appeal of the Employee Relations Officer's approval of the petition, and recommended a vote.

In March and April 2009, Employee Relations Officer Osborn contacted CSMCS to schedule an election and serve as election supervisor. SEIU counsel communicated to CSMCS Chief Paul Roose (Roose) that there was a dispute over the new unit because it contained peace officers and non-peace officers; the County did not participate in these discussions. On April 14, Osborn asked Roose/CSMCS to supervise the election in the severance petition. Roose told Osborn that CSMCS would not supervise the election. On April 14 or 15, Assistant County Counsel David Sirias (Sirias) complained to CSMCS Chief Deputy Director David Rowan, Roose's supervisor, about CSMCS' refusal to supervise the election.

On April 20, 2009, CSMCS Chief Roose sent an electronic mail message (e-mail) to Employee Relations Officer Osborn, SEIU counsel, and CCPSEA representative Beltran.

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[14] The General Counsel/Board agent also issued a partial dismissal, dismissing the allegations that the County violated the EERO/its local rules by approving an inappropriate unit, and by including peace officers and non-peace officers in that unit, for failure to state a prima facie case. SEIU did not appeal the partial dismissal to the Board.

[15] Counsel for CCPSEA appeared at the hearing as a third party Intervener. SEIU did not object to Intervener status by the Association in PERB Case No. SA-CE-552-M.

Roose advised the parties that no charge had been filed with PERB over the appropriateness of the unit, and he wanted to schedule the election. Roose added that if a charge was filed, he would consult with the parties to determine if it would interfere with reaching agreement on the election. Roose informed the parties that another neutral could conduct the election. Roose attached a sample election agreement, which included provisions for the parties' approvals of bargaining unit composition and eligible voters. An hour later, SEIU counsel sent an e-mail to the parties and Roose, advising that the Union's charge would be filed with PERB that day or the next morning; SEIU further claimed that the employer's conduct "will certainly interfere with any hope of a stipulated election." The Union filed this charge on April 20. CSMCS then refused to supervise the election.

Employee Relations Officer Osborn thereafter contacted the Tuolumne County Human Resources Department, which agreed to conduct the election. On April 24, 2009, Osborn notified SEIU representative Fouch and CCPSEA representative Beltran that an impartial representative from the Tuolumne County Human Resources Department would supervise the May 7 secret ballot election in San Andreas; the notice also included election information (i.e., eligible voters, ballot language, observers, majority vote of valid ballots cast).

On the morning of April 28, 2009, Employee Relations Officer Osborn received an e-mail from the Tuolumne County Human Resources Department identifying the employee who would assist in conducting the May 7 election. Also on April 28, SEIU counsel sent a letter and facsimile transmission (fax) to Tuolumne County Counsel Gregory Oliver (Oliver), attaching Osborn's April 24 election notice, and urging Tuolumne County to "refrain from thrusting itself into the vortex of Calaveras County's inability to follow its own Unit Modification rules;" the letter further stated that CSMCS had refused to conduct the election because the Union had filed an "unfair labor practice charge" with PERB over its dispute with

the County. The County Counsel's Office received the April 28 letter on April 30, and faxed it to the County Human Resources Office that morning.

Also on April 28, 2009, Employee Relations Officer Osborn e-mailed a list of eligible voters in the unit modification/severance election to SEIU representative Fouch and CCPSEA representative Beltran. On the morning of April 30, Fouch responded, "Since Tuolumne will not be conducting the election, who will?" Osborn replied immediately to Fouch that a Tuolumne County Human Resources representative would be the election supervisor.

On the morning of April 30, 2009, a Tuolumne County Human Resources Department representative informed Employee Relations Officer Osborn that Tuolumne County would not supervise the May 7 election. That day, Osborn spoke with Tuolumne County Counsel Oliver who agreed to honor the commitment to assist in the election, but only as an observer.

On May 1, 2009, Employee Relations Officer Osborn requested a representative from the Tuolumne County Human Resources Department to observe the election; Tuolumne County agreed to send one. Also on May 1, Osborn received contact information for Campbell, who had retired from CSMCS, from Tuolumne County and CSMCS Chief Roose. Campbell subsequently agreed to serve as the election officer.

On May 4, 2009, SEIU counsel sent a letter and fax to Assistant County Counsel Sirias requesting confirmation that the May 7 election would not be held because Tuolumne County was not participating. If the election would be conducted, the Union requested the name and contact information for the election supervisor. Sirias then contacted Tuolumne County Counsel Oliver to learn why the Tuolumne County Human Resources Department would not supervise the election.

From April 29 through May 4, 2009, Employee Relations Officer Osborn, SEIU President James Turley (Turley), and SEIU representative Fouch exchanged e-mails on use of

County e-mail and posting of election notices, which confirmed that the May 7 election would not be cancelled.

On May 6, 2009, Employee Relations Officer Osborn advised SEIU representative Fouch that Campbell would supervise the May 7 election. That day, Fouch asked Campbell for her e-mail address so he could provide it to SEIU counsel. On May 7, Fouch came to the election site with an envelope from SEIU Field Director Ulysses Madison (Madison), his supervisor, but Campbell would not accept it.[16] The Union sent a package to Campbell's home by certified mail; Campbell refused to accept it, and returned it. On May 7, Luisa Blue, a SEIU employee in Oakland, called Campbell at home.

Campbell supervised the May 7, 2009 election and certified the results, which were signed by SEIU President Turley and a County representative. Of 65 eligible voters, 42 employees voted. Thirty-seven voted for CCPSEA as exclusive representative. Five employees voted for SEIU as exclusive representative.

On May 8, 2009, SEIU representative Fouch prepared a letter to Employee Relations Officer Osborn objecting to any change in the deduction of membership dues and agency fees in the "disputed" unit, and demanding that any changed deductions be placed in an escrow account. The letter further stated that it would "constitute embezzlement" if SEIU dues or fees were transferred to any other location. Osborn did not receive the letter, and had not seen it before the hearing.

[16] On May 7, Fouch prepared a letter to Campbell objecting to the election because she was not a neutral party. Fouch testified that Madison told him he had given the letter to Campbell, but Fouch did not know when the letter was delivered. Campbell did not mention the letter to Osborn.

On June 9, 2009, the County Board of Supervisors recognized CCPSEA as the exclusive representative for the Public Safety Employees Unit (Public Safety or Unit 10).[17] On August 11, the County and CCPSEA executed a side letter agreement.[18] On October 5, 2010, the County Board of Supervisors approved a new contract between the County and CCPSEA for Unit 10 from July 1, 2010 through September 30, 2011.[19]

On September 7, 2010, the County Board of Supervisors approved a new contract between SEIU and the County for the Miscellaneous unit from July 1, 2010 through August 31, 2011.[20]

As of late October 2010, there are 59 positions in the Public Safety unit, and 283 positions in the Miscellaneous unit. Seven Deputy Probation Officers I, II, and III have always held limited term peace officer status. In May 2008, after approving the unit modification/severance petition, Employee Relations Officer Osborn learned that emergency legislation had granted limited term peace officer status to the 4 Correctional Corporals, 10 Correctional Officers/Matrons, and 2 Correctional Sergeants.

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[17] The existing SEIU-County MOU term was January 1, 2009 through June 30, 2010. On October 6, 2009, during Fiscal Year (FY) 2009-10, 21 Unit 7 employees were laid off.

[18] Bargaining Unit 10 employees would contribute 5.6 percent to their retirement until June 30, 2010. As a result, scheduled layoffs of 3.39 full time equivalent (FTE) positions were rescinded, and 3.6 positions were added to the unit for FY 2009-10.

[19] Bargaining Unit 10 employees contribute 3 percent to their retirement. The County increased health insurance contributions by 4.9 percent, with an additional increase equaling 75 percent of total benefit premiums; the cash in lieu of benefits option also increased. Neither the 2009 side letter nor the 2010-11 contract provided for furloughs of Unit 10 employees.

[20] Bargaining Unit 7 employee salaries were reduced 4.6 percent over 26 pay periods. There are 12 furlough days, 7 fixed and 5 floating. The County increased its health insurance contributions by 4.9 percent, with an additional increase equaling 75 percent of total benefit premiums; the cash in lieu of benefits option also increased. The vacation allotment was increased by 12 days so employees could continue to accrue vacation despite the furlough days. Three new job classes were eligible for uniform allowances.

All but one employee in the Public Safety unit signed authorizations for membership dues deductions to CCPSEA.

Employee Relations Officer Osborn testified that it was not the County's historical practice to seek agreement from all parties on selection of a neutral third party to conduct elections. Her testimony was not controverted.

ISSUES

1. Did the County act inconsistently with or otherwise violate EERO section 9 by approving the CCPSEA severance petition for a Public Safety bargaining unit which contained limited term peace officers (Deputy Probation Officers I, II, and III, Correctional Corporals, Correctional Officers/Matrons, Correctional Sergeants) and non-peace officer classes in March 2009?

2. Did the County act inconsistently with or otherwise violate EERO section 7 by twice replacing CSMCS as the third party neutral election supervisor in the severance petition election, first with the Tuolumne County Human Resources Department, and then with retired CSMCS Mediator Campbell, in April and May 2009 without discussions with or agreement by SEIU?

CONCLUSIONS OF LAW

A charging party must prove the allegations of an unfair practice complaint by a preponderance of the evidence. (*California State University (San Francisco)* (1986) PERB Decision No. 559-H; PERB Regulation 32178.) Preponderance of the evidence has been defined by the courts as "evidence that has more convincing force than that opposed to it." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314 (*Glage*).) Preponderance of the evidence is usually defined in terms of the probability of the truth, or such evidence, which when weighed against opposing evidence, has the greater probability of truth. (*California*

Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal.4th 1133.) If the evidence is so evenly balanced that one is unable to say that evidence on either side of an issue preponderates, the finding on that issue must be against the party who has the burden of proving it. (*Glage, supra.*) The relevant facts in this case are undisputed, however. At issue is the proper characterization of the language of MMBA and County EERO.

This is a case of first impression. No cases directly on point were cited by the three parties or found after independent research. This is not a dispute over the reasonableness of the two sections of the County EERO. The issues are whether the County violated two local rules which it had apparently never enforced for one group of peace officers, and in selecting a neutral election supervisor.

MMBA section 3500 states that its purpose is to

> promote the improvement of personnel management and employer-employee relations by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies.

Public Safety Unit and EERO Section 9

It is undisputed that County EERO section 9 requires peace officers and limited term peace officers to be represented in separate bargaining units composed solely of such peace officers. Under the local rule, the County has had two peace officer-only units, Deputy Sheriffs and Sheriffs' Management, since 1998. Notwithstanding section 9, it is also uncontroverted that County Deputy Probation Officers, who are limited term peace officers, have been part of a mixed unit of peace officers and non-peace officers since at least 1998, represented by IUOE, CCEA, SEIU, and CCPSEA, respectively. The disputed Public Safety unit also includes the limited term peace officer classes of Correctional Corporal, Correctional Officer/Matron, and Correctional Sergeant, granted peace officer status in 2008. Throughout

this history of representation of changing exclusive representatives after the filing of decertification and unit modification/severance petitions, there is absolutely no evidence that any of these peace officer classes ever sought to be included in a peace officer-only unit.

IUOE represented peace officers and non-peace officers in the mixed Miscellaneous unit from at least 1998 to 2003 when it was replaced by CCEA. CCEA represented the mixed Miscellaneous unit from 2003 until Fall 2005 when the County Board of Supervisors formally recognized SEIU as exclusive representative following a decertification petition and election. SEIU represented the mixed Miscellaneous unit from Fall 2005 until June 2009 when the County Board of Supervisors formally recognized CCPSEA as the exclusive representative for the mixed peace officer and non-peace officer Public Safety unit following the May 2009 unit modification/severance petition and election. SEIU continues as the exclusive representative of the Miscellaneous unit which now does not contain any peace officers.

SEIU argues that it is not inconsistently seeking to enforce EERO section 9 against CCPSEA while benefiting from its non-enforcement as the exclusive representative of the mixed Miscellaneous unit. The Union asserts that the mixed Miscellaneous unit was in existence before 2000, when MMBA section 3507.1(b) was enacted. Section 3507.1(b) provides:

> Notwithstanding subdivision (a) and rules adopted by a public agency pursuant to Section 3507, a bargaining unit in effect as of the effective date of this section shall continue in effect unless changed under the rules adopted by a public agency pursuant to Section 3507.[21]

SEIU contends that the mixed Miscellaneous unit could "continue undisturbed" as a pre-existing unit, but when the County granted the severance petition, it created a new unit prohibited by EERO section 9. The Union construes MMBA section 3507.1(b) to prohibit

[21] The complaint does not mention MMBA section 3507.1(b).

public employers from interfering with existing units when there are changes in peace officer status or local rules. This argument is difficult to follow and cannot be accepted, given other provisions in the MMBA.

MMBA section 3507(a)(4) allows public agencies to adopt reasonable rules and regulations for the administration of employer-employee relations, including the exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees. This is what occurred here. Pursuant to Article II, sections 4 through 12, including section 9, of the County EERO, CCPSEA filed a unit modification/severance petition to create a new Public Safety unit; the severance petition was granted by the County Employee Relations Officer; SEIU appealed the approval of the petition; the County Board of Supervisors rejected the appeal and recommended an election; an election was conducted in which the proposed unit employees voted for CCPSEA over SEIU by a substantial margin; and the Board of Supervisors formally recognized CCPSEA as the exclusive representative for the Public Safety unit. The Union does not challenge the County's procedural compliance with the EERO in processing the severance petition, but only its decision to approve the petition and proposed new unit. The mixed Miscellaneous unit exclusively represented by SEIU continued until it was changed by the filing of the severance petition and subsequent election in which CCPSEA was selected over SEIU as exclusive representative for a mixed Public Safety unit under the County's local rules. If all provisions of EERO Article II are given effect, the pre-existing "grandfathered" mixed Miscellaneous unit continued until it was changed under local rules by the election. Thus, no violation of MMBA section 3507.1(b) occurred.

Past practice has been defined in the unfair practice/unilateral change context. To be binding, a past practice must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice

accepted by both parties. (*Trustees of the California State University* (2007) PERB Decision No. 1886-H; *Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285; *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186.) It must be "regular and consistent" or "historic and accepted." (*Desert Sands Unified School District* (2010) PERB Decision No. 2092; *County of Placer* (2004) PERB Decision No. 1630-M (*Placer County*). A long-standing practice need not be labeled as the employer's official policy or reflected in the applicable contract. (*City of Alhambra* (2009) PERB Decision No. 2036-M.)

The undisputed facts demonstrate that County Deputy Probation Officers were in the mixed peace officer and non-peace officer Miscellaneous unit from 1998 through 2009, and are now in the mixed Public Safety unit, notwithstanding EERO section 9. This 22-year history of representation would certainly qualify as a "historic and accepted" and "fixed and established" practice if the past practice doctrine is properly applied to these facts.

SEIU argues that the County and CCPSEA cannot rely on a past practice of mixed units because it conflicts with the clear and unambiguous language of EERO section 9 and MMBA section 3507.1(b). The Union cites *Placer County, supra,* PERB Decision No. 1630-M, as holding that a public entity is not bound by past practice if the practice is contrary to the plain language of the public entity's rules or procedures.

The Union's narrow, restrictive construction of MMBA section 3507.1(b) is rejected for the above-stated reasons. SEIU also misstates the holding in *Placer County, supra.* In that case, the Union asserted a past practice of the County's failure to enforce civil service rules requiring complaints to be filed within 60 days, timelines incorporated into the parties' MOU. The Board held that it was "debatable" whether the five instances of non-enforcement of timelines and acceptance of complaints established a valid past practice. Citing *Marysville*

Joint Unified School District (1983) PERB Decision No. 314, PERB concluded that "the County simply did not enforce a provision of the MOU they had every right to enforce."

There is no applicable contract language here. The County is not seeking to apply EERO section 9 because of its past practice of not enforcing section 9, allowing Deputy Probation Officers to elect to be included in a mixed bargaining unit of peace officers and non-peace officers. In this case, past practice essentially equates to history of representation, a factor long recognized in determination of appropriate bargaining units, and specifically set forth in EERO section 9.

A basic rule of statutory construction is to construe an administrative regulation or rule in harmony with the purposes, provisions, and policies of the governing statute. (*Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506; *State of California (Department of Personnel Administration)* (1993) PERB Order No. Ad-246-S.) Although MMBA allows a considerable degree of local regulation, where it sets a standard, local divergence is not allowed. When looking at a local rule, the inquiry does not concern whether PERB would find a different rule more reasonable. The question is whether the rule is consistent with and effectuates the purposes of the express terms of MMBA. The standards established by MMBA "may not be undercut by contradictory rules or procedures that would frustrate its purposes." (*County of Imperial* (2007) PERB Decision No. 1916-M; *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191; *International Federation of Professional & Technical Engineers v. City and County of San Francisco* (2000) 79 Cal.App.4th 1300; *Huntington Beach Police Officers Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492.)

MMBA section 3508(a) provides, in pertinent part:

> However, the governing body may not prohibit the right of its employees who are full-time "peace officers," as that term

> is defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, to join or participate in employee organizations which are composed solely of those peace officers, . . . and which are not subordinate to any other organization.

Presumably section 3508(a) was the statutory basis for EERO section 9. The two are fundamentally different, however. MMBA section 3508(a) grants peace officers the affirmative right to join or participate in peace officer-only employee organizations, a right which, if exercised, a public agency cannot deny or prohibit. Nothing in section 3508(a) mandates or requires peace officers to exercise this right to separateness. Section 9 takes this one step further, by limiting the ability of County peace officers to be exclusively represented to peace officer-only bargaining units. Section 3508(a) confers a right to be separate on statewide peace officers, while section 9 prohibits County peace officers from being represented by an organization which includes non-peace officers even if they choose such representation, as did the Deputy Probation Officers, Correctional Corporals, Correctional Officers/Matrons, and Correctional Sergeants in this severance petition and election. Requiring rigid adherence to section 9 is inconsistent with the exercise of employee free choice to join and be represented by employee organizations recognized as a stated purpose of MMBA in section 3500.

SEIU has failed to meet its burden of proof that the County violated the MMBA by its non-enforcement of EERO section 9 to limited term peace officers who elected representation in a mixed peace officer and non-peace officer bargaining unit by a different exclusive representative.

Third Party Neutral Election Supervisor and EERO Section 7

In July 2002, Assistant County Counsel Sirias and Employee Relations Officer Osborn informed the County Board of Supervisors that recent changes to the MMBA "specifically

required agencies to follow unit determination dispute resolution protocol that placed unit determination in the hands of neutral third parties," citing "new" MMBA section 3507.1(c). The memorandum (memo) stated that this "relatively minor change" required amendment of EERO sections 5, 6, and 7 to provide that the Employee Relations Officer would "follow the procedures of MMBA section 3507.1(c) for final determination by a neutral third party" (section 5) and "for placing contested matters under section 6 in care of a neutral third party to conduct a secret ballot election, if necessary" (section 7).

The stipulated and established facts demonstrate that the County did not have a past practice of seeking agreement from all parties to a representation election on selection of a neutral third party election supervisor both before and after this dispute arose. Instead, Employee Relations Officer Osborn contacted CSMCS to conduct these elections. For example, in Spring and Fall, 2005, then-CSMCS Mediator Campbell conducted the election in the decertification petition filed by SEIU for the Miscellaneous unit. In Fall 2007, Campbell supervised the agency fee election in the Miscellaneous unit, and certified the results approving the fees.

SEIU asserts that EERO section 7 "unambiguously" requires the County to use MMBA section 3507.1(c) procedures when it selects neutral third parties to conduct elections. The Union ignores the operative and qualifying words, "if necessary," at the end of EERO section 7, however. Construing the language in its entirety, EERO section 7 requires MMBA section 3507.1(c) procedures for selection of a third party neutral to conduct elections if necessary. It has not been necessary for the County to invoke MMBA section 3507.1(c) because of its history in selecting CSMCS to supervise these elections.

The same procedures were followed in the instant case, at least initially. After the filing of the unit modification/severance petition, from Fall 2007 through Spring 2008,

CSMCS Mediator Campbell attended a meeting on the petition, conducted one mediation session, and attempted other mediations.[22] In September 2008, CSMCS notified the parties that the election would be held in October, but the election did not proceed because of the charge filed by SEIU. In March and April 2009, after the County Board of Supervisors denied the Union's appeal of the approved petition and recommended a vote, Employee Relations Officer Osborn contacted CSMCS to supervise the election. In the course of communications over whether CSMCS would supervise the election due to the disputed unit and the filing of this charge, CSMCS Chief Roose informed the parties that another neutral could conduct the election.

It is undisputed that in April 2009, Employee Relations Officer Osborn contacted the Tuolumne County Human Resources Department to conduct the election only after CSMCS refused to run it, based on communications with SEIU over the disputed unit and the filing of this charge. It is also uncontroverted that Osborn contacted Campbell, now retired from CSMCS, to supervise the election after Tuolumne County refused to conduct it, following communications with the Union over the disputed unit.

SEIU has failed to meet its burden of proof that the County violated the MMBA because EERO section 7 does not require use of MMBA section 3507.1(c) procedures. In addition, the County had a past practice of selecting CSMCS as the third party neutral election supervisor until it was required to find other neutral election supervisors because CSMCS would not conduct the election.

In sum, SEIU does not contest the validity of the severance election in which employees in the Public Safety unit voted overwhelmingly to change their exclusive

[22] In its November 2007 appeal of the approved severance petition, SEIU also requested mediation of it by Campbell.

representative to CCPSEA. The Union continues to exclusively represent the Miscellaneous unit and receive agency fees. To set aside the election results based on the technical language of the EERO, given the past practice to the contrary, would elevate form over substance. It would also not promote the purposes of MMBA section 3500 which recognizes employee free choice in joining and being represented by an exclusive representative.

Accordingly, the unfair practice charge and unfair practice complaint are dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE-596-M, *Service Employees International Union Local 1021 v. County of Calaveras*, are hereby DISMISSED.

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

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

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile

transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of 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).)

Christine A. Bologna
Acting Chief Administrative Law Judge