*** * * CLARIFIED BY T*rustees of the California State University v. Public Employment Relations Bd.* (2026) 118 Cal.App.5th 90 and *Trustees of the California State University* (2026) PERB Decision No. 2915a-H * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ORANGE COUNTY EMPLOYEES ASSOCIATION, et al., Charging Parties, v. COUNTY OF ORANGE, Respondent.	Case Nos. LA-CE-934-M LA-CE-935-M LA-CE-944-M PERB Decision No. 2594-M November 6, 2018

Appearances: Donald L. Drozd, General Counsel, for the Orange County Employees Association; Reich, Adell & Cvitan, by Marianne Reinhold, Laurence S. Zakson, and Aaron G. Lawrence, Attorneys, for the Orange County Attorneys Association; The Meyers Law Group, by Adam N. Stern, Attorney, for International Union of Operating Engineers Local 501; Liebert Cassidy Whitmore, by Adrianna E. Guzman, Attorney, for the County of Orange.

Before Banks, Winslow, Shiners, and Krantz, Members.

DECISION

WINSLOW, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions by the Orange County Attorneys Association (OCAA), the Orange County Employees Association (OCEA), and the County of Orange (County) to a proposed decision by an administrative law judge (ALJ). The complaints alleged that the County violated the Meyers-Milias-Brown Act (MMBA)[1] by adopting what is referred to as the Civic Openness in Negotiations (COIN) ordinance, without giving the charging parties—OCAA, OCEA, and the International Union of Operating Engineers, Local 501 (Local 501)—notice and an opportunity to meet and confer. The ALJ concluded that some of

[1] The MMBA is codified at Government Code section 3500 et seq. All statutory references herein are to the Government Code, unless otherwise specified.

the disputed provisions of the ordinance fell within the scope of representation and were therefore unlawfully adopted without giving OCAA, OCEA, or Local 501 notice and an opportunity to bargain. The ALJ also considered, but rejected, OCAA's theory that MMBA section 3507 required the County to consult in good faith before adopting the ordinance.

The Board itself has reviewed the record in its entirety and considered the parties' exceptions and responses thereto. Based on that review, we affirm in part and reverse in part the ALJ's decision.

SUMMARY OF FACTS

OCEA, OCAA, and Local 501 are the exclusive representatives of appropriate units of employees within the meaning of PERB Regulation 32016, subdivision (b),[2] and are recognized employee organizations within the meaning of MMBA 3501, subdivision (b).[3] The County is a public agency within the meaning of MMBA section 3501, subdivision (c) and PERB Regulation 32016 subdivision (a).

On May 14, 2014, the County posted the agenda for its May 20, 2014 Board of Supervisors meeting. One of the agenda items was consideration of the first reading of the proposed COIN ordinance.

At the May 20, 2014 meeting, representatives of OCEA, OCAA, and Local 501 objected to the County's failure to give notice and an opportunity to bargain before adopting

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

[3] OCEA represents multiple County bargaining units including the General Unit, Health Care Professional Unit, Community Services Unit, Office Services Unit, Sheriff's Special Officer and Deputy Coroner Unit, Supervising Management Unit, Probation Services Unit, and Probation Supervisory Management Unit. OCAA represents the Attorney Unit, and Local 501 represents the Craft and Plant Engineer Unit.

the ordinance. The first reading was continued to a meeting in June. Meanwhile, the parties exchanged correspondence in which OCEA, OCAA, and Local 501 continued to demand bargaining over the ordinance. The County maintained that the ordinance was outside the scope of representation and refused to bargain.

The proposed COIN ordinance was amended over the course of several Board of Supervisors meetings in June and July. At the August 5, 2014 meeting, the Board of Supervisors approved the ordinance, which added section 1-3-21 to the County's codified ordinances, with the following provisions:

- **Prospective Application:** The ordinance shall not apply to labor contract negotiations which had already commenced prior to the adoption of the ordinance. (Subd. (a)(1).)[4]

- **Independent Principal Negotiator:** The County's principal negotiator shall not be an employee of the County. The use of the principal negotiator may only be waived by a majority vote of the Board of Supervisors. (Subd. (a)(2).)

- **Description of Negotiable Ground Rules:** The ordinance shall not prevent the negotiation of ground rules to any MMBA labor contract negotiations. Consistent with the MMBA, the parties may, but are not required to, negotiate preliminary procedural matters governing the conduct of negotiations, including, but not limited to, the time and place of bargaining, the order of issues to be discussed, the signing of tentative agreements, the requirement of package bargaining, or the use of supposals. (Subd. (a)(3).)

- **Independent Economic Analysis—Opening Proposal:** The County Auditor-Controller shall prepare an independent economic analysis or report which describes and summarizes the fiscal costs to the County of benefits and pay currently provided to bargaining unit members in comparison to the costs of each term and condition offered in negotiations or set forth as a supposal in negotiations. The report will itemize

[4] All undifferentiated references to a subdivision hereafter refer to the COIN ordinance, section 1-3-21.

the annual and cumulative costs which would result from the adoption or acceptance of any initial meet and confer proposal. (Subd. (b)(1).)

- **Public Disclosure of Economic Analysis of Opening Proposal—30 Days Before Consideration by the Board of Supervisors:** The report shall be made available for review by the Board of Supervisors and the public at least 30 days before consideration by the Board of Supervisors of an opening proposal to be presented to a recognized employee organization of an amended, extended, successor or original Memorandum of Understanding (MOU). (Subd. (b)(2).)

- **Independent Economic Analysis—Ongoing proposals:** The County Auditor-Controller shall prepare an updated report itemizing annual and cumulative costs which would result from the adoption or acceptance of each meet and confer proposal from the recognized employee organization or County. Such updates shall compare the compensation elements with the prior year as well as to prior proposals made. Reports and updates shall include best estimates as to the change from currently computed pension unfunded actuarial accrued liability and retiree medical unfunded actuarial accrued liability. (Subd. (b)(3).)

- **Reporting Out of Closed Session-Prior Formal Offers, Counteroffers and Supposals:** The Board of Supervisors shall timely report out from closed session any and all prior formal offers, formal counteroffers and supposals made by either the County or the recognized employee organization which were communicated to the County during closed session. Such report shall also include the release of the names of persons in attendance at, and locations of, and any pertinent facts regarding the negotiations sessions. (Subds. (c)(2) and (c)(3).)

- **Duty to Advise During Closed Session:** The Board of Supervisors' representatives have a duty to advise the Board of Supervisors during any closed session of offers, counteroffers, information provided, statements of position by recognized employee organization and County representatives since the last closed session. (Subd. (c)(4).)

- **Disclosure of all Offers, Counteroffers and Supposals within 24 hours to the Board of Supervisors and the Public:** All offers, counteroffers and supposals made by

either the County or the recognized employee organization(s) shall be disclosed to the Board and the public within 24 hours of the making of such proposal. (Subd. (c)(6).)

- **Adoption of Agreement Only After a Minimum of Two Board Meetings where Public has opportunity to Review and Comment:** The adoption of an agreement between the County and the recognized employee organization shall only take place after the matter has been heard at a minimum of two board meetings and the public has had an opportunity to review and comment on the matter. The agreement shall be posted on the County website along with the final report and updates made by the County Auditor-Controller. (Subd. (d).)

- **Severability Clause:** If any provision or clause of the ordinance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity will not affect the other provisions or clauses. (Subd. (f).)

PROPOSED DECISION

The ALJ considered five of the COIN ordinance's requirements: (1) that the County Auditor-Controller prepare a pre-negotiations report of the cost of employee wages and benefits and the cost of any initial proposals to be considered by the Board of Supervisors (subd. (b)(1)); (2) that the Auditor-Controller's report be available to the Board of Supervisors and the public for 30 days before the Board of Supervisors considers its opening bargaining proposal (subd. (b)(2)); (3) that the report be updated to include the cost of all proposals throughout negotiations (subd. (b)(3)); (4) that all offers, counteroffers, and supposals made during negotiations be publicly reported within 24 hours, and that the Board of Supervisors publicly report out of its closed sessions all offers, counteroffers, and supposals (subds. (c)(2), (c)(3), (c)(6)); and (5) that the Board of Supervisors may not adopt a tentative agreement until it has held two public meetings (subd. (d)).

The ALJ analyzed these requirements under the test for negotiability articulated in *Claremont Police Officers Association v. City of Claremont* (2006) 39 Cal.4th 623 (*Claremont*)

and applied by the Board in *City of Alhambra* (2010) PERB Decision No. 2139-M (*Alhambra*). He concluded that the requirement of subdivision (b)(2)—which he termed a "30-day non-negotiations period"—fell within the scope of representation, because it potentially interferes with section 3505's command to meet and confer "promptly." The ALJ also concluded that the requirements of subdivisions (c)(2), (c)(3), and (c)(6), fell within the scope of representation, because they preclude an agreement to keep negotiations confidential. He concluded that the remaining requirements did not fall within the scope of representation, as they pertained to the County's internal processes.

As for OCAA's allegation that the County was required to consult in good faith over the COIN ordinance pursuant to MMBA section 3507, even if it was not within the scope of representation, the ALJ considered this allegation under the unalleged violation test, rather than as a motion to amend the complaint. The ALJ concluded that this allegation met the test for an unalleged violation, but that it failed on the merits. He determined that "[t]he restriction[s] on ground rules in COIN do not fall into the same category of dispute resolution procedures set forth in MMBA section 3507, subdivision (a)(5), which would most likely include: mediation, factfinding, or interest arbitration" and that "[i]t also does not fall under the catchall subsection of MMBA section 3507, subdivision (a)(9), as it does not concern employee organization/employer 'representation' matters (recognition, etc.) which is the focus of MMBA section 3507."

As a remedy for the County's failure to bargain, the ALJ ordered that the County rescind the unlawfully adopted portions of the ordinance and post a notice of its violation by physical and electronic means "customarily used by the County to communicate with its employees in the bargaining units represented by OCEA, OCAA, and [Local 501]."

THE PARTIES' EXCEPTIONS

OCEA and OCAA except to the ALJ's conclusions regarding subdivisions (b)(1) and (b)(3) of the ordinance. OCAA also excepts to the ALJ's conclusion regarding subdivision (b)(2) as being too narrow, and to the scope of the proposed order. The County excepts to the ALJ's conclusions that subdivisions (b)(2) and (c)(2), (c)(3), and (c)(6) are within the scope of representation.[5]

DISCUSSION

I. Unilateral Change

The ALJ determined that the only element of PERB's unilateral change test at issue in this case is whether the COIN ordinance concerned a matter within the scope of representation. (See *County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 18-19.) This is also the only element raised by the parties' exceptions.

The scope of representation under the MMBA includes "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (§ 3504.) This case does not directly involve wages, hours, or other terms and conditions of employment, but rather aspects of the COIN ordinance that are claimed to be negotiable because they constitute ground rules for negotiations.

[5] No party has excepted to the ALJ's conclusion that subdivision (d) is outside the scope of representation and the scope of consultation. Therefore, it is not before us. (PERB Regulation 32300, subd. (c).) Nor has any charging party contended that unilateral adoption of subdivision (a) of the ordinance was unlawful.

The Board has long held that "the parties must bargain collectively about the preliminary arrangements for negotiations in the same manner they must bargain about substantive terms or conditions of employment." (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 23 (*Stockton*), citing *General Electric Co.* (1968) 173 NLRB 253; see also *Anaheim Union High School District* (1981) PERB Decision No. 177, p. 10 (*Anaheim*), citing *Borg-Warner Corp.* (1972) 198 NLRB 726; *St. Louis Typographical Union No. 8* (1964) 149 NLRB 750 [no legal basis for distinguishing negotiations on ground rules from negotiations on substantive issues]; *Gonzales Union High School District* (1985) PERB Decision No. 480, adopting proposed decision, p. 47.) Thus, ground rules are "equivalent to a mandatory subject of bargaining." (*Compton Community College District* (1989) PERB Decision No. 728, adopting proposed decision, p. 56.) We see no reason not to apply this precedent when interpreting the MMBA. (See *Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1090.)

Arguing a point not raised by any party in this case, our dissenting colleague would overrule our longstanding case law holding that ground rules are a mandatory subject of bargaining and follow the National Labor Relations Board (NLRB) and some other jurisdictions in treating ground rules as a permissive subject. As we have consistently noted, PERB may take guidance from the NLRB, but we are not compelled to follow every turn of the private sector case law, especially where we conclude that it does not effectuate the purposes of the statutes we are charged with enforcing. (*Napa Valley Community College District* (2018) PERB Decision No. 2563, p. 13; *Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 28.) In this case, we decline to follow the NLRB rule for several reasons.

At the outset, we note that this Board has treated ground rules as a mandatory subject of bargaining for 38 years. (*Stockton*, *supra*, PERB Decision No. 143.) In *Anaheim*, *supra*, PERB Decision No. 177, pp. 8-12, the Board explained:

> *It is essential to the negotiating scheme of things that neither side be afforded, by law, dominance over the process, thus negating the concept of mutuality and good faith. Allowing the employer to unilaterally dictate the matter of released time, including the number of employee negotiators, amounts of compensation and scheduling of sessions, would give to the employer precisely that objectionable form of dominance. . . .*
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> . . . . To permit the employer to decide at the outset how many hours or days will finally be required and at what times negotiations shall take place and over what duration per session is to apply an inherently unrealistic formula to these arrangements and, by definition, to establish an unreasonably inflexible and mechanistic policy.
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> [¶ . . . ¶]
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> *[T]here is no legal basis for distinguishing negotiations on ground rules from negotiations on substantive issues. The duty to bargain means just that. The employer's position on procedural issues, as its position on wages, hours or terms and conditions of employment, is to be expressed through its own proposals or counterproposals*.

(Emphasis added.) The Board has reaffirmed this rule time and again. (*Gonzales Union High School District*, *supra*, PERB Decision No. 480, p. 47-48; *Compton Community College District*, *supra*, PERB Decision No. 728, adopting proposed decision, p. 56; *Sierra Joint Community College District* (1981) PERB Decision No. 179, p. 6 [neither party may unilaterally dictate scheduling of negotiations]; *State of California (Board of Equalization*) (1997) PERB Decision No. 1235-S, p. 3; *Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 26 [ignoring proposal for ground rules considered a flat refusal to bargain].) This consistent treatment of ground rules as a mandatory subject of bargaining has

established a settled expectation among PERB's constituents. To upset that expectation in a case in which the issue was not raised by the parties and therefore not briefed by them would be a disservice to rational adjudication.

These four decades of treating ground rules as a mandatory subject belie the dissent's belief that PERB's rule makes it more likely that a party will insist to impasse on a ground rule and thereby stifle negotiations in their inception. Our case law discloses no such adverse consequences. In contrast, one of the cases the dissent cites reveals exactly this consequence occurring under the rule the dissent proposes. (*Lincoln County*, 2018 WL 4292910 [Washington Public Employment Relations Commission].) During the term of a collective bargaining agreement, the employer unilaterally adopted a COIN-type resolution declaring, among other things, that it would "conduct all collective bargaining contract negotiations in a manner that is open to the public." (*Id.* at p. 1). Thereafter, when the employer and an employee organization began negotiating a new contract, they vehemently disagreed on whether to bargain in private as they had in the past, or to follow the employer's newly passed resolution and invite the public to negotiations. Each party refused to negotiate unless the other conceded this ground rule issue, and each filed an unfair practice charge averring that the ground rule was a permissive subject of bargaining, and that the other party was unlawfully refusing to negotiate while insisting to impasse on a permissive subject. Twenty months after the parties' contract had expired, with the parties still unable to begin negotiations, the Commission ruled that the topic was a permissive subject of bargaining and that both parties had therefore unlawfully insisted to impasse on a permissive topic. The Commission then considered the appropriate remedy. The hearing examiner's order had directed that the parties must return to the table and work it out, leading one of the parties to indicate, on appeal, that

such an order "begs the question, 'What do we do now?'" (*Id*. at p. 8). The Commission answered as follows: "What the parties do now is . . . [t]he parties must bargain." (*Ibid*.) Thus, faced with each side refusing to bargain over a ground rule, the Commission concluded that the proper remedy was to treat the ground rule as essentially a mandatory topic, even while labeling it permissive. (*Id*. at p. 10.) Indeed, the extent to which the Commission fell back on treating the issue as essentially a mandatory topic is evident throughout the decision, especially where the Commission indicates that parties are out of compliance if they "respond[] to the other party's proposals on how to conduct the negotiations by simply saying 'no.'" (*Ibid*.) Equally importantly, the Commission recognized that no matter how it labeled the issue, and no matter how much the parties might try to negotiate, they might still end up disagreeing. Accordingly, the Commission ordered that if the parties could not reach agreement on public versus private bargaining during two additional bargaining sessions, they must engage a mediator, and if they still could not reach agreement at the close of mediation, then the union's position would prevail and bargaining would occur in private. (*Id*. at p. 10.)

Lincoln County, *supra*, 2018 WL 4292910, thus demonstrates why a bargaining break down over ground rules is at least as likely, if not more likely, to occur if such topics are labeled as permissive. The case also highlights that for bargaining parties, the most important issue may not be whether a topic is mandatory or permissive, but whether there is a default position established by statute or precedent that impacts parties' ability to impose or insist upon their position at various stages. Indeed, for some permissive topics, one side has a prerogative to make a unilateral change or to insist that none be made, while as to other permissive topics both parties have the right to insist that no change be made. For instance, if the parties cannot agree on the permissive topic of unit scope, or one party declines to

negotiate on that topic, then neither side may alter the status quo. (*Aggregate Industries v. NLRB* (D.C. Cir. 2016) 824 F.3d 1095, 1099.) But if the parties cannot agree on a permissive matter involving internal union affairs, or a union declines to negotiate on that topic, then the union has full prerogative to make changes. (*Id.* at p. 1099, fn. 4.) The same is true as to certain mandatory topics. (See, e.g., *City of San Ramon* (2018) PERB Decision No. 2571-M, pp. 13-14 [contract duration is a mandatory subject, but after impasse employer may not impose duration for new terms of employment]; *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, pp. 23-24 [although no-strike clause is a mandatory subject, after impasse an employer may not impose a no-strike clause or other waivers of statutory rights].)

In declaring that bargaining in private should be the default, Washington's Commission is not alone. PERB and other labor agencies have established similar defaults—irrespective of whether those agencies treat the topics as mandatory or permissive—in order to provide guidance that supports sound labor relations, and to prevent negotiations from stalling over preliminary topics. (See, e.g., *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 28-29 & 33-34 (*Petaluma*) [although presence of observers at bargaining is negotiable, the legislative scheme provides a default rule under which there are no such observers, absent agreement, meaning neither party is entitled to insist on the presence of observers, nor to impose such a condition after impasse].)

Along the same lines, the dissent cites a series of non-California cases holding that a party may not insist on observers at bargaining, and also may not insist that the other party agree to audio or stenographic recording of negotiations. (*Bartlett-Collins Co.* (1978) 237 NLRB 770, 773 & fn. 9, enf. (10th Cir. 1981) 639 F.2d 652 [finding that recording inhibits

free bargaining, the default should therefore be no recording, and any party's proposal to change that default is permissive and may not be insisted upon]; *Latrobe Steel Co. v. NLRB* (3d Cir. 1980) 630 F.2d 171, 176 [employer unlawfully insisted on presence of stenographers as a precondition to bargaining]; *Local 342-50, United Food and Commercial Workers Union* (2003) 339 NLRB 148, 155 [applying the *Bartlett-Collins Co.* default rule to grievance meetings]; *Washington County Consolidated Communications Agency*, 2014 WL 3339216, p. 8 [Oregon Employees Relations Board] ["[W]e have decided to adopt the approach taken by the NLRB on the subject of recording bargaining sessions"]; *County of Kane* (1988) 4 PERI ¶ 2031 [Illinois State Labor Relations Board] [employer had no right to insist on verbatim record of negotiations]; *City of Deerfield Beach* (1981) 7 FPER ¶ 12438 [Florida Public Employees Relations Commission] [tape recording is permissive subject of bargaining]; *Town of Shelter Island* (1979) 12 PERB ¶ 3112 [New York Public Employment Relations Board] [parties may propose having observers at bargaining, and may seek mediation on the issue, but may not insist to impasse on that issue].)[6]

We have no quibble with the above-stated default rule that no party may unilaterally impose or insist on negotiations being recorded or on inviting observers to bargaining. However, based on our precedent, including *Petaluma*, *supra*, PERB Decision No. 2485, we

[6] One case upon which the dissent relies involved a ground rules dispute on a different topic. In *University of Illinois, Chicago* (2018) 34 PERI ¶ 173, a non-precedential decision by the executive director of the Illinois Educational Labor Relations Board, it was concluded that the parties' history, in which they had typically commenced successor bargaining in the spring prior to a summer contract expiration, provided the default for when the parties' next round of bargaining should begin. The employer was therefore found to have had no duty to bargain in response to a union's demand for early negotiations. We need not delve into whether such history sets a "default" in any particular set of circumstances, but we disagree that one party's request to start successor negotiations earlier than in the past is not a mandatory topic of bargaining. Such a rule is antithetical to sound labor relations.

reach that result not by artificially labelling ground rules issues as permissive. As noted above, labeling a topic as mandatory or permissive does not resolve whether one party may or may not impose or insist on a particular position. In other words, even as to ground rule issues for which there is an established default, such as recording negotiations or allowing observers at negotiations, it makes sense for PERB to maintain its longstanding rule that such topics are mandatory rather than permissive. Either party must negotiate in good faith regarding such issues at the other party's request, but there is a default that applies in the absence of agreement. This arrangement has worked well in California for decades, and we continue to believe it serves the parties best in avoiding the consequences the dissent fears.

As to some ground rule topics, there is no default in the absence of an agreement. For instance, there is no established default that prescribes particular days of the week, times, intervals, durations, frequencies, topic sequences, or locations for bargaining. As to these topics, too, we find it preferable to label them as mandatory. Indeed, even in jurisdictions that label all ground rules as permissive, it is rare to find a decision suggesting that any party may decline to negotiate over these standard topics.[7]

There are other flaws in the dissent's belief that our rule of the last four decades will suddenly begin to cause contract negotiations to be hung up on ground rules. A disagreement over ground rules would not privilege either side to declare an overall impasse or to refuse further meetings. There is no impasse absent an overall deadlock, meaning that a party cannot separate out just one negotiable subject and declare impasse on that topic alone. (*City of*

[7] No party has the right to impose unilaterally its positon regarding days of the week, times, intervals, durations, frequencies, topic sequences, or locations for bargaining. (See, e.g., *Anaheim*, *supra*, PERB Decision No. 177, p. 9.) While the dissent appears to agree, it is willing only to opine that a party's refusal to discuss ground rules "could still be evidence of bad faith bargaining."

Roseville (2016) PERB Decision No. 2505-M, p. 33.) In order for an overall impasse to occur based on a single disagreement, the subject of disagreement must be of overriding importance. (*Ibid.*) For that reason, and given that the duty to meet and confer in good faith does not permit a party to insist, for instance, on unreasonably narrow windows in which to bargain,[8] it is not surprising that California bargaining parties have adapted to the PERB rule and avoided the ills that the dissent predicts.

Moreover, the dissent ignores that in many cases, including this one, a ground rules issue arises not during contract negotiations, but rather as part of an employer's mid-contract effort to legislate new procedures for the future. (See, e.g., *Lincoln County*, 2018 WL 1833319, pp. 2, 7, fn. 4 [discussing how employer came to believe it would gain a strategic bargaining advantage by unilaterally passing a resolution requiring public negotiations].) While the dissent urges us to overrule longstanding precedent and label ground rules as a permissive subject of bargaining, it is unclear if the dissent assumes that under such a revised rule employers would enjoy the right to legislate new ground rules unilaterally.[9]

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[8] See, e.g., *Gonzales Union High School District*, *supra*, PERB Decision No. 480, adopting proposed decision at p. 38 [union representing school district employees could not declare that it was unavailable to bargain during summer break].

[9] As discussed *ante*, it would not be safe to assume this is true for the topics at issue in the County's ordinance, as both for certain mandatory topics and for certain permissive topics, employers are constrained from making unilateral changes. Because in this case the County passed its ordinance without notice and an opportunity to meet and confer, and the County refused to meet and confer with OCEA, OCAA and Local 501, we are not called upon to determine what defaults may or may not apply as to each of the ordinance's topics, nor must we decide whether the County could have imposed or insisted on any part of the ordinance after meeting and conferring in good faith and reaching a bona fide impasse, or as a condition to signing a new contract. Generally, however, unilateral action as to ground rules will often have a destructive impact on negotiations by torpedoing such efforts before they get underway. Such conduct could therefore constitute an indicia of bad faith under the totality of

However, two things are clear to us regarding an employer's mid-contract desire to alter the parameters of future negotiations. First, treating ground rules as a mandatory topic is the most straightforward path to improving communication between parties, maximizing their opportunities to achieve a strong relationship, and preventing unilateral self-help designed to create a more favorable playing field for one side in future negotiations. Second, such discussions are a stand-alone negotiation occurring at a time that does not necessarily delay other negotiations.

In sum, as a matter of policy, we believe treating the general subject of ground rules as a mandatory subject of bargaining better effectuates the purposes of the MMBA and the other statutes we administer. The MMBA declares dual purposes in section 3500: "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment between public employers and public employee organizations," and to promote the improvement of employer-employee relations. These purposes are best served by collective bargaining. We therefore decline to alter our long-held rule that ground rules must be bargained over just as any other mandatory subject of bargaining.

The ALJ acknowledged the Board's precedent on the negotiability of ground rules, but noted that it has not been specifically determined whether ground rules are negotiable under the MMBA. To answer this question, and to determine whether the specific aspects of the COIN ordinance were negotiable, the ALJ turned to the three-part test applied by the Board in *Alhambra*, *supra*, PERB Decision No. 2139-M, which is derived from the Supreme Court's

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circumstances test, even if it did not constitute a per se violation as a unilateral change. (*Stockton*, *supra*, PERB Decision No. 143, p. 24.)

decision in *Claremont*, *supra*, 39 Cal.4th 623. We believe this was an unnecessary analytical step, and not well-suited to determine whether matters within the general topic of ground rules are negotiable.

Claremont prescribes a three-step balancing test "to determine whether management must meet and confer with a recognized employee organization . . . when the implementation of a fundamental managerial or policy decision significantly and adversely affects a bargaining unit's wages, hours, or working conditions." (*Claremont*, *supra*, 39 Cal.4th 623, 637.) The California Supreme Court explained the test as follows:

> First, we ask whether the management action has "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees." . . . If not, there is no duty to meet and confer. . . . Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then . . . the meet-and-confer requirement applies. . . . Third, if both factors are present . . . we apply a balancing test. The action "is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question."

(*Id.* at p. 638, citations omitted.) *Claremont* acknowledged that *First National Maintenance Corporation v. NLRB* (1981) 452 U.S. 666 (*First National Maintenance*) "applied a similar balancing test." (*Claremont*, *supra*, at p. 637.)

In *Alhambra*, *supra*, PERB Decision No. 2139-M, the Board described *Claremont* as establishing the "test to determine whether a matter is within the scope of representation under the MMBA." (*Id.* at p. 13.) In that case, the issue was whether the minimum qualifications for a bargaining unit position was within the scope of representation. Applying *Claremont*, the Board determined it was not.

A year after *Alhambra* issued, the California Supreme Court again clarified the test for determining the scope of bargaining under the MMBA. (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. PERB* (2011) 51 Cal.4th 259, 272-273 (*Richmond Firefighters*).) The Court observed that there are three distinct categories of managerial decisions, each with its own implications for the scope of representation: (1) "decisions that 'have only an indirect and attenuated impact on the employment relationship' and thus are not mandatory subjects of bargaining," such as advertising, product design, and financing; (2) "decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls," which are "*always* mandatory subjects of bargaining" (emphasis added); and (3) "decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve 'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.'" (*Ibid*.) The Court explained that the *First National Maintenance* balancing test applies only to the third category of managerial decisions:

> To determine whether a particular decision in this third category is within the scope of representation, the high court [in *First National Maintenance*] prescribed a balancing test, under which "in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."

(*Richmond Firefighters*, *supra*, at p. 273, quoting *First National Maintenance*, *supra*, 452 U.S. 666, 679.)

By explaining that decisions directly defining the employment relationship are always mandatory subjects of bargaining, *Richmond Firefighters* provides an important clarification of the limits of *Claremont*. It is not necessary to ask whether such a decision has a "significant and adverse effect" on wages, hours, or other terms and conditions of employment, nor is it necessary to balance that effect against the employer's need for unencumbered decisionmaking. This is consistent with our own case law. (See *Huntington Beach Union High School District* (2003) PERB Decision No. 1525, pp. 8-9 [when the Legislature expressly places a subject within the scope of representation, it is "neither necessary nor proper to . . . balance[] the potential benefits of negotiating a particular item against the employer's management prerogatives"].) And indeed, the literal application of the *Claremont* test to decisions directly defining the employment relationship would conflict with decades of settled labor law. Because a decision to increase employee wages or benefits would not have an adverse effect on employees, those decisions would be withheld from the scope of representation. But "[w]hether a change is beneficial or detrimental to the employees is a decision reserved to the employees as represented by their union." (*Solano County Employees' Assn. v. County of Solano* (1982) 136 Cal.App.3d 256, 262.) Increases in wages and benefits are fully negotiable. (See, e.g., *NLRB v. Katz* (1962) 369 U.S. 736, 743; *Ruline Nursery Co. v. Agricultural Labor Relations Bd.* (1985) 169 Cal.App.3d 247, 266; *Modesto City Schools* (1983) PERB Decision No. 291, pp. 47-48.) *Richmond Firefighters* confirms that *Claremont* did not signal a departure from this longstanding principle.

Thus, under *Richmond Firefighters*, a balancing test applies only to employer decisions that directly affect employment, such as eliminating jobs, but also involve "'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to

manage its affairs unrelated to employment.'" (*Richmond Firefighters*, *supra*, 51 Cal.4th 259, 273; see also *International Assn. of Firefighters, Local 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 1210 ["The scope of representation includes, among other things, management decisions 'directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls'" (quoting *Richmond Firefighters*)].) To the extent *Alhambra*, *supra*, PERB Decision No. 2139-M, conflicts with *Richmond Firefighters* on this point—specifically, by suggesting that the *Claremont* test *always* applies to determine whether a matter is within the scope of representation under the MMBA—we disavow it.[10]

Applying the proper framework, our first inquiry in this case is whether the disputed provisions of the COIN ordinance constitute ground rules. Ground rules may include "the time and place for bargaining to start, the order of issues to be discussed, the final settlement conditions that may be imposed, questions of ratification and approval . . . , and a variety of similar procedural matters." (*Anaheim*, *supra*, PERB Decision No. 177, p. 9.)[11] As another example, parties sometimes propose that negotiations should remain confidential. (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 3; *King City Joint Union High School District* (2005) PERB Decision No. 1777, adopting proposed decision, p. 5.) In short,

[10]While *Claremont* remains good law, we must acknowledge the Supreme Court's more recent pronouncement in *Richmond Firefighters* that the *First National Maintenance*-type balancing test—the same test prescribed by *Claremont*—applies only to some managerial decisions, not those directly defining the employment relationship. (*Richmond Firefighters*, *supra*, 51 Cal.4th 259, 273.)

[11] Subdivision (a)(3) of the ordinance itself defines ground rules as "preliminary procedural matters governing the conduct of negotiations including, but not limited to, the time and place for bargaining, the order of issues to be discussed, the signing of tentative agreements, the requirement of package bargaining, or the use of supposals."

ground rules directly regulate the bargaining relationship between the parties. If the provisions of the COIN ordinance qualify as ground rules, they are negotiable like any other mandatory subject (*Stockton*, *supra*, PERB Decision No. 143, p. 23), regardless of any managerial interest the County might assert (*Richmond Firefighters*, *supra*, 51 Cal.4th 259, 272).

If the ordinance's provisions do not directly regulate the bargaining relationship, however, they may still be negotiable if they have a direct impact on the negotiating process, and if the benefit of negotiations outweighs the County's need for unencumbered decisionmaking. (*Richmond Firefighters*, *supra*, 51 Cal.4th 259, 272.) On the other hand, if their impact is indirect and attenuated, they are not negotiable. (*Ibid.*)

Some fundamental matters related to negotiations are reserved to the parties and excluded from negotiations, such as the identity of a party's bargaining representatives. (*Anaheim Union High School District* (2015) PERB Decision No. 2434, p. 16.) Moreover, while ground rules must be negotiated in good faith, for certain ground rules there are, as noted above, established defaults that neither party may insist on changing. (See, e.g., *Anaheim*, *supra*, PERB Decision No. 177, pp. 13-14 [proposal to charge union for the cost of statutory released time]; *Bartlett-Collins Co.*, *supra*, 237 NLRB 770 [stenographic recording of negotiations]; cf. *Petaluma*, *supra*, PERB Decision No. 2485, pp. 33-34 [observers at negotiations].) Proposed ground rules that conflict with the purpose of the MMBA or any specific obligation imposed or right secured by the statute would also be considered non-mandatory.[12]

[12] This case was litigated as a violation of the duty to bargain, and did not allege that the COIN ordinance was an unreasonable local rule under PERB Regulation 32603, subdivision (f), which describes as an unfair practice, adopting or enforcing a "local rule that is

With these principles in mind, we next consider whether the challenged provisions of the County's ordinance are ground rules over which the County had a duty to negotiate.

Subdivision (b)(1)

Subdivision (b)(1) of the ordinance requires that before the County makes an opening proposal, the Auditor-Controller must provide a report of the fiscal costs of the current compensation and benefits received by the bargaining unit in question, as well as the costs of possible opening proposals by the County. The ALJ concluded that this provision concerns the County's fundamental managerial prerogative and is outside the scope of representation. OCEA excepts to this conclusion.

We do not believe subdivision (b)(1) is a ground rule that directly regulates the bargaining relationship between the parties or has any direct impact on procedures for negotiations. Although it mandates certain actions that must occur before negotiations begin, these actions have to do with the County's internal process for arriving at its opening proposal. Certainly, in the absence of an ordinance, nothing would prevent the County from adhering to this procedure. An employer is entitled to deliberate privately and fully develop a proposal affecting negotiable subjects before presenting it to the employees' representative. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 30, fn. 15.) We therefore agree with the ALJ's conclusion that such matters are within the employer's managerial prerogative, just as a proposal that intrudes on a union's process for formulating its own opening proposals—such as by surveying their members, researching the existing terms and conditions of employment, and

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not in conformance with MMBA." We therefore save for another day resolution of whether certain ground rules would be prohibited because they are unreasonable.

analyzing the costs of possible proposals—would be within the union's exclusive purview. (*NLRB v. Wooster Div. of Borg-Warner Corp.* (1958) 356 U.S. 342, 350.)

In its exceptions, OCEA argues that this provision is negotiable because the entire COIN ordinance was "deliberately calculated to inhibit" the meet-and-confer process. The County's intent, however, is not our concern in determining whether it has committed a per se violation of the duty to bargain. (*City of Montebello* (2016) PERB Decision No. 2491-M, p. 10.) Our concern is with the effect of the provision on the statutory bargaining process. (*Fresno County In-Home Supportive Services Public Authority*, *supra*, PERB Decision No. 2418-M, p. 13.) Because it merely prescribes the County's internal process for deciding on an initial proposal, subdivision (b)(1) is consistent with the MMBA's collective bargaining process.

OCEA also argues that "in the Orange County environment," this provision "*could* conflict with the parties' obligation to meet and confer in good faith, and *could* lend to the domination of the bargaining process or unduly delay negotiations." (Emphasis in original.) OCEA offers no further argument on this point, and cites no facts in the record regarding the "Orange County environment." If these provisions are in fact employed in a way that inhibits good faith bargaining, the remedy is a surface bargaining charge.

Therefore, we reject OCEA's exceptions and agree with the ALJ that subdivision (b)(1) of the ordinance is not within the scope of representation.

Subdivision (b)(2)

Subdivision (b)(2) of the ordinance establishes that the report prepared by the Auditor-Controller must be made public for 30 days before the Board of Supervisors decides on its opening proposal for "negotiation of an amended, extended, successor, or original

memorandum of understanding." The ALJ termed this a "non-negotiations" period, and compared it to the "sunshine" provisions found in other statutes under PERB's jurisdiction, e.g., the Educational Employment Relations Act (EERA), the Higher Education Employer-Employee Relations Act (HEERA), and the Ralph C. Dills Act (Dills Act).[13] The Dills Act prescribes a 7-day period of non-negotiations, during which the public has an opportunity to comment on initial proposals, while EERA allows for a "reasonable" period of time for public comment before negotiations begin. The MMBA requires the parties to meet "promptly" upon written request by either party and has no "sunshine" provision. Given the disparity between a seven-day non-negotiations period and a 30-day period, the ALJ determined the 30-day period was inconsistent and contrary to the obligation to meet "promptly." The ALJ further noted:

> The MMBA's requirement to meet "promptly" upon request creates an even greater impetus for the parties to decide together how soon the parties should meet after an opening proposal is sunshined. Such bilateral negotiation of a reasonable non-negotiations period satisfying the "promptly" requirement would be an example where the benefit to employer-employee relations of bargaining over this non-negotiations time period would outweigh the employer's need for unencumbered decision-making. . . . Such negotiations would eliminate disputes in the future as to when bargaining should commence. Therefore, the non-negotiations time period after the sunshine of an opening proposal falls within the scope of representation.

We agree with the ALJ. A period of non-negotiations is a procedure that affects the bilateral negotiations process, and in the absence of a statutory prescription, the parties must determine bilaterally whether negotiations should be placed on hold while the public has an opportunity to comment on initial proposals, and if so, for how long. (Cf. *Santa Clara County Correctional Peace Officers' Assn. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1038-1039 [the

[13] EERA is codified at section 3540 et seq. HEERA is codified at section 3560 et seq. The Dills Act is codified at section 3512 et seq.

MMBA does not specify how long parties must meet and confer, but parties may "agree in advance on a period of time that they consider reasonable to allow them to freely exchange information and proposals and endeavor to reach agreement"].) By banning negotiations on wages, hours and working conditions for at least 30 days, the County unilaterally dictated this important procedural issue in violation of its duty to negotiate in good faith over ground rules. (*Stockton*, *supra*, PERB Decision No. 143, pp. 8-12.)

The County excepts to the ALJ's characterization of this 30-day period as one of "non-negotiations," arguing that not all negotiations are prohibited during this time. For example, according to the County, the parties could discuss "ground rules" and information requests, and explain or clarify initial bargaining requests. We reject this exception. The provision prohibits the County from submitting its opening proposal for at least 30 days. Without seeing an opening proposal, the unions are unduly hampered in making information requests. There are no initial proposals to explain or clarify. A moratorium on presenting an opening substantive proposal on wages, hours and working conditions is a "non-negotiations" period for all intents and purposes, and the ALJ did not err in naming it as such.

Subdivision (b)(3)

Subdivision (b)(3) of the ordinance requires the Auditor-Controller to regularly update the report to "itemize the annual and cumulative costs that would or may result from adoption or acceptance of each meet and confer proposal." We presume this includes proposals made by either the County or the unions. The ALJ noted the unions' concerns that this requirement would lead to delays in bargaining, but determined that the lawfulness of those delays would be best addressed on a case-by-case basis through a surface bargaining analysis. The ALJ also

determined that there was no requirement that these on-going updated reports from the Auditor-Controller be made public. OCAA excepts to these conclusions.

OCAA's exceptions raise several concerns about how subdivision (b)(3) will operate in practice. It argues that the provision can be read to require: (1) publication of the report; (2) a cessation of bargaining after every proposal, to allow the Auditor-Controller's report to be updated and publicized; and (3) a particular level of specificity in the parties' proposals, which would prevent them from adopting an interest-based bargaining approach, which typically generates less specific proposals. Although, as the County points out, the plain language of subdivision (b)(3) does not require any of these actions, neither are OCAA's concerns unreasonable. The overall purpose of the ordinance supports OCAA's reading of subdivision (b)(3). For instance, the ordinance's hortatory preamble refers at least four times to the need for enhanced transparency in negotiations between employees and public agencies: it praises the "transparency of th[e] methods of communication" used by employees and public agencies, mentions the County's duty as a public agency to its residents of "transparency in its decision-making," declares that information and knowledge is enhanced "by virtue of employees and public agencies undertaking their duties and obligations pursuant to the Act [MMBA] in an open and transparent manner," and adopts the finding "that the communication between the County and its employees required by the Act regarding changes in wages, hours and other terms and conditions of employment would benefit from public scrutiny."

The County asserts in response that nothing in subdivision (b)(3) requires the Auditor-Controller's updates to be publicly disclosed throughout the course of the negotiations. It points to subdivision (d) concerning the adoption of the MOU, which provides in relevant part: "Not less than seven (7) days prior to the first board meeting where the matter shall be heard,

the County shall post on its website the memorandum of understanding under consideration for adoption, along with any final report and updates made by the Auditor-Controller pursuant to subsection (b) herein." According to the County, this section means that the Auditor-Controller updates are not made public during negotiations. We are not persuaded by this attempted post-hoc interpretation. Simply because the updates must be placed on the website when the MOU is being considered for adoption, does not preclude those updates from being disclosed throughout the process. One act is not mutually exclusive of the other.

The County further asserts that subdivision (b)(3) is an exercise of managerial prerogative, one that it is entitled to implement "to gather all possible information and to make the best decisions to ensure the County's financial well-being."

In light of this emphasis on public scrutiny and transparency, it is entirely foreseeable that the County could interpret subdivision (b)(3) in the manner OCAA fears—to require a public reporting of each updated report and a hiatus in negotiations until the report is made public and/or until the public has commented on the report. However, we are still left with no clear evidence of how the County will implement this particular rule.

The ambiguity of subdivision (b)(3) demonstrates why negotiations over its terms might have solved this dilemma. It is well settled that the parties have a duty to utilize the bargaining process to resolve any ambiguities in their bargaining proposals. (*Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 7; *Rio Hondo Community College District* (2013) PERB Decision No. 2313, p. 5 [refusing demand to bargain without attempting to clarify ambiguities and whether matters fall within scope of representation violates duty to bargain in good faith]; *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, p. 9 (*Healdsburg*).)

An employer has a duty to "voice its reasons for believing that a proposal is outside scope, and to enter into negotiations on those aspects of proposals which it finally views as [within scope]." (*Jefferson School District* (1980) PERB Decision No. 133, p. 11 (*Jefferson*).) Proscribed "is the perfunctory refusal to consider matters which are not patently negotiable without affording the opportunity for clarification or explanation. The obligation to negotiate includes the obligation to express one's opposition in sufficient detail to permit the negotiating process to proceed on the basis of mutual understanding." (*Ibid.*)[14]

Depending on how the County implements subdivision (b)(3), it may be negotiable because it would affect the bilateral process of negotiations over substantive terms by potentially impeding the flow of negotiations, restricting the authority of the County's bargaining representatives, and preventing any agreement regarding confidentiality of the bargaining process. On the other hand, if this provision is implemented as the County implies it will be—as merely a directive to the Auditor-Controller similar to subdivision (b)(1), and not to require publication of the updates or a hiatus in negotiations while the updates are prepared—we would agree with the County that the provision is not negotiable for the same reasons we conclude that subdivision (b)(1) is not negotiable. But by outright refusing the unions' demands to bargain over COIN, the County did exactly what *Jefferson*, *supra*, PERB Decision No. 133, and its progeny prohibit—precluding the possibility of either party clarifying or inquiring about the parameters of the negotiable aspects of the ordinance. As we have said in *Healdsburg*, *supra*, PERB Decision No. 375 and *County of Santa Clara*, *supra*,

[14] In *Jefferson*, *supra*, PERB Decision No. 133, as in this case, the Board was unable to determine the precise limits of negotiability because the employer refused to discuss proposals it declared to be outside the scope of representation. Nevertheless, the Board determined the employer violated its duty to bargain in good faith by refusing to seek clarification.

PERB Decision No. 2321-M, such conduct is itself a refusal to bargain in good faith and the employer acts at its own peril when it acts unilaterally.

Subdivision (c)

Subdivision (c) of the ordinance is titled "Civic Openness in the Meet and Confer Process." Subdivisions (c)(2) and (c)(3) require that after the Board of Supervisors meets in closed session with its labor negotiators, the Board of Supervisors must report to the public all offers, counteroffers, and supposals made by the parties during negotiations. Subdivision (c)(6) further requires that the County disclose to both the Board of Supervisors and the public all offers, counteroffers, and supposals made during negotiations, within 24 hours. The ALJ determined that these provisions were negotiable because they prevent the parties from agreeing to keep negotiations confidential.

As we noted above, parties sometimes propose a confidentiality arrangement, and other times propose inviting observers to bargaining. (See, e.g., *King City Joint Union High School District*, *supra*, PERB Decision No. 1777, adopting proposed decision, p. 5; *San Ysidro School District* (1980) PERB Decision No. 134, pp. 7, 15; *Muroc Unified School District*, *supra*, PERB Decision No. 80, p. 3.) Because one party cannot unilaterally insist on either of these arrangements, the default is that observers are not permitted, but the parties are permitted to report to the public or the press regarding what occurred in negotiations, absent an agreement to the contrary. (See, e.g., *Ross School District Board of Trustees* (1978) PERB Decision No. 48, adopting proposed decision, p. 9 (*Ross*); *Petaluma*, *supra*, PERB Decision No. 2485, pp. 27-29 [negotiations are to occur solely between parties' representatives, absent agreement to the contrary; union cannot insist on negotiations being open to members who are not on the bargaining team].) These two cases arose under EERA, which expressly exempts negotiations

from the open meeting requirements of the Ralph M. Brown Act (Brown Act),[15] an exemption absent from the MMBA. However, their reasoning was also grounded in more general principles, not just the express open-meeting exemption. In particular, *Ross* cited several authorities from other jurisdictions noting the disruptive effect outsiders could have on bargaining by inhibiting the give and take necessary for successful bargaining. (*Ross*, *supra*, adopting proposed decision, pp. 7-8; see also *Bartlett-Collins Co.*, *supra*, 237 NLRB 770.)[16]

While subdivision (c) of the COIN ordinance does not literally invite the public into bargaining sessions, requiring disclosure of every proposal, counterproposal and supposal to the public within 24 hours, has a very similar effect to the practices condemned in *Ross*, *supra*, PERB Decision No. 48, and *Petaluma*, *supra*, PERB Decision No. 2485. Mandating that every step of the negotiating process be made public invites the same potential disruption to negotiations that having outside observers present during negotiations sessions, viz., inhibiting the free flow of frank discussions, encouraging "grandstanding" for the benefit of perceived interest groups, and stifling informal exploration of ideas that could lead to mutual agreement.

While nothing in our holding prevents a party from reporting to the public what occurs in negotiations if there is no applicable confidentiality agreement, in this case the County unilaterally tied its own hands before bargaining, thereby preventing the parties from ever discussing confidentiality. Indeed, it is often the case that parties agree to a temporary media blackout when negotiations get serious near their close, and the County permanently took that

[15] The Brown Act is codified at section 54950 et seq.

[16] The California Attorney General has also recognized the problems inherent in public negotiations, opining that the Legislature did not intend to require local agencies subject to the MMBA "to do their labor bargaining in a fish bowl." (61 Ops.Cal.Atty.Gen. 1, 5-6, (1978).)

possibility off the table before bargaining even began. In other words, the County preemptively refused to bargain over a mandatory topic.

Because the ordinance directly regulates the bargaining process by precluding the parties from bargaining over or mutually agreeing to keep negotiations confidential, we agree with the ALJ that subdivisions (c)(2), (c)(3), and (c)(6) are negotiable. (*Richmond Firefighters*, *supra*, 51 Cal.4th 259, 272; *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492 [local agency cannot use rulemaking power to remove a negotiable subject from the scope of representation].)

The County argues that this conclusion conflicts with the Brown Act. The Brown Act generally requires a local agency's governing body to conduct its business in an open, public meeting. (Brown Act, § 54953.) But it provides an exception allowing that the governing body "may" meet in closed session with its designated representatives "regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits . . . and . . . any other matter within the statutorily provided scope of representation." (*Id*., § 54957.6.)

Emphasizing the permissive nature of Brown Act section 54957.6, the County argues that its Board of Supervisors "has the legislative authority to determine for itself whether to meet with its labor negotiators in open session." This may be true under the Brown Act. But such authority does not mean confidentiality is outside the scope of representation. Where external law touches upon matters within the scope of representation, those matters "remain negotiable to the extent of the employer's discretion, that is, to the extent that the external law does not 'set an inflexible standard or insure immutable provisions.'" (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 13, quoting *San Mateo City School Dist. v. PERB* (1983) 33 Cal.3d 850, 864-865.) Here, the Brown Act allows, but does not

require, the Board of Supervisors to hold open sessions with its designated representatives. Simply because the Brown Act gives the Board of Supervisors discretion, does not remove confidentiality ground rules from the scope of representation.

The County also argues that the Board of Supervisors itself could serve as the County's negotiating team, in which case the Brown Act would require the negotiations to be held in open session. We need not determine whether a confidentiality ground rule would be negotiable in this scenario, because it is not contemplated by the COIN ordinance. Instead, subdivision (a)(2) of the ordinance specifically requires that the Board of Supervisors appoint a "principal negotiator," who is not a County employee and who has demonstrated expertise in negotiating labor agreements on behalf of public entities.[17]

The dissent argues that subdivision (c) does not prevent the parties from entering into a confidentiality agreement because it does not prohibit, for instance, a mutual agreement not to issue press releases or disclose "bargaining table conversations." While the ordinance does leave some interstitial space for narrow confidentiality agreements in certain respects, this does not change the ordinance's broad requirements to publicly disclose all offers, counteroffers, and supposals—the essence of negotiations. In doing so, the ordinance substantially restricts the flexibility of negotiations and reduces the range of ground rules that may be mutually agreed upon.

Therefore, we conclude that subdivisions (c)(2), (c)(3), and (c)(6) are negotiable.

[17] Should a local agency subject to the MMBA elect to serve as its own negotiating team, the governing board would be unable to meet in closed session to discuss negotiations. As the Attorney General has noted, this would give the employee organization a significant advantage in being able to caucus in private. (Cf. 61 Ops.Cal.Atty.Gen., *supra*, at p. 5.)

II. Violation of Section 3507

Because we have concluded that the County had no duty under MMBA section 3504 to meet and confer over subdivision (b)(1), which requires the Auditor-Controller to prepare a pre-negotiations report on the cost of current benefits and pay, we turn to OCAA's argument that this provision is within the scope of consultation under section 3507.[18]

Section 3507, subdivision (a) provides that "[a] public agency may adopt reasonable rules and regulations *after consultation in good faith* with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter." (Emphasis added.) The broad range of subjects that may be addressed in these rules and regulations include:

> (1) Verifying that an organization does in fact represent employees of the public agency.
>
> (2) Verifying the official status of employee organization officers and representatives.
>
> (3) Recognition of employee organizations.
>
> (4) Exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself or herself as provided in Section 3502.
>
> (5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.
>
> (6) Access of employee organization officers and representatives to work locations.
>
> (7) Use of official bulletin boards and other means of communication by employee organizations.

[18] As noted, the ALJ concluded that OCAA's argument met the unalleged violation test. The County has not excepted to that conclusion, and it is not before us. (PERB Regulation 32300, subd. (c).)

> (8) Furnishing nonconfidential information pertaining to employment relations to employee organizations.
>
> (9) Any other matters that are necessary to carry out the purposes of this chapter.

(*Ibid*.) These "'mandatory subjects' for consultation" are distinct from the mandatory subjects of bargaining under section 3504. (*City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 30.)

The ALJ rejected OCAA's argument that any provision of the COIN that was not within the scope of negotiations under MMBA section 3504 must also be considered under MMBA section 3507. According to the ALJ, subdivision (a)(5) of section 3507 is limited to procedures such as mediation, factfinding, or interest arbitration, while subdivision (a)(9) includes only rules governing representation matters.

We disagree with this overly narrow reading of MMBA section 3507, subdivisions (a)(5) and (a)(9). The meet-and-confer process is itself a procedure for resolving disputes regarding wages, hours, and other terms and conditions of employment. This is reflected in the MMBA's primary purpose "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (MMBA, § 3500, subd. (a).) When the MMBA was enacted with this language, meeting and conferring in good faith was the only dispute resolution process mandated. Mediation was permitted but not required, and there were no provisions for factfinding or interest arbitration. (Stats. 1968, ch. 1390, pp. 2725-2729.) Thus, rules that regulate the meet-and-confer process would fall within the scope of section 3507, subdivisions (a)(5) and (a)(9), assuming they are not within the scope of sections 3504 and 3505. (*City of Palo Alto*, *supra*, PERB Decision No. 2388a-M, p. 30.) Such rules adopted pursuant to MMBA section 3507

would also be subject to review for reasonableness. (*County of Monterey* (2004) PERB Decision No. 1663-M; *City and County of San Francisco* (2017) PERB Decision No. 2536-M.)

Nevertheless, subdivision (b)(1) does not constitute a "procedure for the resolution of disputes involving wages, hours, and other terms and conditions of employment." This provision solely concerns how the County analyzes and reports the costs of current benefits and of ongoing meet-and-confer proposals. This provision does not place any restrictions on recognized employee organizations or on the interactions between the parties in the negotiating process. Therefore, we deem it beyond the scope of MMBA section 3507, and the County was not required to consult with OCAA in good faith before enacting it.

III. The Remedy

A. Severability

We next turn to OCAA's exceptions concerning whether the negotiable provisions of the COIN ordinance are severable from those that are non-negotiable. We conclude they are.

OCAA argues that the ordinance's severability clause does not contemplate severability in the event of invalidation by an administrative agency such as PERB, but only by a "court of competent jurisdiction." (Subd. (f).) Although PERB is not a court, it is the quasi-judicial agency with exclusive initial jurisdiction over the MMBA. There is no reason to believe the County's Board of Supervisors intended that a court could sever any invalid provisions of the ordinance, but that an administrative agency must invalidate the whole thing. Moreover, invalid legislative provisions may be found severable even in the absence of a severability clause. (*County of Sonoma v. Super. Ct.* (2009) 173 Cal.App.4th 322, 352.) Therefore, we reject the argument that we may not find portions of the ordinance severable.

To be severable, "the invalid provision must be grammatically, functionally, and volitionally separable." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821 (*Calfarm*).) The first requirement, grammatical severability, means that the invalid provision may be removed without affecting the wording of the remaining provisions. (*Id.* at p. 822.) This requirement is met here. Subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) are distinct provisions. Their removal does not alter the wording of any remaining provisions.

The requirement of functional severability means that the remaining provisions can operate without the excised ones. (*Calfarm*, *supra*, 48 Cal.3d 805, 822.) This requirement is also met. Subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) concern the non-negotiations period, the Auditor-Controller's ongoing updates to the cost report, and the County negotiator's obligation to report proposals, counter-proposals, and supposals to the public and to the Board of Supervisors.[19] The remainder of the ordinance, including its provisions for an initial cost report, an outside principal negotiator, and approval of a tentative agreement after two public meetings, are not affected by the removal of the negotiable provisions.

The final requirement, volitional severability, is also met. This means the remaining provisions "would likely have been adopted" had the legislative body foreseen the partial invalidity of the enactment. (*Calfarm*, *supra*, 48 Cal.3d 805, 822; see also *Santa Barbara School Dist. v. Super. Ct.* (1975) 13 Cal.3d 315, 331.) OCAA argues that the removal of the

[19] Subdivision (c)(3) requires the disclosure of more than just offers, counteroffers, and supposals, but also "a list of names of all persons in attendance during the negotiation sessions, the date of the sessions, the length of the sessions, the location where the sessions took place and any pertinent facts regarding the negotiations that occurred in a particular session." The ALJ did not determine, and the unions do not argue, that disclosure of these other facts is negotiable. However, the ALJ's remedy addressed the entirety of the subdivision (c)(3). The County, while excepting to the conclusion that it was negotiable, does not argue that only certain portions of this provision should be severed. The County has thus waived that issue (PERB Reg. 32300, subd. (c)), so we do not consider it.

invalid portions undermines the fundamental purpose of the ordinance so substantially that the Board of Supervisors would not have adopted the remainder, but we disagree. The purpose of increasing public transparency is served by the disclosure of the Auditor-Controller's initial report, reflecting the current costs as well as the costs of possible opening proposals by the County. That purpose is also served by the requirement of two public meetings before the adoption of a tentative agreement by the Board of Supervisors. Other provisions of the ordinance serve purposes not directly related to transparency, including the use of an outside negotiator, which is claimed to reduce the potential for conflicts of interest.

OCAA argues that the County did not need to enact an ordinance to implement these remaining provisions. Presumably, OCAA means that the County could have enacted these policies by resolution instead. That may be true, but we are not concerned with the form of the County's legislative action, but with whether it took those actions in accordance with the process required by the MMBA.

Therefore, we conclude that subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) are severable from the remainder of the ordinance.

B. Scope of the Remedy

The ALJ ordered the County to rescind the various provisions of the COIN ordinance he determined were within the scope of representation. We amend this portion of the remedy to declare void and unenforceable those portions of the COIN ordinance which we have concluded are unlawful.

At the time he issued the proposed decision, the ALJ did not have the benefit of our decision in *City of San Luis Obispo* (2016) PERB Order No. Ad-444-M, concerning the scope of the remedy in a unilateral change case such as this one. We explained that:

> When an employer's conduct is alleged to constitute a unilateral change or other bargaining violation simultaneously affecting more than one bargaining unit, the exclusive representative of each unit must file a charge and litigate on behalf of the employees in its respective unit. [Citations.] In such circumstances, the Board's usual practice is to limit the remedy to only the unit or units where the designated representative has successfully litigated the case. [Citations.] This approach is necessary to protect the rights of the respondent to notice of the allegations against it and to protect the rights of other employee organizations who, for whatever reason, may prefer to acquiesce to an employer's conduct rather than file and litigate unfair practice charges.

(*Id.* at p. 6.)

The County's unilateral change in this case primarily affects the rights of the exclusive representatives of County employees to meet and confer in good faith. (MMBA, §§ 3505, 3506.5, subd. (c).) We are aware of at least three exclusive representatives of County bargaining units that are not parties to these consolidated cases.[20] Although there may be grounds for those exclusive representatives to challenge the COIN ordinance in the future,[21] by

[20] The record in this case mentions the Orange County Managers Association, which represents the Administrative Management Unit. In addition, exceptions are pending concerning proposed decisions in two cases involving other County bargaining units, represented by the American Federation of State, County & Municipal Employees, Local 2076, and the Association of Orange County Deputy Sheriffs, respectively. (See *El Monte Union High School District* (1980) PERB Decision No. 142 [the Board may take administrative notice of its own files].)

[21] For instance, the ALJ questioned whether it would be lawful for the County, even after bargaining to impasse, to enact an ordinance and "cement a ground rule in perpetuity rather than allow the parties to negotiate ground rules during the beginning of each successor MOU negotiations." The ALJ also observed that, despite his conclusion that the County was not required by section 3507 to consult in good faith before enacting the COIN ordinance,

> the County would not be allowed pursuant to MMBA section 3507 to set parameters as to the bargaining process which conflicted with other sections of the MMBA, such as the obligation to bargain in good faith under MMBA section 3505 as

this decision we conclude only that the County violated the MMBA by failing to give OCAA, OCEA, and Local 501 the opportunity to meet and confer over the negotiable provisions of the ordinance. Therefore, we confine our remedy to declaring those provisions void and unenforceable as to OCEA, OCAA, and Local 501. As our remedy affects only OCEA, OCAA, and Local 501, we order that the electronic distribution of the notice to employees be confined to the employees represented by those employee organizations and deny OCAA's request for a broader posting order directed at all County employees.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it has been found that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3505 and 3506.5, subdivision (c), and PERB Regulation 32603, subdivision (c), by adopting subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) of the Civic Openness in Negotiations (COIN) ordinance, without affording the Orange County Employees Association (OCEA), the Orange County Attorneys Association (OCAA) and the International Union of Operating Engineers Local 501 (Local 501), an opportunity to meet and confer over the decision or effects of the proposed ordinance. By this conduct, the County also interfered with the right of unit employees to participate in the activities of OCEA,

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> the disputed local rule or its application would be inconsistent and contrary to the express provisions of the MMBA. (*International Brotherhood of Electrical Workers, Local 1245 v. City of Gridley* (1983) 34 Cal.3d 191; [*Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492]; *City of San Rafael* (2004) PERB Decision No. 1698-M; *County of Monterey* (2004) PERB Decision No. 1663-M.)

Because the parties have not addressed these or any other theories in this case, we express no opinion on how they would apply to the provisions of the COIN ordinance.

OCAA, and Local 501, in violation of Government Code sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a), and denied OCEA, OCAA, and Local 501 the right to represent employees in their employment relations with a public agency in violation of Government Code sections 3503 and 3506.5, subdivision (b), and PERB Regulation 32603, subdivision (b).

Pursuant to section 3509, subdivision (a), of the Government Code, it is hereby ORDERED that subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) of the COIN ordinance are void and unenforceable in the County's negotiations with OCEA, OCAA, and Local 501, and that the County, its governing board, and representatives shall:

A. CEASE AND DESIST FROM:

1. Enforcing subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) of the COIN ordinance.

2. Implementing an unlawful unilateral change and refusing to meet and confer with OCEA, OCAA, and Local 501 prior to adopting a proposed ordinance concerning matters within the scope of representation.

3. Interfering with the right of bargaining unit employees to be represented by OCEA, OCAA, and Local 501.

4. Denying OCEA, OCAA, and Local 501 their right to represent employees in their employment relations with the County.

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

1. Within ten (10) workdays after this decision is no longer subject to appeal, post at all work locations in the County, where notices to employees 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 the County will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the bargaining units represented by OCEA, OCAA, and Local 501. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M.) Reasonable steps shall be taken to ensure that this Notice is not reduced in size, altered, defaced or covered with any other material.

2. 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 served concurrently on OCEA, OCAA and Local 501.

Members Banks and Krantz joined in this Decision.

Member Shiners' concurrence and dissent begins on p. 42.

SHINERS, Member, concurring and dissenting: I agree with my colleagues that Section 1-3-21, subdivision (b)(1), of the County of Orange's Civic Openness in Negotiations (COIN) ordinance is not within the scope of representation under section 3504 of the Meyers-Milias-Brown Act (MMBA),[22] and not subject to the consultation requirement in MMBA section 3507. I respectfully but strongly dissent, however, from the majority's conclusions that subdivisions (b)(2), (c)(2), (c)(3), and (c)(6) of the COIN ordinance are within the scope of representation, and that the County violated its duty to meet and confer in good faith by not bargaining with Charging Parties over those subdivisions, as well as subdivision (b)(3), before adopting the ordinance.[23] As explained below, I would find all of the COIN ordinance provisions at issue to be outside the scope of representation, and accordingly would dismiss the complaints in these consolidated cases.

1. Ground Rules and the Scope of Representation

The scope of representation under the MMBA includes "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment." (MMBA, § 3504.) The majority admits that the provisions of the COIN ordinance at issue do not involve "wages, hours, or other terms and conditions of employment." (Maj. Opn. p. 7.) Nevertheless, the majority finds subdivisions (b)(2), (c)(2), (c)(3), and (c)(6) to be within the scope of representation as ground rules for negotiations. The majority is wrong for two reasons.

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

[23] All undifferentiated references to a subdivision hereafter refer to the COIN ordinance, section 1-3-21.

First, these subdivisions are not ground rules. Ground rules typically cover such topics as "the time and place for bargaining to start, the order of issues to be discussed, the final settlement conditions that may be imposed, questions of ratification and approval of [agency] officials, and a variety of similar procedural matters." (*Anaheim Union High School District* (1981) PERB Decision No. 177, p. 9 (*Anaheim*).) Similarly, subdivision (a)(3) of the COIN ordinance itself defines ground rules as "preliminary procedural matters governing the conduct of negotiations including, but not limited to, the time and place for bargaining, the order of issues to be discussed, the signing of tentative agreements, the requirement of package bargaining, or the use of supposals." The COIN provisions at issue are not akin to the "procedural matters" described above because they do not govern how negotiations will proceed.

Subdivision (b)(2) requires that a financial report be available for review at least 30 days before the Board of Supervisors considers its opening bargaining proposal. This requirement applies only to the County before negotiations commence; it does not govern the parties once negotiations begin and therefore is not a ground rule.

Subdivisions (c)(2), (c)(3), and (c)(6) require public disclosure of proposals made in bargaining and certain facts about each bargaining session, such as location, attendees, etc., within a certain time after each negotiating session. Although these provisions obviously apply during negotiations, they do not determine the procedure by which negotiations will take place. Instead, they merely require the County's negotiator to provide the Board of Supervisors and the public with objective data about negotiations. These after-the-fact reports are not ground rules governing how the parties' negotiations must proceed.

Second, the authority the majority relies upon to find subdivisions (b)(2), (c)(2), (c)(3), and (c)(6) to be within the scope of representation is based on long-overruled law and is out of step with every other jurisdiction. The majority cites *Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton*) and *Anaheim*, *supra*, PERB Decision No. 177 for the proposition that ground rules are within the scope of representation. (Maj. Opn. pp. 8-9.) Both decisions cited to National Labor Relations Board (NLRB) precedent in support of this proposition: *Stockton* to *General Electric Co.* (1968) 173 NLRB 253, and *Anaheim* to *St. Louis Typographical, Local 8 (Graphic Arts Ass'n)* (1964) 149 NLRB 750. But in *Bartlett-Collins Co.* (1978) 237 NLRB 770, the NLRB overruled those two decisions and held that "threshold matter[s], preliminary and subordinate to substantive negotiations," i.e., ground rules, are outside the scope of representation. (*Id*. at pp. 772-773; see *Latrobe Steel Co. v. NLRB* (3d Cir. 1980) 630 F.2d 171, 176 (*Latrobe Steel Co.*) [acknowledging and approving NLRB's overruling of *General Electric* and *St. Louis Typographical*].)

The doctrinal foundation for the rule that ground rules are a mandatory subject of bargaining was demolished 40 years ago—two and three years, respectively, *before Stockton* and *Anaheim* relied on these overruled NLRB decisions without explaining why it was appropriate for PERB to adopt this rejected rule.[24] I cannot support the majority's imposition of a duty to bargain over ground rules based on long-overruled precedent.

[24] Additionally, *Anaheim* relied on a second NLRB decision, *Borg-Warner Controls, A Division of Borg-Warner Corporation* (1972) 198 NLRB 726 (*Borg-Warner)*, to support the rule that ground rules are a mandatory subject. That case, however, involved a surface bargaining allegation, not an allegation that the employer refused to bargain over ground rules. Specifically, the employer refused to mutually arrange meeting times and locations, which would be an indicator of surface bargaining under PERB precedent. (E.g., *Oakland Unified School District* (1983) PERB Decision No. 326, pp. 33-34.) *Borg-Warner* thus does not support imposing a statutory obligation to bargain over ground rules.

Instead, I find persuasive the NLRB's reasons for deeming ground rules to be outside the scope of representation. The NLRB's reasoning for changing the law 40 years ago was based, in part, on the fact that ground rules do not affect "wages, hours, and other terms and conditions of employment." (*Bartlett-Collins Co.*, *supra*, 237 NLRB at p. 772.) But perhaps more importantly, the NLRB recognized that if ground rules were a mandatory subject, either party could insist to impasse on them, thereby "stifl[ing] negotiations in their inception over such a threshold issue." (*Id*. at p. 773.) In upholding the *Bartlett-Collins* rule, one court of appeal noted: "It would be contrary to the policy of the Act, which mandates negotiation over the substantive provisions of the employer-employee relationship, to permit negotiations to break down over [the] preliminary procedural issue." (*Latrobe Steel Co.*, *supra*, 630 F.2d at p. 177.)

Today, a majority of jurisdictions deem ground rules to be outside the scope of representation. (E.g., *Local 342-50, United Food and Commercial Workers Union (Pathmark Stores, Inc.)* (2003) 339 NLRB 148, 155; *Lincoln County*, 2018 WL 4292910, p. 5 [Washington Public Employment Relations Commission]; *University of Illinois, Chicago* (2018) 34 PERI ¶ 173 [Illinois Educational Labor Relations Board]; *Washington County Consolidated Communications Agency*, 2014 WL 3339216, p. 8 [Oregon Employees Relations Board]; *County of Kane* (1988) 4 PERI ¶ 2031 [Illinois State Labor Relations Board]; *City of Deerfield Beach* (1981) 7 FPER ¶ 12438 [Florida Public Employees Relations Commission]; *Town of Shelter Island* (1979) 12 PERB ¶ 3112 [New York Public Employment Relations Board].) A small number of jurisdictions hold that ground rules are presumptively within the scope of representation but the presumption may be rebutted by showing the proposed ground rule would impede the bargaining process. (*U.S. Food & Drug Administration* (1998) 53

FLRA 1269, 1291-1292 [Federal Labor Relations Authority]; *University of the District of Columbia*, 1992 WL 12601368, p. 2, fn. 3 [District of Columbia Public Employee Relations Board].) California thus is the *only* jurisdiction with a categorical rule that ground rules are a mandatory subject of bargaining. I see no compelling reason for PERB to remain out of step with other jurisdictions on this issue. Consequently, the categorical rule should be abandoned.

The majority devotes many pages to criticizing the above legal authority but ultimately decides to retain the categorical rule for policy reasons.[25] I agree that it is beneficial for parties to discuss and try to reach mutual agreement on ground rules. Unlike my colleagues, I do not believe this policy is best served by deeming ground rules a mandatory subject of bargaining. Rather—as every other federal and state labor board that has addressed the issue in a reported decision has done—I would hold that ground rules are outside the scope of representation.[26] Of course, a party's refusal or failure to discuss ground rules could still be evidence of bad faith bargaining. (*Oakland Unified School District*, *supra*, PERB Decision No. 326, pp. 33-34.) Thus, if a party's intransigence over ground rules impedes negotiations, the other party still would have a remedy under our extant decisional law.

[25] The majority dismisses my concern that deeming ground rules a mandatory subject of bargaining may allow a party to torpedo negotiations before they start. First, this concern is consistently expressed in the labor board and court of appeal decisions cited above as a reason for deeming ground rules to be outside the scope of representation. Second, there is no evidence before us showing that PERB's categorical rule has in fact prevented negotiations from breaking down over ground rule disagreements, as the majority claims. It is equally possible that parties do not find ground rules a significant enough issue to let disagreement over them stall negotiations, or that they choose not to use them at all.

[26] Contrary to the majority's characterization, such a holding would not be "follow[ing] every turn of the private sector case law." (Maj. Opn. p. 8) The NLRB adopted this rule forty years ago and it has withstood the frequently oscillating currents of that board's decisional law to this day.

In sum, I do not find the COIN ordinance provisions at issue to be ground rules. I also would overrule *Stockton* and *Anaheim*, and adopt the *Bartlett-Collins* rule that ground rules are outside the scope of representation—as most other jurisdictions have done. Either way, I would find the disputed provisions of the COIN ordinance to be outside the scope of representation and thus would conclude that the County had no obligation to meet and confer with Charging Parties before adopting them.

2. Application of the *Claremont* Test

I agree with the majority's harmonization of the California Supreme Court's decisions in *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623 (*Claremont*), and *International Assn. of Fire Fighters, Local 188, AFL-CIO v. PERB* (2011) 51 Cal.4th 259 (*Richmond Firefighters*). I disagree, however, with the majority's conclusion that *Claremont* does not apply in this case.[27]

In *Richmond Firefighters*, the Court identified three categories of managerial decisions: (1) "decisions that 'have only an indirect and attenuated impact on the employment relationship' and thus are not mandatory subjects of bargaining," such as advertising, product design, and financing; (2) "decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls," which are "always

[27] Unlike my colleagues, I see no need to disavow any part of *City of Alhambra* (2010) PERB Decision No. 2139-M (*Alhambra*). In *Alhambra*, the Board held that a particular change in minimum qualifications was not within the scope of representation. At that time, neither PERB nor the courts had held minimum qualifications to be a mandatory subject of bargaining, nor are they obviously so. The Board thus had to apply the *Claremont* test to determine whether the city had an obligation to meet and confer over the change at issue. To the extent my colleagues fault *Alhambra* for failing to mention the other two categories of managerial decisions enumerated in *Richmond Firefighters*, that omission was immaterial to the Board's decision. Accordingly, I do not find *Alhambra* incompatible with the majority's clarification of the test for mandatory bargaining subjects under the MMBA.

mandatory subjects of bargaining"; and (3) "decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve 'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.'" (*Richmond Firefighters*, *supra*, 51 Cal.4th at pp. 272-273.) The majority finds ground rules to be in the second category of decisions that are always within the scope of representation. But that category consists of "decisions directly defining the employment relationship." As indicated by the examples the Court cited, i.e., "wages, workplace rules, and the order of succession of layoffs and recalls," the "employment relationship" is *between employees and their employer*, not between the union and the employer. (*Id*. at p. 272.) Thus, ground rules do not fall within the second category.

Instead, ground rules fall into the third category—decisions that may be negotiable under certain circumstances—which requires application of the *Claremont* test. Under that test, a management action is negotiable when (1) it has "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees"; (2) that effect does not "arise[] from the implementation of a fundamental managerial or policy decision"; and (3) "the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." (*Claremont*, *supra*, 39 Cal.4th at p. 638.) The provisions of the COIN ordinance at issue here fail to meet the first prong because they do not affect wages, hours, or working conditions *in any way*, much less in a significant or adverse way. Thus, the challenged provisions are not within the scope of representation.

3. Effect of Disputed Provisions on the Bargaining Process

The majority concludes that subdivisions (b)(2), (c)(2), (c)(3), and (c)(6) are within the scope of representation because they either "directly regulate the bargaining relationship" or "have a direct impact on the negotiating process." The majority's erroneous conclusion that these subdivisions are ground rules which "directly regulate the bargaining relationship" was addressed in section 1 above. Before addressing why these subdivisions do not directly impact the negotiating process, I must point out that the majority offers no direct legal authority for its statement that proposals which "have a direct impact on the negotiating process" are within the scope of representation. In support of this proposition, the majority cites only *Richmond Firefighters*. (Maj. Opn. p. 21.) But that decision categorizes subjects of negotiations based on their impact on the "employment relationship" (*Richmond Firefighters*, *supra*, 51 Cal.4th at pp. 272-273)—which necessarily is *between employees and their employer*, not between the union and the employer. Thus, *Richmond Firefighters* provides no support for the majority's new rule. Furthermore, jurisdictions that deem ground rules to be presumptively within the scope of representation allow the presumption to be rebutted by a showing that the proposed ground rule would impede the bargaining process. (*U.S. Food & Drug Administration*, *supra*, 53 FLRA at pp. 1291-1292; *University of the District of Columbia*, 1992 WL 12601368, p. 2, fn. 3.) The majority's rule is just the opposite: a proposal is within scope if it would impede negotiations. Because it lacks any foundation in existing precedent, I cannot accept the majority's proffered rule.

I also disagree with the conclusions the majority reaches by applying its newly-created rule to the COIN ordinance provisions in dispute. The majority finds that subdivision (b)(2) is

within scope because it creates a 30-day "non-negotiations period" before bargaining can begin. (Maj. Opn. pp. 24-25.) Subdivision (b)(2) states:

> The [County Auditor-Controller's] report shall be completed and made available for review by the Board of Supervisors and the public at least thirty (30) calendar days before consideration by the Board of Supervisors of an opening proposal to be presented to any recognized employee organization regarding negotiation of an amended, extended, successor, or original memorandum of understanding.

Nothing in this language says that during the 30-day period the parties cannot engage in aspects of the negotiation process such as discussing ground rules, propounding and responding to information requests, or even meeting and conferring over union proposals. In contrast, many of the statutes under PERB's jurisdiction clearly preclude negotiations for a certain period of time after the parties' initial proposals have been made public. (E.g., Gov. Code, §§ 3523, subd. (b) [Dills Act; "not less than seven consecutive days"]; 3547, subd. (b) [EERA; "a reasonable time"]; 3595, subd. (b) [HEERA; "a reasonable time"]; Pub. Util. Code, § 99569, subd. (b) [TEERA; "a reasonable time"].) There is no such prohibitory language in subdivision (b)(2). Moreover, the record before us does not contain facts showing the County intended subdivision (b)(2) to preclude all negotiation activity during the 30-day period or has applied the subdivision in such a manner. Absent clear language or extrinsic evidence showing that subdivision (b)(2) would in fact prohibit any negotiating activity for 30 days, the majority's conclusion is based on mere speculation.

Additionally, under the statutes that provide a "reasonable time" for public consideration of initial proposals before negotiations begin, PERB has found anywhere from eight days to three weeks to be reasonable. (E.g., *Los Angeles Unified School District* (1993) PERB Decision No. 1000, pp. 12-13 [eight days]; *Los Angeles Unified School District* (1990)

PERB Decision No. 852, p. 4 [two weeks]; *Los Angeles Unified School District* (1994) PERB Decision No. 1044, p. 6 [three weeks].) It is difficult to see how allowing the public 30 days to review the County Auditor-Controller's report before the County makes its initial proposal crosses the line into unreasonableness. Thus, even if subdivision (b)(2) does prohibit negotiations for 30 days, that in itself is insufficient to show a significantly adverse impact on negotiations to bring the subdivision within the scope of representation under the majority's newly-minted rule.

Turning to the disclosure provisions, subdivisions (c)(2) and (c)(3) require the Board of Supervisors to report during an open public meeting all offers, counteroffers, and supposals which were communicated to the Board during the closed session portion of that same meeting. The report also must include the names of persons who attended the negotiations, the location of negotiations, "and any pertinent facts regarding the negotiations [sessions]." Subdivision (c)(6) further requires that all offers, counteroffers, and supposals made during negotiations shall be disclosed to the Board and the public within 24 hours of being presented at the bargaining table.

The majority finds these provisions negotiable on the ground that they prevent the parties from entering into a confidentiality agreement as part of their ground rules. (Maj. Opn. p. 31.) This conclusion is based on an overly broad reading of subdivisions (c)(2), (c)(3), and (c)(6). These subdivisions require public disclosure only of (1) proposals, counterproposals and supposals, (2) who attended a bargaining session, and (3) where the session took place. Disclosure of what was said during negotiations is not required, and the parties therefore could mutually agree not to publicly disclose bargaining table conversations. Similarly, nothing in subdivisions (c)(2), (c)(3), or (c)(6) precludes the parties from agreeing not to issue press

releases or otherwise publicly comment upon ongoing negotiations. (See, e.g., *Muroc Unified School District* (1978) PERB Decision No. 80, p. 3 [parties agreed not to issue press releases during negotiations].) Thus, although these subdivisions require public disclosure of proposals themselves and certain factual details about each bargaining session, the parties still would be free to mutually agree to prohibit or limit public disclosure of all other aspects of negotiations. Subdivisions (c)(2), (c)(3), and (c)(6) therefore do not, as the majority claims, prevent the parties from entering into a confidentiality agreement.

The majority also characterizes the disclosure provisions as akin to conducting negotiations in public (Maj. Opn. p. 30), but this comparison is inapt. As the majority notes, the presence of outside observers during negotiation sessions potentially inhibits the free exchange of ideas that could lead to mutual agreement, as negotiators may feel obligated to conform their statements to the observers' expectations or desires. But requiring public disclosure of the parties' proposals does not make the public privy to the give and take of bargaining table discussions; it merely allows the public to see what has already been proposed. The parties remain free to confidentially discuss the proposals and explore possible areas for compromise and agreement away from the public eye. Subdivisions (c)(2), (c)(3), and (c)(6) consequently do not open the County's labor negotiations to the public. As a result, the authority the majority cites to strike down the disclosure provisions is inapposite.[28]

[28] This authority also does not support the majority's conclusion that the COIN ordinance's disclosure provisions are a mandatory subject of bargaining. In *Ross School District Board of Trustees* (1978) PERB Decision No. 48, the Board held that the district unlawfully insisted to impasse on labor negotiations being conducted in public, a permissive subject of bargaining because under the EERA public negotiations may only be conducted by mutual agreement. (*Id*., adopting proposed decision, pp. 6-9.) In *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, the Board declined to decide whether the presence of employee observers at negotiations is within the

In sum, neither the COIN ordinance's 30-day initial report review provision (subdivision (b)(2)), nor its disclosure provisions (subdivisions (c)(2), (c)(3), and (c)(6)), "have a direct impact on the negotiating process." None of these provisions necessarily delays negotiations nor poses an impediment to full and frank discussion between the parties of their bargaining positions and potential compromises. Nothing in the record supports the majority's speculation that these provisions will prevent the County from engaging in meaningful negotiations with its employee organizations. Of course, if problems arise from application of these provisions in the future, PERB can address those problems on the basis of the record before it at that time. But I cannot find that on their face subdivisions (b)(2), (c)(2), (c)(3), and (c)(6) have a direct impact on negotiations such that they would fall within the scope of representation under the majority's newly-minted legal standard.

4. Failure to Bargain over Subdivision (b)(3)

Finally, the majority concludes that the County violated its duty to meet and confer with Charging Parties over subdivision (b)(3), which requires the County Auditor-Controller to prepare updated financial reports as the parties make proposals in negotiations. The majority admits that it cannot determine whether subdivision (b)(3) is within scope, but nonetheless imposes liability on the County under the theory that it had a duty to meet and confer with Charging Parties over whether the provision is within the scope of representation. (Maj. Opn. pp. 28-29.)

Again, the majority's conclusion is not supported by the authority upon which it relies. The majority primarily relies on *Jefferson School District* (1980) PERB Decision No. 133 and

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scope of representation. (*Id*. at p. 34.) Neither decision found a proposal to conduct public negotiations—to which the majority likens the disclosure provisions—to be within the scope of representation.

Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375 (*Healdsburg/San Mateo*), where the Board held that an employer has a duty to meet with an employee organization to clarify the terms of an ambiguous union proposal to determine whether the proposal concerns a subject within the scope of representation; the employer cannot perfunctorily declare the proposal outside scope and refuse to bargain over it. (*Jefferson School District*, *supra*, PERB Decision No. 133, p. 11; *Healdsburg /San Mateo*, *supra*, PERB Decision No. 375, pp. 9-10.) The majority also relies on *County of Santa Clara* (2013) PERB Decision No. 2321-M and *Bellflower Unified School District* (2014) PERB Decision No. 2385, in which the Board held that an employer has a duty to meet with an employee organization to clarify whether the union's demand to bargain the effects of a non-negotiable management decision encompasses any effects within the scope of representation. (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, pp. 31-32; *Bellflower Unified School District*, *supra*, PERB Decision No. 2385, p. 7.)

These decisions address the employer's obligation to seek clarification of a union proposal or demand that may or may not encompass subjects within the scope of representation. No decision says that when an employer takes an action it believes to be outside the scope of representation, it must meet and confer with employee organizations over whether the action is in fact a mandatory bargaining subject. But that is the rule the majority adopts today.

The majority's new rule creates two big problems. First, it allows employee organizations to demand bargaining over non-negotiable management decisions in the guise of "clarifying" whether the decision is within the scope of representation. This necessarily undermines the employer's right to make the non-negotiable decision.

Second, the majority's new rule absolves charging parties of their burden of proof in unilateral change cases like this one. In a unilateral change case, the charging party bears the burden of proving that the challenged employer action concerned a subject within the scope of representation. (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 13; PERB Reg. 32178.)[29] If PERB is unable to determine from the record whether the employer's action was within the scope of representation, the charging party has not met its burden and the allegation must be dismissed. Here, as the majority admits, the record does not prove that subdivision (b)(3) is within the scope of representation. Yet the majority nonetheless finds a unilateral change violation. Unlike the majority, I would follow—not upend—PERB Regulation 32178 and dismiss the unilateral change allegation as to subdivision (b)(3) because Charging Parties failed to prove that provision is within the scope of representation.

5. Conclusion

The majority's imposition of a bargaining obligation over the challenged provisions of the COIN ordinance (with the exception of subdivision (b)(1)) rests on a shaky legal foundation. The majority's perpetuation of a categorical rule that ground rules are within the scope of representation—the initial adoption of which was based upon *previously* invalidated federal precedent—is out of step with every other jurisdiction in the country. Similarly, there is no legal basis for the majority's determination that the challenged provisions are not subject to the *Claremont* test, nor for its decision to make employer actions that "have a direct impact on the negotiating process" subject to mandatory negotiations. And the majority provides no

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

reason for creating a new bargaining obligation over non-negotiable decisions instead of enforcing the burden of proof set out in PERB's Regulations.

Ultimately, however, the majority's legal sleight of hand does not produce a rabbit because, as explained above, the challenged provisions are neither ground rules nor do they impede labor negotiations. Rather, these provisions merely allow the taxpayers who will shoulder the cost of any County labor contract to obtain sufficient information to understand the potential financial ramifications of what their elected representatives may agree to in negotiations. Accordingly, I would dismiss the consolidated complaints because none of the challenged provisions of the COIN ordinance are within the scope of representation.

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 Nos. LA-CE-934-M, LA-CE-935-M, and LA-CE-944-M, *Orange County Employees Association, et al. v. County of Orange*, in which all parties had the right to participate, it has been found that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c), by adopting subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6) of the Civic Openness in Negotiations ordinance (COIN), without prior notice to the Orange County Employees Association (OCEA), the Orange County Attorneys Association (OCAA) and the International Union of Operating Engineers, Local 501 (Local 501), and affording them an opportunity to meet and confer over the decision or effects of the proposed ordinance.

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

A. CEASE AND DESIST FROM:

1. Enforcing subdivisions (b)(2), (b)(3), (c)(2), (c)(3), and (c)(6)of the COIN ordinance.

2. Implementing an unlawful unilateral change and refusing to meet and confer with OCEA, OCAA, and Local 501 prior to adopting a proposed ordinance concerning matters within the scope of representation.

3. Interfering with the right of bargaining unit employees to be represented by OCEA, OCAA, and Local 501.

4. Denying OCEA, OCAA, and Local 501 their right to represent employees in their employment relations with the County.

Dated: _____ COUNTY OF ORANGE

By: _____
Authorized Agent

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