STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case No. LA-CE-605-M PERB Decision No. 2280-M August 14, 2012

Appearances: Weinberg, Roger & Rosenfeld by Alan G. Crowley, Attorney, for Service Employees International Union, Local 721; The Zappia Law Firm by Edward P. Zappia and Brett M. Ehman, Attorneys, for County of Riverside.

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

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of Riverside (County) to the proposed decision (attached) of an administrative law judge (ALJ). The ALJ ruled that the County violated the Meyers-Milias-Brown Act (MMBA)[1] when it denied a unit modification petition submitted by Service Employees International Union, Local 721 (SEIU) on the ground that the petition was not supported by a majority of employees covered by the petition.

The ALJ determined that the unit modification rule in the County's Employee Relations Resolution (ERR) did not require proof of majority support, and that by imposing a majority support requirement the County unreasonably applied its rule and thereby violated MMBA section 3506. The ALJ also determined that the County's conduct constituted an unfair

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

practice under MMBA section 3509(b) and PERB Regulation 32603(a) and (g).[2] The ALJ proposed an order requiring the County to rescind the denial of SEIU's petition and to process the petition with a reasonable interpretation of the ERR consistent with the proposed order.

The County excepts to the ALJ's reading of the County's ERR and the unit modification rules therein.[3] The proposed order would, asserts the County, include employees covered by SEIU's petition in bargaining units represented by SEIU without affording the employees an opportunity to approve such inclusion. The County asserts that this violates MMBA and additionally constitutes "forced unionism" which, contends the County, contravenes the employees' constitutional due process rights.[4]

We have reviewed the hearing record, the proposed decision, the County's exceptions and SEIU's response. The ALJ's findings of fact are adequately supported by the record, and we adopt them as the findings of the Board itself.[5] The ALJ's conclusions are well reasoned

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

[3] The County requests oral argument pursuant to PERB Regulation 32315. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453; *City of Modesto* (2008) PERB Decision No. 1994-M.) Based on our review of the record, all of the above criteria are met in this case. Therefore, the Board denies the request.

[4] The County relies for its due process claims on *Mariscal v. Employee Relations Board of City of Los Angeles* (2010) 187 Cal.App.4th 164 (*Mariscal*) (merger of union locals did not present "question of representation" for labor board determination; internal statewide discussion and vote by union members on merger was consistent with state statutes; local-by-local vote not required).

[5] The County's exceptions all designate portions of the proposed decision falling within the conclusions of law, and no exception is taken to portions of the proposed decision falling within the findings of fact. An exception not specifically urged is waived. PERB Regulation 32300(c).

and in accordance with applicable law, and we affirm them subject to our discussion below of the County's exceptions.

FACTUAL BACKGROUND

The County employs persons within a so-called Temporary Assignment Program (TAP). Such persons, designated TAP assistants, are assigned to fill vacancies in County positions across the scope of County operations. TAP positions are not permanent civil service positions. (Proposed Dec., at p. 4.)

The County has adopted local rules pursuant to MMBA section 3507, known as the County's ERR. These rules govern, inter alia, formation and modification of bargaining units and recognition of exclusive and/or recognized bargaining representatives. SEIU represents employees in a professional unit, a para-professional unit and a registered nurses unit. TAP assistants are not included in any of the County's bargaining units. (Proposed Dec., at pp. 4-5.)

The County's ERR section 10 provides for modification of bargaining units. (See Discussion in Proposed Dec., at p. 5.)

In September 2009, SEIU petitioned to accrete into each of its three bargaining units those TAP assistant employees whose assignments, working titles, or duties are the same, or close to, those performed by the regular full-time or part-time employees in each unit. SEIU did not provide proof of support that the petitioned-for TAP assistant employees desired SEIU representation or inclusion in a SEIU bargaining unit. (Proposed Dec., at p. 5.)

In October 2009, the County denied SEIU's petition, stating that the County required a showing of majority support before it would act to "affect the representation rights of unrepresented employees." The County stated that it took no position as to the appropriateness of the proposed unit modifications, but was denying the petition on the threshold basis that

SEIU failed to "demonstrate majority (actually any) support from the affected TAP workers." (Proposed Dec., at p. 6)

In March 2010, SEIU brought its unfair practice charge seeking an order compelling the County to process its petition. PERB's Office of General Counsel thereafter issued a complaint alleging a violation of County ERR section 10 and of MMBA sections 3506 and 3509(b) and PERB Regulation 32603(a) and (g). (Proposed Dec., at pp. 1-2.)

PRIOR LITIGATION

We begin with a previous PERB decision involving these parties raising the same issue treated here. In *County of Riverside* (2011) PERB Decision No. 2163 (*Riverside I*), the Board considered the County's interpretation of its ERR rules regarding unit modification under which the County imputed a majority support requirement for petitions seeking to add unrepresented positions to an existing bargaining unit. The Board held that the imputed majority support requirement constituted an unreasonable reading of the unit modification rules, and directed the County to process SEIU petitions in accordance with a reasonable interpretation of these rules. The County sought judicial review of the Board's decision in *Riverside I*, which review was pending at the time the ALJ issued the proposed decision in the instant case. Thus, the ALJ appropriately declined to consider the Board's *Riverside I* ruling as binding PERB precedent.

On April 11, 2012, the Court of Appeal for the 4th Appellate District, Division Two issued its order in Case No. E053161, denying review of the Board's decision in *Riverside I.* Thus, the Board's *Riverside I* decision is now final, and may serve as precedent guiding our deliberations in the instant case.

THE PROPOSED DECISION

The ALJ concluded that: (1) ERR section 10 applies to the unit modification requests at issue (Proposed Dec., at p. 7); (2) the County's decision to deny SEIU's petition was inconsistent with the plain language of ERR section 10 (Proposed Dec., at p. 8); (3) ERR section 10 is the operative rule for modifying County bargaining units (Proposed Dec., at pp. 8-9); (4) ERR section 10 does not require a petitioning employee organization to provide employee support for a unit modification (Proposed Dec., at p. 10); and (5) alternatively, assuming ERR section 10 does not apply, when rejecting SEIU's petition the County relied on an unwritten policy requiring majority support, which policy was adopted without meeting and conferring as required by MMBA and thus exceeded the County's authority (Proposed Dec., at p. 11).

THE COUNTY'S EXCEPTIONS

The County excepts to each of the principal legal conclusions reached by the ALJ, raising as to each exception essentially the same contentions, which are:

1. Section 10 of the ERR does not apply to a petition for unit modification seeking to accrete unrepresented employees, and the County requires a majority showing of interest before processing a petition to unionize unrepresented employees;

2. Processing SEIU's petition would force unrepresented employees to join a union without their consent or vote, violating MMBA section 3502 and PERB Regulation 32604(a);

3. Due process requirements of the Fourteenth Amendment prohibit accretion of unrepresented employees because the employees have no opportunity to contest joining a union or to object to paying union dues;

4. California case law, *Mariscal*, requires that prior to accretion to a bargaining unit represented by a union, current, unrepresented employees must be afforded the opportunity to consider, discuss and approve their inclusion; and

5. Requiring the County to process SEIU's unit modification petition absent proof of majority support among the covered employees will violate PERB Regulation 32604(a), which precludes a union to "cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507."

DISCUSSION

We begin with *Riverside I.* The Board there considered and decided the principal issue here presented, namely, the County's insistence on proof of majority support for a unit modification petition seeking to add to an existing bargaining unit various current and unrepresented employees. The County then urged, and the Board then considered and ruled on, many of the same contentions the County urges here.

In *Riverside I*, the Board wrote:

> The County denied SEIU's petitions because they were not accompanied by proof that a majority of the employees to be added to the units desired to be represented by SE1U. In the proposed decision, the ALJ concluded that it was unreasonable for the County to impose a majority support requirement on SEIU's petitions.
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> In its exceptions, the County acknowledges that its ERR is silent regarding proof of support for a unit modification petition but nonetheless argues that it is necessary to imply a majority support requirement into Section 10 to prevent unrepresented employees from being "involuntarily unionized against their will." Such a requirement, however, is contrary to well-established law governing the addition of employees to an existing bargaining unit, which requires a showing of majority support among the employees to be added to the unit only under certain circumstances.

The National Labor Relations Board (NLRB) does not require a showing of majority support "when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted." (*E.I. Du Pont de Nemours, Inc.* (2004) 341 NLRB 607, 608.) It only requires such a showing when the employees to be added historically have been excluded from the unit, typically (but not necessarily) by agreement between the union and the employer. (*Teamsters National United Parcel Service Negotiating Committee v. National Labor Relations Bd.* (D.C. Cir. 1994) 17 F.3d 1518, 1522; *Laconia Shoe Co.* (1974) 215 NLRB 573, 576.)

PERB does not follow the NLRB's approach to accretion. Instead, PERB regulations require a showing of majority support when adding the requested employees "would increase the size of the established unit by ten percent or more." (PERB Regs. 32781(e)(1); 61450(e)(1); 81450(e)(1); 91450(e)(1).) [Fn. 3 omitted.] If the addition would not increase unit size by ten percent or more, no showing of majority support is required. (*Regents of the University of California* (2010) PERB Decision No. 2107-H.)

As these authorities demonstrate, a showing of majority support is not required every time a union seeks to add employees to an existing bargaining unit. Nor do the authorities apply different rules when a unit modification petition seeks to add unrepresented employees to a unit. Accordingly, we reject the County's argument that a majority support requirement must be implied in ERR Section 10.[6]

In the alternative, the County contends that PERB Regulation 61450(e)(1) should apply in light of Section 10's silence regarding majority support. Pursuant to MMBA section 3509, subdivision (a), "PERB regulations serve to 'fill in the gap' when a local agency has not adopted a local rule on a particular

[6] [Fn. 4: We also note that PERB has consistently held that "while employees have the right to choose which employee organization, if any, they want to represent them, they have no right to choose the bargaining unit in which their classification or position is placed." (*Regents of the University of California, supra; Elk Grove Unified School District* (2004) PERB Decision No. 1688; *Salinas Union High School District* (2002) PERB Order No. Ad-315.)]

> representation issue."[7] (*County of Siskiyou/Siskiyou County Superior Court* (2010) PERB Decision No. 2113-M.) Under this standard, PERB regulations apply only when the agency has no rule at all that governs a representation issue. (*County of Orange* (2010) PERB Decision No. 2138-M; *County of Siskiyou/Siskiyou County Superior Court, supra.*) Here, the County has adopted a local rule governing unit modification and, therefore, PERB's unit modification regulations do not apply.
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> MMBA section 3507, subdivision (a) gives the County the ability to directly address its concern that ERR Section 10 allows unrepresented employees to be added to a bargaining unit without any showing of support: "after consultation in good faith with representatives of a recognized employee organization or organizations," the County can amend its unit modification rule to include a reasonable employee support requirement. The County may not ignore the Legislature's directive by adding requirements to the rule without participating in the statutorily required consultation. Nor has the Legislature granted PERB the authority to use its regulations to rewrite a local agency's rules, even if the agency urges PERB to do so. Thus, unless and until a proper amendment of its unit modification rule occurs, the County may not lawfully require a showing of majority support to add employees to an existing bargaining unit. [Fn. 6 omitted.]

(*Riverside I*, at pp. 2-5.)

We return to the County's exceptions. Our decision in *Riverside I* treated several of the contentions raised again here. They are as numbered above, 1 and 2. Accordingly, we deem it unnecessary to revisit these contentions and their disposition in *Riverside I*. We therefore address here exceptions 3, 4 and 5. We take them in order.

Exception 3: Due process requirements of the Fourteenth Amendment prohibit the County from accreting unrepresented employees into an existing bargaining unit, because the employees have no opportunity to contest joining a union or to object to paying union dues. We disagree.

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[7] [Fn.5: MMBA section 3509, subdivision (a) states, in relevant part: "Included among the appropriate powers of the board are the power to order elections, to conduct any election the board orders, and to adopt rules to apply in areas where a public agency has no rule."]

MMBA section 3502 protects the right of employees individually to join or not to join an employee organization or union. Neither represented nor unrepresented employees have standing to contest placement of their position or job classification in a particular bargaining unit. (*Regents of the University of California* (2010) PERB Decision No. 2107-H; *Elk Grove Unified School District* (2004) PERB Decision No. 1688; *Salinas Union High School District* (2002) PERB Order No. Ad-315.) Requiring that the County process SEIU's unit modification petition does not interfere with or coerce employees in violation of MMBA section 3502.

Likewise, neither MMBA section 3502 nor the Fourteenth Amendment is offended by a system of service or agency fees. The union chosen by a majority of unit employees as the exclusive representative of the employees in the bargaining unit, may implement a service or agency fee system requiring all unit employees either to join the union or in lieu of joining to pay the union a service or agency fee. (*Abood v. Detroit Bd. of Educ.* (1977) 431 U.S. 209, 221-222; *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal. 3d 575, 588-589.) Due process protections required as a condition to implementing a service or agency fee are sufficient to protect employees' interests under the Fourteenth Amendment. (*Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292.)

Exception 4. The County contends that California case law, *Mariscal*, requires that prior to accretion to a bargaining unit represented by a union, current, unrepresented employees must be afforded the opportunity to consider, discuss and approve their inclusion. We disagree.

Mariscal stands for a different proposition. In *Mariscal* an international union merged several of its locals into a single local. One of the predecessor locals was Local 347. Dan Mariscal was a member of Local 347. Following the merger, the successor local [Local 721] petitioned the labor board (Employee Relations Board for the City of Los Angeles

or ERB) for amendment of Local 347's certification to reflect its new identity. Dan Mariscal opposed the amendment arguing that members of Local 347 were entitled to a separate vote to determine whether Local 347 would merge with the other locals into a single local. ERB held a hearing, and thereafter ruled that the successor local's petition for amendment of certification should be granted. ERB ruled there was no substantial change in the identity of the union, but rather there was a "continuity of representation." Thus, there was no question concerning representation (QCR) requiring a separate vote of Local 347's bargaining unit members. ERB ruled as well that the union's internal procedures for making the merger decision met "due process" standards for member involvement in the union's merger decision, viz., union members were given notice of the proposed merger, had an opportunity to comment thereon, and to participate in a statewide election approving it. Dan Mariscal appealed.

The appellate court affirmed. (*Mariscal*, at pp. 169-174.) The court ruled that substantial evidence supported the ERB's determination that the merger presented merely a continuity of representation and not a QCR, and that the union had provided for appropriate member involvement in the decision via the statewide vote preceded by adequate notice and discussion. The court likewise ruled that ERB had relied appropriately on state and federal case law governing union mergers, including without limitation, *NLRB v. Financial Inst. Employees* (1986) 475 U.S. 192.

The County's reliance on *Mariscal* is misplaced. *Mariscal* concerns a merger of union locals, and the rights of union members to participate in internal union decision making about the merger. It does not establish rights for unrepresented employees when their employer receives a petition to modify a bargaining unit by including the employees in that bargaining unit.

Under the MMBA, decisions about unit modification are made by a public agency under the agency's reasonable rules which are subject to meeting and conferring with employee organizations, or in the absence of an applicable local agency rule, by rules established by PERB. At the time of the petition in this case, the County had a unit modification rule, thus PERB's rules were not applicable. The County's unit modification rule did not require proof of majority support when modifying an existing unit by accretion of unrepresented employees. We conclude that the ALJ reasonably determined to apply the County's rule, and reasonably interpreted the County's rule to prohibit the County from requiring proof of majority support.

Exception 5. Requiring the County to process SEIU's unit modification petition absent proof of majority support among the covered employees will violate PERB Regulation 32604(a), which precludes a union to "cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507." We disagree.

We have already concluded that the County has its own unit modification rule, and that the County's rule does not require proof of majority support under any circumstance. Thus, neither PERB nor the County has authority to apply PERB's unit modification rules, and the County must process SEIU's petition under the County's existing rule.

We likewise have concluded that the County's rule, as construed by the ALJ, is reasonable and despite the County's contrary claims, may be implemented without violating employee rights under MMBA section 3502. Thus, by seeking to enforce implementation of the County's unit modification rule, SEIU does not seek to cause or attempt to cause the County to engage in conduct prohibited by the MMBA or by the County's own local rules. As such, neither SEIU nor PERB is violating PERB Regulation 32604(a).

CONCLUSION

For all these reasons, we conclude, with the ALJ, that by refusing to process SEIU's unit modification petition absent proof of majority support among the employees subject to the petition, the County acted inconsistently with its own ERR section 10 and that its conduct violates MMBA section 3506 and constitutes an unfair practice under MMBA section 3509(b) and PERB Regulation 32603(a) and (g).

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3506 and 3509(b) by unreasonably and unlawfully denying a petition submitted by Service Employees International Union, Local 721 (SEIU) on September 1, 2009, seeking to add certain Temporary Assignment Program employees to SEIU's existing represented bargaining units. This conduct also violated the MMBA by denying SEIU's right to represent its members and interfering with the rights of County employees.

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

A. CEASE AND DESIST FROM:

1. Applying the rules of the County's Employee Relations Resolution (ERR) regarding unit modification unreasonably to require proof of majority support for SEIU's September 1, 2009 unit modification petition.

2. Denying SEIU the right to represent County employees.

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

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

1. Rescind the October 30, 2009 denial of SEIU's September 1, 2009 unit modification petition.

2. Within ten (10) workdays of the service of a final decision in this matter, process SEIU's September 1, 2009 unit modification petition with a reasonable interpretation of the County's ERR that is consistent with this Order.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the County customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU.

Chair Martinez and Member Dowdin Calvillo joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-605-M, *Service Employees International Union, Local 721 v. County of Riverside*, in which all parties had the right to participate, it has been found that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by denying Service Employees International Union, Local 721's (SEIU) September 1, 2009 unit modification petition.

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

A. CEASE AND DESIST FROM:

1. Applying the rules of the County's Employee Relations Resolution (ERR) regarding unit modification unreasonably to require proof of majority support for SEIU's September 1, 2009 unit modification petition.

2. Denying SEIU the right to represent County employees.

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

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

1. Rescind the October 30, 2009 denial of SEIU's September 1, 2009 unit modification petition.

2. Within ten (10) workdays of the service of a final decision in this matter, process SEIU's September 1, 2009 unit modification petition with a reasonable interpretation of the County's ERR that is consistent with this Order.

Dated: _____ COUNTY OF RIVERSIDE

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-605-M PROPOSED DECISION (August 5, 2011)

Appearances: Weinberg, Roger & Rosenfeld by Alan G. Crowley, Attorney, for Service Employees International Union, Local 721; The Zappia Law Firm by Edward P. Zappia and Day B. Hadaegh, Attorneys, for County of Riverside.

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges a public employer's decision to deny an employee organization's petition to add unrepresented positions to existing bargaining units pursuant to its local employer-employee relations rules was unlawful. The public employer disputes that its denial violates either the local rules or the Meyers-Milias-Brown Act (MMBA).[1]

On March 26, 2010, Service Employees International Union, Local 721 (Local 721) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the County of Riverside (County) alleging a violation of sections 8 and 10 of the County's Employee Relations Resolution (ERR) and, as a consequence, the MMBA.

On June 21, 2010, Local 721 withdrew its allegation that the County violated ERR section 8. On the same date, the PERB Office of the General Counsel issued a complaint, alleging a violation of ERR section 10. The complaint further alleges that the same conduct

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

violates MMBA sections 3506 and 3509(b) and PERB Regulation 32603(a) and (g).[2] On July 21, 2010, the County answered the complaint denying that any violation occurred.

On July 29, 2010, the parties participated in an informal settlement conference but the matter was not resolved. At that point, the matter was scheduled for formal hearing by Administrative Law Judge Thomas Allen to be held on November 8-10, 2010.

On November 8, 2010, the parties stipulated to a set of 45 joint exhibits and further stipulated no other evidence was necessary to decide the case. On February 11, 2011, Local 721 filed its post-hearing brief. The County filed its post-hearing brief on February 18, 2011.

On February 25, 2011, Local 721 filed a request for judicial notice regarding PERB decision *County of Riverside* (2011) PERB Decision No. 2163-M. The County does not oppose the request. The County did, however, file a petition for writ of extraordinary relief with the California Court of Appeal, Fourth Appellate District seeking review of that decision. The County's petition is under consideration by the court.

On April 18, 2011, the instant case was transferred to then-Acting Chief Administrative Law Judge Christine A. Bologna. Bologna issued an Order to Show Cause (OSC) as to why the present matter should not be held in abeyance pending decision from the appellate court concerning *County of Riverside*, *supra*, PERB Decision No. 2163-M and another case involving the same parties, *County of Riverside* (2010) PERB Decision No. 2119-M. At the time Bologna issued the OSC, Decision No. 2119-M was being considered for review by the appellate court.

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

On May 9, 2011, Local 721 filed a response to the OSC. The County filed its response on May 12, 2011. Both parties opposed placing the case in abeyance for different reasons. At that point, the record was closed and the case was submitted for decision. On July 12, 2011, the case was transferred to the undersigned.

LOCAL 721'S REQUEST FOR ADMINISTRATIVE NOTICE

Local 721 requests that PERB take administrative notice of *County of Riverside*, *supra*, PERB Decision No. 2163-M. PERB has previously found it appropriate for administrative agencies, like PERB, to take notice of their own records. (*Regents of the University of California* (1999) PERB Decision No. 1359-H, citing *El Monte Union High School District* (1980) PERB Decision No. 142.) In this case, Local 721's request is not opposed by the County. Thus, to the extent that administrative notice is required of the Board's decision in *County of Riverside*, *supra*, PERB Decision No. 2163-M, Local 721's request is granted. However, because the decision is currently being considered for review by the appellate court, it cannot be accorded precedential value.

RULING ON ORDER TO SHOW CAUSE

On April 18, 2011, PERB issued an OSC inquiring whether the case should be placed in abeyance pending further action by the appellate court in *County of Riverside*, *supra*, PERB Decision No. 2119-M and *County of Riverside*, *supra*, PERB Decision No. 2163-M. The County's petition for review of Decision No. 2119-M was denied by the appellate court and accordingly provides no basis for an abeyance.

PERB has previously held unfair practice charge cases in abeyance while related litigation was pending with the consent of the parties. (*State of California (Department of Personnel Administration)* (2008) PERB Decision No. 1978-S.) In this case, both parties oppose placing the case in abeyance. In addition, the present case arises under a different set

of facts from *County of Riverside*, *supra*, PERB Decision No. 2163-M. Accordingly, I decline to hold this case in abeyance and will proceed with issuing a proposed decision.

FINDINGS OF FACT

I. Jurisdiction Over the Parties

The County is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a). Local 721 is an exclusive representative within the meaning of PERB Regulation 32016(b) and represents the Professional, Para-Professional, and the Registered Nurses bargaining units in the County.[3]

II. The Temporary Assignment Program

The County operates a Temporary Assignment Program (TAP) which allows the County to fill vacant County positions on a temporary basis. TAP employees may fill any number of vacancies at the County including, but not limited to, office assistants, planning technicians, grounds workers, pharmacists, and licensed vocational nurses. Unlike other positions at the County, TAP positions are not considered to be permanent civil service positions. Although TAP employees may receive differing job assignments, all TAP employees are in a single job classification, the TAP Assistant.

III. The County's ERR and Existing Bargaining Units

The County has adopted local rules pursuant to MMBA section 3507 regarding the formation of bargaining units, recognition of recognized and/or exclusive bargaining representatives, and the modification of bargaining units. That set of local rules is known as the County's ERR.

[3] The County states in its answer that it "denies that Charging Party is an exclusive representative of any 'appropriate unit' for purposes of this charge." However, the stipulated record shows that Local 721 is the representative of four units, including the three at issue in the September 1, 2009 petition. All these units are listed in the County's ERR as existing appropriate bargaining units.

ERR section 7 specifies different criteria for establishing an appropriate bargaining unit. ERR section 8 lists 11 existing bargaining units at the County, including a Professional Unit, a Para-Professional Unit, and a Registered Nurses Unit. The TAP Assistant position is not included in any of the County's bargaining units.

ERR section 10 is entitled "MODIFICATIONS OF UNITS" and states, in relevant part:

> 1. A registered employee organization may propose the modification of an established unit by filing a request with the Human Resources Director, accompanied by proof that its represented members comprise 15 percent of the employees in the unit. The Human Resources Directors may also propose a modification.
>
> 2. No such proposal shall be submitted except between July 1 and September 1, for immediate determination.

The other portions of ERR section 10 provide a process for notifying other employee organizations affected by a petition, for affected employee organizations to challenge a petition, and for resolving challenges and other unit determination issues raised by a petition. No other section of the ERR allows employee organizations to petition to modify existing bargaining units. In addition, there are no other local rules concerning unit modification or any other representation issues included in the stipulated record.

IV. Local 721's September 1, 2009 Unit Modification Petition

On September 1, 2009, Local 721 filed a unit modification petition with the County pursuant to ERR section 10. Local 721's petition requested to "accrete into three of its existing bargaining units those TAP employees whose assignments, working titles, or duties are the same, or close to, those performed by the regular full time or part time employees represented by Local 721 in the Professional, Para-Professional, and Registered Nurse units." It is undisputed that Local 721 did not include any proof that the petitioned-for TAP employees desired representation by Local 721.

On October 30, 2009, the County denied Local 721's petition by letter. The County stated in the letter that "the County has consistently required a showing of majority support before it will proceed with any application to affect the representation rights of unrepresented employees." The County suggested that the three bargaining units at issue lacked a community of interest with the petitioned-for TAP positions, but ultimately stated that "it makes no finding at this time with respect to the appropriateness of the proposed modifications." Rather, the County stated "[t]he County thus denies [Local 721's] request on the threshold issue that [the petition] fails to demonstrate majority (actually any) support from the affected TAP workers."

ISSUE

Did the County violate the MMBA by denying Local 721's September 1, 2009 unit modification petition on the grounds that the petition did not include proof that a majority of the petitioned-for TAP employee supported the petition?

POSITIONS OF THE PARTIES

Local 721 contends that County ERR section 10 applies to unit modification petitions and that this section does not include a proof of support requirement. The County's decision to require a showing of support was therefore inconsistent with the County's own rules concerning unit modifications.

The County contends that "Section 10 of the ERR does not apply to a petition for unit modification of unrepresented employees. For unionization of unrepresented employees, the County requires a showing of majority consent before processing a petition to unionize *unrepresented* employees, as is only fair and in defense of employees' statutory right to refuse to participate in union [activity]." (Emphasis in original.)

CONCLUSIONS OF LAW

MMBA section 3507 authorizes a public agency to adopt local rules for the administration of employer-employee relations, including but not limited to, rules regarding the modification of existing bargaining units. (*County of Orange* (2010) PERB Decision No. 2138-M; *City & County of San Francisco* (2009) PERB Decision No. 2041-M.) It is an unfair labor practice for a public agency to violate a local rule adopted pursuant to MMBA section 3507. (MMBA, § 3509(b); PERB Reg. 32603(g).) Such conduct also violates MMBA section 3506. (*County of Ventura* (2009) PERB Decision No. 2067-M.)

I. Applicability of County ERR Section 10

The parties disagree over whether ERR section 10 applies to Local 721's September 1, 2009 petition. PERB has found that when the language of a statute or local rule is clear and unambiguous, then the intent of the drafters is reflected in the plain meaning of the written language. (*County of Santa Barbara* (2011) PERB Decision No. 2181-M, citing *Barstow Unified School District* (1996) PERB Decision No. 1138.) The plain language of ERR section 10 describes the process where "[a] registered employee organization may propose the modification of an established bargaining unit by filing a request with the Human Resources Director, accompanied by proof that its represented members comprise 15 percent of the employees in the unit."[4] The ERR makes no distinction between petitions to add unrepresented positions to existing bargaining units and other types of unit modification petitions. Therefore, I find that ERR section 10 applies to unit modification requests, including Local 721's September 1, 2009 request.

[4] The County does not contend that Local 721 failed to satisfy the requirement that 15 percent of the bargaining units at issue are represented members of Local 721.

Furthermore, nothing in the plain language of ERR section 10 requires an employee organization proposing any type of unit modification to demonstrate that a majority of the employees in the petitioned-for positions support the petition. Accordingly, I find that the County's October 30, 2009 decision to deny Local 721's petition was inconsistent with the plain language of ERR section 10. Such conduct constitutes an unfair practice under MMBA section 3509(b) and PERB Regulation 32603(a) and (g).

The County argues that ERR section 10 does not apply in petitions to add unrepresented positions to existing bargaining units. PERB has previously found that a public agency's local representation rules are applicable if the rules can achieve what the petitioner is seeking without placing an undue burden on the petitioner. (*County of Orange*, *supra*, PERB Decision No. 2138-M.) If, on the other hand, the goal of the petition cannot be achieved through the public agency's local rules, then PERB Regulations apply. (*Id.*, citing *County of Siskiyou/Siskiyou County Superior Court* (2010) PERB Decision No. 2113-M (*County of Siskiyou*); see also PERB Reg. 61000.)

In *County of Orange*, *supra*, PERB Decision No. 2138-M, the Board held that the employer's local rules concerning unit modification could be applied to the charging party's petition to sever classifications from one unit into a newly formed bargaining unit. In support of this conclusion, the Board recognized that the employer's unit modification rules applied broadly for the purpose of reconfiguring bargaining units. Along the same lines, nothing in the employer's local rules precluded applying the unit modification rules to achieve severance. (*Ibid.*)

Applying this holding to the present case, ERR section 10 is the operative rule for modifying the County's bargaining units. This is precisely what Local 721 sought to do with its September 1, 2009 petition. I find that the goal of Local 721's petition may be readily

achieved through ERR section 10 and that nothing in the ERR precludes using section 10 to achieve Local 721's requested modifications. Accordingly, I reject the County's contention that ERR section 10 did not apply to Local 721's September 1, 2009 petition.

II. Applicability of MMBA Section 3502

The County argues that the majority support requirement is a "well-established labor relations principle" contained in MMBA section 3502. That section states:

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

I find nothing in the language of MMBA section 3502, or any other section of the MMBA for that matter, that requires an employee organization to provide majority support when petitioning to add unrepresented positions to an existing bargaining unit. The County does not argue otherwise. Instead, the County appears to contend that a majority support requirement is implicit in employees' right to refrain from joining or participating in the activities of employee organizations.

The County cites *Jasta Manufacturing, Inc.* (1979) 246 NLRB 48, *Dadco Fashions* (1979) 243 NLRB 1193, *and Lincoln Manufacturing, Inc.* (1966) 160 NLRB 1866 in support of its position. All of these cases concern the formation of a new bargaining unit, not the modification of an existing bargaining unit. For that reason, I find that these cases are distinguishable.[5] Instead, I find *Regents of the University of California* (2010) PERB Decision

[5] It is undisputed that County ERR section 9 requires a showing of majority support to become the majority representative of a new bargaining unit.

No. 2107-H (*UC Regents*), decided under the Higher Education Employer- Employee Relations Act (HEERA),[6] to be more on point. Similar to MMBA section 3502, HEERA section 3565 provides higher education employees with "the right to refuse to join employee organizations or to participate in the activities of these organizations[.]" In *UC Regents*, *supra*, PERB Decision No. 2107-H, an employee organization petitioned to add unrepresented classifications to an existing bargaining unit. Noting first that the PERB regulations concerning unit modifications under HEERA do not require proof of majority support unless the proposed modification will augment the unit by more than 10 percent, the Board expressly rejected the notion that there is some kind of implicit or discretionary authority under the law to require proof of majority support. (*Ibid.*)

Similarly in the present case, County ERR section 10 does not require a petitioning employee organization to provide employee support for a unit modification petition. As the Board found in *UC Regents*, *supra*, PERB Decision No. 2107-H, statutory language protecting employees' rights to refuse to join or participate in the activities of employee organizations does not mandate such a proof of support requirement. Therefore, the County's argument is unpersuasive.

Moreover, the central issue in a unit modification petition is the appropriateness of the proposed bargaining unit. (*Orcutt Union Elementary School District* (2011) PERB Decision No. 2183 (*Orcutt*).) Employee preference is not determinative on this issue. (*Id.*, citing *Berkeley Unified School District* (2005) PERB Decision No. 1744.)

[6] HEERA is codified at Government Code section 3560 et sequentes.

III. The Requirements of MMBA Section 3507

Assuming for the purposes of discussion both that ERR section 10 did not apply and that the MMBA did require a showing of support for unit modification petitions, the County's conduct would have nonetheless been unlawful. In the absence of a local rule on point, the County was not entitled to independently create a rule requiring majority support. Rather, MMBA section 3507 entitles public agencies like the County to adopt new local representation rules only *after* consultation in good faith with the representatives of its recognized employee organizations. There is no evidence in the stipulated record that the County consulted with Local 721 or any other employee organization prior to imposing the majority support requirement.[7]

In the alternative, the County could have informed Local 721 of its position that ERR section 10 did not apply to the September 1, 2009 petition. At that point, Local 721 would have had the option to file its petition under PERB Regulation 61450 et sequentes. PERB Regulations for representation proceedings apply in those cases where the public agency has not adopted applicable local rules. (PERB Reg. 61000.) At that point, PERB, not the County, would have had jurisdiction to approve or deny Local 721's petition. (*County of Orange*, *supra*, PERB Decision No. 2138-M.) The County did not consult with the appropriate employee organizations or inform Local 721 that its local rules did not apply. Instead, the County rejected Local 721's petition based on an unwritten majority support policy. The County's decision to adopt such a policy exceeds the authority granted to it under MMBA section 3507.

[7] The record does include evidence that the County denied prior unit modification petitions for lacking proof of support. This is not sufficient to demonstrate that the County consulted with the required employee organizations prior to adopting this policy.

IV. The County's Other Defenses

The County also makes several other arguments in its defense. Namely, the County contends that the instant complaint should be dismissed because the bargaining units proposed in the September 2009 petition are not appropriate units under the County's unit determination criteria. The County further argues that incorporation of TAP positions into the proposed bargaining units would unlawfully require the County to deduct union dues from TAP employees and to convert temporary TAP positions into civil service positions.[8] Finally, the County argues that the employees in the petitioned-for TAP positions lack a "reasonable basis expectation of continued employment" and thus are not eligible for inclusion in a bargaining unit.[9] I find it unnecessary to address these issues because they were not raised in either the PERB complaint or the County's answer.

[8] To the extent that the County contends that the parties' existing memorandum of understanding would automatically apply to the newly added positions, this assumption is unfounded. The addition of new positions to a bargaining unit does not necessarily mean that previously negotiated terms and conditions of employment apply to the new positions. (*Orcutt, supra*, PERB Decision No. 2183, citing *Palo Alto Unified School District* (1983) PERB Decision No. 352.) Rather, application of such terms would be subject to the negotiations process. (*Ibid.*)

[9] In support of this argument, the County cites to *San Bernardino City Unified School District* (2004) PERB Decision No. 1602 and *State of California (Department of Personnel Administration)* (1992) PERB Decision No. 948-S. Both of those cases concerned whether certain individuals were considered "employees" for determining their eligibility to participate in a representation election concerning an appropriate bargaining unit. In contrast, the present case concerns Local 721's petition to modify existing bargaining units to include unrepresented TAP positions, is irrespective of the employees that currently fill those positions. The petition sought a determination on unit appropriateness, and the County declined to address that issue.

In addition, to the extent that the County argues that temporary TAP employees lack representation rights under the MMBA, MMBA grants rights and protections to all public agency employees, defined as "any person employed by the public agency[.]" (MMBA, § 3501(d).) There is no length of employment requirement in this definition.

For all these reasons, I find that the County acted inconsistently with ERR section 10 and that its conduct violates MMBA section 3506 and constitutes an unfair practice under MMBA section 3509(b) and PERB Regulation 32603(a) and (g).

REMEDY

Government Code sections 3509(b) and 3541.3(i) give PERB the authority:

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

In this case, the County violated the MMBA by acting inconsistently with its own local rules regarding unit modification petitions. It is the ordinary remedy in such cases that an order issue directing the respondent to cease and desist from continuing to engage in such conduct. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.) It is also appropriate that the County be ordered to rescind its denial of Local 721's September 1, 2009 unit modification petition and to process that petition in good faith according to the County's ERR. It is also appropriate to require the County to post a notice incorporating the terms of the order. (*Placerville Union School District* (1978) PERB Decision No. 69.) It effectuates the purpose of the MMBA that employees be informed by a notice, signed by an authorized agent, that the respondent has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. (*Ibid.*)

PERB typically requires that the above-referenced notice be posted in all work locations where notices to County employees are customarily posted. (*County of Riverside* (2009) PERB Decision No. 2090-M.) In addition to that, Local 721 requests that PERB order the County to post the notice of violation electronically, citing in support *J&R Flooring, Inc.* (2010) 356 NLRB No. 9. I find some merit in Local 721's request, particularly given that the temporary nature of

TAP employee job assignments may make it unlikely for TAP employees to see a traditional notice posting. Nevertheless, I find that insufficient evidence was presented in the record about whether the County has the capability to post PERB notices electronically or whether TAP or other County employees were more likely to view an electronic posting over a traditional posting. Therefore, I deny Local 721's request for an electronic posting.

Local 721 also requests unspecified sanctions against the County. PERB lacks the authority to issue punitive damages. (*Regents of the University of California* (2010) PERB Decision No. 2094-H, citing *Mark Twain Union Elementary School District* (2003) PERB Decision No. 1548.) Thus, any remedy ordered by PERB must be compensatory in nature. (*County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M.) However, PERB has ordered the payment of attorneys' fees where the respondent's case was "without arguable merit" and pursued in "bad faith." (*City of Alhambra* (2009) PERB Decision No. 2036-M.)

In this case, Local 721 contends that sanctions are appropriate because the County has previously denied similar petitions by Local 721 for the same reasons and PERB found such conduct to be unlawful. The conduct described by Local 721 is the subject of *County of Riverside*, *supra*, PERB Decision No. 2163-M. As explained above, the appellate court is currently considering whether to review that decision. Local 721 opposed holding the instant case in abeyance pending the court's decision. Because of the pending nature of the Decision No. 2163-M, I find insufficient information to decide whether the County's conduct was without arguable merit and pursued in bad faith. (*City of Alhambra*, *supra*, PERB Decision No. 2036-M.) Therefore, I deny Local 721's request for sanctions.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3506 and 3509(b) by unreasonably and unlawfully denying a petition submitted by Service Employees International Union, Local 721 (Local 721) on September 1, 2009, seeking to add certain Temporary Assignment Program employees to Local 721's existing represented bargaining units. This conduct also violated the MMBA by denying Local 721's right to represent its members and interfering with the rights of County employees.

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

A. CEASE AND DESIST FROM:

1. Applying the rules of the County's Employee Relations Resolution regarding unit modification unreasonably to require proof of majority support for Local 721's September 1, 2009 unit modification petition.

2. Denying Local 721 the right to represent County employees.

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

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

1. Rescind the October 30, 2009 denial of Local 721's September 1, 2009 unit modification petition.

2. Within ten (10) workdays of the service of a final decision in this matter, process Local 721's September 1, 2009 unit modification petition with a reasonable

interpretation of the County's Employee Relations Resolution that is consistent with this Proposed Order.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the County customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 721.

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

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

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

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

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

Eric J. Cu
Administrative Law Judge