STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF TULARE, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Respondent.	Case No. SA-CO-120-M PERB Decision No. 2697-M February 20, 2020
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. COUNTY OF TULARE, Respondent.	Case No. SA-CE-894-M

Appearances: Deanne H. Peterson, County Counsel, and Jennifer M. Flores, Chief Deputy County Counsel, for County of Tulare; Weinberg, Roger & Rosenfeld, by Kerianne R. Steele, Attorney, for Service Employees International Union Local 521.

Before Banks, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of Tulare (County) and Service Employees International Union, Local 521 (SEIU) to the attached proposed decision of an administrative law judge (ALJ). In Case No. SA-CO-120-M, the County alleged that SEIU bargained in bad faith during negotiations for a new Memorandum of Understanding (MOU), thereby violating the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations.[2] In Case No. SA-CE-894-M, SEIU alleged that the County violated the MMBA and PERB Regulations by refusing to provide information, by maintaining an unreasonable rule restricting protected activities in County buildings, and in pursuing Case No. SA-CO-120-M, which allegedly had a tendency to dominate SEIU and/or interfere with protected union and employee rights.

PERB's Office of the General Counsel (OGC) issued complaints in both cases. After holding a consolidated formal hearing, the ALJ found no merit to any of the allegations in either complaint and proposed to dismiss both charges. The County filed timely exceptions and SEIU filed timely cross-exceptions.

We have reviewed the record in this matter and considered the parties' arguments under applicable law. We find the record supports the ALJ's factual findings on pages 9-36 of the proposed decision, and we adopt them as the Board's

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[1] The MMBA is codified at Government Code section 3500 et seq. Statutory references herein are to the Government Code, except where otherwise specified.

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31005 et seq.

own factual findings. We depart from the ALJ's legal analysis, and we reach several conclusions differing from those set forth in the proposed decision. We find that the County unlawfully refused to provide information and maintained an unlawful rule regarding protected activity in County buildings. We dismiss all other allegations in the complaints.

BACKGROUND

At the time of the formal hearing, SEIU represented County employees in six bargaining units. SEIU and the County had negotiated a 2012-2014 MOU covering five of those units—Units 1, 3, 4, 6, and 7. The 2012-2014 MOU expired on June 30, 2014. Between March and July 2014, the parties met and conferred for a new MOU.[3] About two months into these negotiations, on May 20, the County recognized SEIU for the first time as the exclusive representative of a sixth unit—Unit 2. Within a month thereafter, SEIU began proposing terms covering Unit 2, as part of SEIU's overall MOU proposals. The County claimed that SEIU thereby engaged in regressive bargaining, which was one indicia of bad faith bargaining the County ultimately alleged in Case No. SA-CO-120-M.

On July 21, the parties tentatively agreed on a new MOU for all units other than Unit 2. On July 28, SEIU members ratified the new MOU. On July 29, the County Board of Supervisors approved the new MOU. Thereafter, the parties finalized a new MOU for Unit 2.

On August 27, a group of Unit 3 employees filed an agency fee rescission petition.

[3] Unless otherwise specified, all further date references are to 2014.

On September 17, the County filed Case No. SA-CO-120-M, alleging that SEIU engaged in bad faith bargaining. As a remedy, the County asked that PERB order SEIU to reimburse bargaining unit employees for raises that were allegedly delayed due to SEIU's bad faith conduct.

On August 28, October 2, and October 7, SEIU asked the County to provide a copy of an investigative report regarding hostile work environment complaints in the County's Department of Child Support Services (DCSS). On September 9 and October 10, the County refused to provide the report.

On November 24, SEIU filed Case No. SA-CE-894-M.

At all relevant times, the County's Employment Relations Policy (ERP), at section 14(a)(3), stated: "Employee organizations or any of their members shall neither directly nor indirectly: [¶ . . . ¶] [e]ngage in organizing activities, including distribution of literature within County buildings." The County has no such rule restricting conduct by individuals who are not members of a union.

OGC conducted a rescission election for Unit 3, mailing ballots on December 10, to be returned by January 6, 2015. OGC tallied the ballots on January 7, 2015, determining that a majority had not voted for rescission.

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, to the extent that a proposed decision adequately addresses issues raised by certain exceptions, the Board need not further analyze those exceptions. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) The Board also need not address alleged errors that would not impact the outcome. (*Ibid*.)

I. Bad Faith Bargaining Allegations

The ALJ dismissed the County's allegations that SEIU failed to prepare adequately for negotiations, failed to present substantive proposals or responses on certain issues, violated ground rules regarding designated spokespersons, and spent an unreasonable amount of time caucusing. As to these allegations, we have reviewed the evidence and arguments de novo, and join the ALJ in finding insufficient evidence of such bad faith bargaining indicia.[4]

We also find insufficient evidence that SEIU engaged in regressive bargaining. The ALJ rejected several of the County's regressive bargaining allegations, while accepting the allegation that SEIU made a regressive proposal on June 20, but the ALJ ultimately found that SEIU's June 20 conduct did not tend to frustrate negotiations. We have reviewed the ALJ's factual findings regarding the parties' negotiations in that timeframe, as well as the underlying evidence. Like the ALJ, we do not find that the evidence proves an MMBA violation. However, our analysis departs from the proposed decision.

A party does not engage in regressive bargaining if it offers a sufficiently credible and rationally supported justification of changed circumstances that explain why it has made a proposal that ostensibly appears to move the parties further away

[4] We briefly address one allegation on which the proposed decision was relatively equivocal: SEIU's alleged ground rule violation on July 21, when an SEIU bargaining team member made a verbal proposal. The ground rules do not prevent verbal presentations of hypothetical proposals, and the ground rules permit either a spokesperson or his or her designee to speak for the bargaining team. In this case, the parties reached an overall tentative agreement later on July 21, and we do not find that SEIU was required to reduce its verbal proposal to writing in the short interval between floating the proposal and reaching an overall tentative agreement.

from a resolution. (*City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 6, fn. 5; *City of Arcadia* (2019) PERB Decision No. 2648-M, p. 39.) Here, there were credible and rational changed circumstances supporting SEIU's decision to begin covering Unit 2 in its proposals: two months into the negotiations, the County recognized SEIU as the exclusive representative of Unit 2.[5]

[5] Prior to resting its case-in-chief in Case No. SA-CO-120-M, the County orally moved to amend the complaint to allege that SEIU violated ground rules by attempting to bargain for Unit 2 employees without the County's consent. The County explained that it was seeking to amend the complaint to conform to proof. The ALJ erroneously denied the County's motion. (See, e.g., *Contra Costa Community College District* (2019) PERB Decision No. 2669, p. 9 [Even though charging party had rested his case, under PERB's liberal amendment rules the ALJ should have allowed him to amend the complaint and reopen his case-in-chief, while granting an appropriate continuance if needed to prevent undue prejudice to the responding party].) We note two related principles: (i) The County had no need to amend its complaint, if it sought only to add violation of ground rules as an additional indicator of bad faith, because the complaint need not list all such indicia; and (ii) If the County sought to allege violation of ground rules as an independent violation, then the County could either amend the complaint or satisfy the unalleged violation doctrine. (*City of Davis* (2018) PERB Decision No. 2582-M, p. 13.) Thus, the County had the right to raise its additional allegation in each of three separate ways—as an indicia of bad faith that need not be spelled out in the complaint, as an amendment to the complaint to assert an independent violation (which the ALJ should have granted), and potentially also as an unalleged independent violation if the unalleged violation doctrine was satisfied (we make no finding on that issue). Although we reverse the ALJ's refusal to consider whether SEIU violated a ground rule by attempting to bargain for Unit 2, we reject the allegation on its merits. First, we note that the County does not point to any relevant language in the parties' March 19 ground rules agreement, nor have we found any relevant language. The County instead relies on bargaining notes from May 8 and May 20 showing that SEIU's negotiator indicated that the parties should keep Unit 2 issues "on reserve" so as not to "delay an agreement" regarding the other units, and, accordingly, that the parties should schedule a separate meet and confer session for Unit 2. The County agreed with these suggestions, and the parties proceeded to follow them. Although SEIU made written proposals covering both Unit 2 and the other units, there is no evidence that it did so for any reason other than convenience. Both parties placed specific Unit 2 issues on a side burner so as not to delay an MOU

Moreover, a party does not engage in regressive bargaining by withdrawing concessions on some subjects, while offering more favorable terms on other subjects, if the overall set of changes do not tend to frustrate an overall compromise—this will typically be true if aggregate movements toward the other party's position are approximately equal, or greater than equal, to aggregate movements in a regressive direction. (See *City of Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 6, fn. 5; *Charter Oak Unified School District* (1991) PERB Decision No. 873, pp. 17-18.) Proving net regressive conduct often requires some mathematical calculation (when the allegations mainly involve cost items) and requires a more nuanced argument when the allegations involve a mix of cost items and non-cost items. In this case, during the several weeks in which SEIU allegedly acted in a regressive manner, the parties traded multiple alternative packages, some including resolution of all litigation and some excluding such resolution. We do not find that the County met its burden to show regressive conduct, viz., that SEIU made regressive new demands—not including Unit 2 proposals supported by changed circumstances—that were insufficiently offset by SEIU's contemporaneous movements toward compromise.[6]

Lastly, the ALJ found that an SEIU representative engaged in direct dealing when he allegedly bypassed the County's designated representatives, but the ALJ declined to attribute this conduct to SEIU. For the following reasons, we find that the conduct in question, far from amounting to direct dealing, was protected advocacy.

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for the other units. After the parties reached a tentative agreement for the other units on July 21, the parties met to discuss ground rules for Unit 2 negotiations.

[6] We rely on the same principles in rejecting the County's other regressive bargaining allegations.

An exclusive representative has a right to engage in direct and indirect advocacy with an employer's elected and unelected officials, up to and including the employer's highest levels, provided that the exclusive representative does not make new collective bargaining proposals that the exclusive representative has not already made in negotiations with the employer's chosen bargaining team. (*Anaheim Union High School District* (2015) PERB Decision No. 2434, pp. 52-53; *Westminster School District* (1982) PERB Decision No. 277, p. 10; *San Ramon Valley Unified School District* (1982) PERB Decision No. 230, pp. 16-18.) We partially overrule *County of Inyo* (2005) PERB Decision No. 1783-M, as the majority opinion in that decision contravened PERB precedent in explaining why it was reversing OGC's dismissal of an employer's unfair practice charge against a union. (*Id*. at p. 1.) Among the allegations that OGC dismissed, and which the Board reinstated, was a claim that the union engaged in direct dealing during a presentation to the employer's board. (*Id*. at p. 3.) However, the dissenting opinion had the better explanation: there was no allegation that the union made new proposals to the employer's board, and the union was "well within" its "right to public advocacy." (*Id.* at pp. 8-9 [Shek, dissenting, citing *Westminster School District*, *supra*, PERB Decision No. 277].)

Here, the ALJ found that SEIU unit representative Kermit Wullschleger (Wullschleger) lost the MMBA's protection for advocacy when he sent several e-mails to the County's Board of Supervisors. Wullschleger's e-mails did not present any proposals that SEIU had not already made in prior negotiations. Nonetheless, the ALJ found these e-mails crossed the line separating protected advocacy from impermissible direct dealing, because Wullschleger "admitted his purpose was to

persuade the Board of Supervisors to direct the County to put money on the table," the e-mails' language further confirmed this intent, and the ALJ therefore believed the e-mails to be unprotected efforts to convince County Supervisors "to direct County negotiators to offer SEIU wage increases." (Proposed decision, p. 74.) We find that to be a permissible purpose given that Wullschleger did not advocate for contract terms differing materially from those SEIU sought in bargaining, and we therefore conclude that Wullschleger engaged in advocacy protected under the MMBA.[7]

Nor do we find that SEIU engaged in direct dealing on May 29. On that day, the County's Chief Administrative Officer, Jean Rousseau, participated in bargaining. Rousseau made a finance presentation, and SEIU asked her questions, including whether the County would consider a longevity raise or bonus. We do not find that these questions violated the parties' ground rules or constituted direct dealing.

Therefore, like the ALJ, we dismiss the allegations in Case No. SA-CO-120-M.

II. Domination and Interference Allegations

In Case No. SF-CE-894-M, the complaint alleged that the County's prosecution of its unfair practice charge in Case No. SF-CO-120-M interfered with protected rights and dominated or interfered with SEIU's internal administration. The ALJ dismissed this allegation. The proposed decision, like the parties' briefs, neither cites nor applies the critical line of precedent arising initially from a United States Supreme Court decision applying federal labor law, *Bill Johnson's Restaurants, Inc. v. NLRB* (1983) 461 U.S. 731 (*Bill Johnson's*). In following *Bill Johnson's*, PERB has held that an

[7] Having found Wullschleger's e-mails to have been permissible, we express no opinion regarding the ALJ's conclusion that SEIU did not authorize the emails.

employer's decision to litigate claims against a union is generally not an unfair practice, unless the union can demonstrate that the claim had no reasonable basis and was subjectively motivated by an unlawful purpose. (*County of Riverside* (2018) PERB Decision No. 2591-M, p. 7, fn. 5; *State of California (State Personnel Board)* (2004) PERB Decision No. 1680-S, adopting warning letter at pp. 2-4; *Rim of the World Unified School District* (1986) PERB Order No. Ad-161, pp. 16-18; *Bill Johnson's Restaurants*, *supra*, 461 U.S. at pp. 745-747.) In the absence of argument from the parties applying the above cases to the current facts, we find that SEIU did not meet its burden of proving unlawful domination or interference.[8]

III. Information Request Allegations

SEIU asserts that the County violated the MMBA in refusing to provide SEIU a final report regarding alleged hostile working conditions in DCSS. The ALJ dismissed this allegation on the ground that SEIU made its requests while PERB was processing

[8] Prior to the hearing, SEIU moved to amend the complaint in Case No. SA-CE-894-M. The County requested to continue the hearing if the motion was granted. The ALJ denied the motion on multiple grounds. Contrary to the ALJ, we find that the motion to amend was timely and not prejudicial, particularly given the option of providing a continuance to mitigate any undue prejudice. However, the ALJ correctly noted that PERB Regulation 32647 requires a charging party to file an amended charge with its request to amend the complaint, if and only if its request comes before the hearing begins. SEIU did not file an amended charge with its motion, and thereafter SEIU neither remedied this deficiency nor renewed its motion orally during the hearing, when there would have been no need to file an amended charge. (PERB Regulation 32648.) Accordingly, the ALJ's ruling was correct, solely as to its procedural determination. In its exceptions SEIU asserts that the complaint, even unamended, already included at least one theory of violation contained in its rejected amendment: that the County committed an unlawful unilateral change via prosecuting Case No. SA-CO-120-M. SEIU therefore urges us to consider that theory. However, we have scrutinized the complaint in Case No. SA-CE-894-M and do not find that it encompasses a unilateral change theory.

an agency shop rescission petition involving a bargaining unit that includes DCSS employees. (Proposed decision, pp. 77-78.) In the ALJ's view, providing the report during that time would have violated the County's duty of neutrality. (*Ibid*.) The ALJ rejected the County's other grounds for denying SEIU's request, thereby implying, without finding, that the County would have been required to provide the report after PERB finished processing the rescission petition on January 7, 2015.

We find that the rescission petition did not provide a valid ground for the County to deny SEIU's information request, as SEIU's rights and duties with respect to representing employees continued unchanged during the pendency of the rescission petition. An employer's duty of neutrality between internal union factions does not relieve it from continuing to deal in good faith with the bargaining unit's chosen representatives during the pendency of the internal dispute, and in doing so the employer complies with its duty of neutrality. (*City of Arcadia*, *supra*, PERB Decision No. 2648-M, p. 26.) These principles apply even more strongly here, where the internal dispute solely involved whether the unit should continue to be bound by an agency fee agreement, meaning that there was no dispute as to the identity of the unit's chosen representatives. Thus, while the County believed it was acting neutrally by refusing an information request, precedent supports the opposite view; PERB would likely have found the County's refusal to have tainted election conditions, had SEIU sought to block or overturn an election result. (See, e.g., *Children of Promise Preparatory Academy* (2015) PERB Order No. Ad-428, adopting administrative determination at pp. 19-22 [failure to provide information taints the neutral conditions required for a fair election, as it tends to prevent the union from properly assisting

employees, make the union appear weak, increase employees' dissatisfaction with the union, and otherwise discourage employees from supporting the union].) Thus, a pending petition does not give an employer license to refuse valid requests for information.

The County's other defenses also do not defeat SEIU's claim. A union is presumptively entitled to information that is necessary and relevant to the union in exercising its right to represent bargaining unit employees regarding mandatory subjects of bargaining, including but not limited to discipline, retirement benefits, workplace safety, and hostile work environment issues. (*Contra Costa Community College District* (2019) PERB Decision No. 2652, pp. 15-16 (*Contra Costa*), citing other authorities.) This presumptive entitlement to information includes the right to receive investigatory reports relating to hostile work environment claims impacting employees the union represents, though PERB may order appropriate redactions where needed, as explained further below. (*City of Redding* (2011) PERB Decision No. 2190-M, adopting proposed decision at pp. 17-18 (*Redding*).) A refusal to provide such information upon request constitutes a per se violation of the duty to meet and confer in good faith, as well as interference with protected rights. (*State of California (Department of Veterans Affairs)* (2004) PERB Decision No. 1686-S, adopting proposed decision at p. 18.)

Even if a report regarding hostile work environment claims contains confidential information that implicates "constitutionally significant privacy rights of third parties," a union's "unique representational functions" may give it a right to certain private information in the report, to the extent the union can demonstrate a strong need for

such private information. (*Contra Costa*, *supra*, PERB Decision No. 2652, pp. 18-19, citing *Sacramento City Unified School District* (2018) PERB Decision No. 2597, p. 11 (*Sacramento*) and *Redding*, *supra*, PERB Decision No. 2190-M, adopting proposed decision at pp. 16-18.) PERB has established the following legal framework covering such situations: if a third party possesses a legally protected privacy interest that is based upon an objectively reasonable expectation of privacy, yet the union seeks to invade that privacy in a manner that is serious in both its nature and its scope, then we engage in a balancing test; if the serious invasion of privacy outweighs the union's need for the information, then the union's presumptive right to relevant information is overcome and narrowly tailored redactions or other accommodations become appropriate. (*Contra Costa*, *supra*, PERB Decision No. 2652, p. 18; *Los Angeles Unified School District* (2015) PERB Decision No. 2438, pp. 13-15, citing *County of Los Angeles v. Los Angeles County Employee Relations Commission, et al.* (2013) 56 Cal.4th 905, 926, and noting that balancing test applies only if all three elements of a privacy claim exist.)

If the circumstances surrounding a union's request show that third party privacy rights outweigh the union's presumptive right to information, the employer still may not unilaterally determine how to proceed but must instead negotiate in good faith with the requesting union. (*Contra Costa*, *supra*, PERB Decision No. 2652, pp. 18-19; *Sacramento*, *supra*, PERB Decision No. 2597, pp. 12-14.) In such negotiations, the parties may determine to rely on one of several common accommodations, including "redacting information that is not relevant to the union's purpose in requesting records, or for which privacy otherwise outweighs the union's need," or arrangements in which

the parties agree to use the requested records only for specified purposes and to disclose such records to the union's employees, attorneys, or agents only as needed. (*Ibid.*) If redaction is warranted, the parties can bargain over the method of redaction, as they "may need to replace redacted names with descriptive but de-identified placeholders," thereby permitting parties to track the important figures within a given record or across multiple records. (*Sacramento*, *supra*, PERB Decision No. 2597, p. 13, fn. 7.)

Thus, an employer may not unilaterally reject an information request based on alleged privacy concerns, as that frustrates the purposes of state labor law "by converting the applicable procedure from a two-way negotiation to a unilateral decision." (*Contra Costa*, *supra*, PERB Decision No. 2652, p. 19; *Sacramento*, *supra*, PERB Decision No. 2597, p. 13.) That is what the County did here, thereby violating the MMBA. For instance, while the County asserts that SEIU's request was overbroad because the report covered both employees represented by SEIU and unrepresented employees, the County did not raise that issue at the time, but instead flatly denied SEIU's request. Had the County complied with the MMBA, the parties would have had the opportunity to work out redactions or a different accommodation. The County waived such specific privacy concerns by categorically refusing SEIU's request instead of offering to meet to seek an accommodation. (*Sacramento*, *supra*, PERB Decision No. 2597, p. 12 [employer must raise its confidentiality concerns in a timely manner and then meet with the union to seek an accommodation].)[9]

[9] When the County rejected SEIU's request outright, it also relied on defenses under the California Public Records Act, Gov. Code sec. 6250 et seq. (CPRA), including the deliberative process privilege. As the ALJ noted, defenses to disclosure

If third party privacy rights provide an employer with a legitimate basis for negotiating redactions or accommodations, but the employer instead shuts out the union by flatly denying the request, it can be challenging to discern the most appropriate remedy. An order requiring the employer to provide a redacted copy of the report but leaving it to the employer to decide on the content of such redactions would invite further rounds of litigation challenging the employer's unilateral redactions. Moreover, such an order would fail to enforce the rule that an employer must work with a union promptly after it submits an information request, and it would incentivize employers to do what the County did here. For that reason, where, as here, the employer has waived its right to negotiate an accommodation with the union, PERB must determine the extent of any appropriate redactions.

In most such cases, the best practice is for the ALJ hearing the unfair practice matter to conduct an in camera review and then order production of the full, unredacted document unless there is clear evidence that doing so would lead to a

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under the CPRA cannot be imported into labor law, because a union has a greater right to information than members of the general public. (*Sacramento*, *supra*, PERB Decision No. 2597, pp. 10-11.) Thus, while the CPRA prevents members of the public from obtaining a public entity's internal deliberative records pertaining to certain of its obligations under California labor law (CPRA, Gov. Code sec. 6254(p)), when a union requests relevant information from an employer, the employer benefits only from the more limited privilege that protects both unions and employers from being forced to reveal to the other party their internal collective bargaining strategies or tactics. (Compare *Colton Joint Unified School District/Rialto Unified School District/San Bernardino City Unified School District* (1981) PERB Order No. Ad-113 [adopting the privilege protecting internal discussions regarding strategy for collective bargaining, as set forth in *Berbiglia, Inc.* (1977) 233 NLRB 1476, 1495] with *Trustees of the California State University* (2004) PERB Decision No. 1591-H, pp. 2-3 [the deliberative process privilege is not a valid defense to a union's information request].)

serious invasion of a significant privacy right, in which case the ALJ's proposed decision should provide clear direction regarding the narrowly tailored redactions that are allowable. As noted above, such redactions typically involve replacing names with descriptive but de-identified placeholders, thereby permitting parties to track the important figures within a given record or across multiple records. (*Sacramento*, *supra*, PERB Decision No. 2597, p. 13, fn. 7.)[10]

In this case, the ALJ did not review the report in camera. Thus, although the record to date reveals no evidence showing a potentially serious invasion of a significant privacy right, we recognize that we do not have full knowledge regarding the contents of the report. In these circumstances, relying on OGC's traditional role in ensuring fair and expeditious compliance with our orders, we order the County to submit an unredacted copy of the report to OGC within 10 days from the date this decision is no longer subject to appeal. We direct OGC, upon receipt of the unredacted report, to determine if full disclosure of the unredacted report would constitute a serious violation of a significant privacy interest held by one or more third parties, and, if so, to balance each instance of such a privacy invasion against SEIU's need for the information in question. Solely in those cases in which the serious invasion of a significant privacy right outweighs SEIU's need for the information, we direct OGC to make appropriate narrowly tailored redactions consistent with this decision. If any such redactions are warranted, OGC shall endeavor to replace redacted names and information with descriptive but de-identified placeholders,

[10] The employer, in turn, has the right to take exceptions to the Board, by filing both the redacted and unredacted documents under seal and serving on the union only those documents that the union already possesses.

thereby fostering SEIU's ability to understand and interpret the report to the greatest degree possible, despite the redactions.[11]

Each party may aid OGC in the aforementioned review by submitting a single written letter of no more than 10 pages. Any such letter from the County shall be filed with OGC, concurrently with the unredacted report, within 10 days after this decision is no longer subject to appeal, and any such letter from SEIU shall be filed with OGC within 20 days after this decision is no longer subject to appeal. Within 30 days after this decision is no longer subject to appeal, OGC shall provide SEIU and the County with a copy of the report, with any narrowly tailored redactions found appropriate, unless the parties have notified OGC that they have settled the matter within that timeframe.

IV. Allegations Regarding ERP Section 14(a)(3)

Under the MMBA, a local agency may adopt reasonable access rules. (MMBA, § 3507, subd. (a)(6), (a)(7).) In order to be lawful, such rules and regulations may not undercut or frustrate the MMBA's policies and purposes. (*Int'l Federation of Professional & Technical Eng'rs, Local 21 v. City & County of San Francisco* (2000) 79 Cal.App.4th 1300, 1306 (*IFPTE*); *Huntington Beach Police Officers' Assn v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 500-502 (*Huntington Beach*).) Therefore, whether a local agency has adopted its rules, regulations, or charter provisions via a vote of its electorate, a vote of its governing board, or through any

[11] Even if SEIU's need for the information has lessened with the passage of time since SEIU's request, OGC must disregard that fact, since it is irrelevant to the analysis. (*Children of Promise Preparatory Academy* (2015) PERB Order No. Ad-473, pp. 4-5.)

other means, the resulting policies must be consistent with the MMBA. (*Int'l Bhd. of Elec. Workers v. City of Gridley* (1983) 34 Cal.3d 191, 202; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 781 (*Voters for Responsible Retirement*) [MMBA restricts the local electorate's power to legislate through the initiative or referendum process]; *IFPTE*, *supra*, 79 Cal.App.4th at p. 1306, citing *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 63 ["Local regulation is permitted only if 'consistent with the purposes of the MMBA.'"].)

The MMBA affords both employee and non-employee representatives of employee organizations access to areas in which employees work, subject to reasonable employer regulation. (*County of Orange* (2018) PERB Decision No. 2611-M, p. 3 (*Orange*); *County of Riverside* (2012) PERB Decision No. 2233-M, p. 8.) Any such regulation must be both necessary to the employer's efficient operations or safety of employees or others, and narrowly drafted to avoid overbroad, unnecessary interference with the exercise of statutory rights. (*Orange*, *supra*, PERB Decision No. 2611-M, p. 3.) Moreover, an otherwise lawful rule will violate the MMBA if its language or application singles out union or other protected activities, as compared to non-protected activities. (*Orange*, *supra*, PERB Decision No. 2611-M, pp. 3-4; *Regents of the University of California (Irvine)* (2018) PERB Decision No. 2593-H, p. 8; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 50 (*Petaluma I*).)

In this case, the challenged local rule stated: "Employee organizations or any of their members shall neither directly nor indirectly [¶ . . . ¶] [e]ngage in organizing activities, including distribution of literature within County buildings." As we proceed to

explain, the County's rule is inconsistent with the MMBA because it is both discriminatory and overbroad.[12]

First, the County's rule explicitly addresses only protected activities. We find no evidence that the County has a comparable rule restricting employees from soliciting others, or engaging in organizing or publicity in the workplace, about issues or organizations unrelated to protected employee or union rights.[13]

Furthermore, even if the rule were both written and applied in a nondiscriminatory manner, it nonetheless would violate the MMBA by virtue of its overbreadth. As we noted in *Petaluma I*, *supra*, PERB Decision No. 2485, "a categorical prohibition against distributing literature or other means of communication interferes with fundamental rights of employee organizations to represent and communicate with employees and of employees to self-organize and communicate with one another *in the workplace*." (*Id*. at p. 44, emphasis in original.) Thus, to be

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[12] The proposed decision rejected these allegations on a mix of substantive and procedural grounds. While we address the substantive issues below, we first briefly note that there is no procedural bar to SEIU's claims. Although the ALJ believed that SEIU had not raised a facial challenge prior to the post-hearing briefs, and that SEIU therefore waived any such challenge, we disagree. The complaint included a facial challenge, as it alleged that the County violated the MMBA by "maintaining" the rule, which is a separate act from any alleged enforcement. Moreover, to the extent the proposed decision rejected SEIU's facial challenge as having been brought outside the statute of limitations, we note that a facial challenge may be brought at any time where, as here, a charging party would risk discipline or other adverse consequences if it were to violate the rule. (*City and County of San Francisco* (2017) PERB Decision No. 2536-M, pp. 14-15 & fn. 12.)

[13] One example is that the rule covers employees represented by a union, and the record does not reveal a comparable rule covering employees who are unrepresented.

lawful, such a rule must not only be nondiscriminatory in language and in application, it must also permit protected activities in nonwork times and nonwork areas. (*Id*. at pp. 45-47.)[14] In drafting a prohibition that carves out nonwork time and nonwork areas, an employer should refrain from using vague or overbroad phrases such as "during the workday" or "off school property," which fail to note explicitly that the prohibition does not apply in those places and times in which the employer tolerates other nonofficial activities, such as during breaks. (*Id*. at pp. 46-47.) The instant case is not a close one, as the County's rule is a categorical prohibition with no qualifications. Indeed, the key phrase appearing in the rule—"within County buildings"—is overbroad in that it includes both nonwork times and nonwork areas. (Cf. *Superior Court v. Public Employment Relations Board* (2018) 30 Cal.App.5th 158, 195-197 [rule prohibiting protected activities in "working areas" was unlawfully overbroad because it could be interpreted as categorical ban on all such activities anywhere on employer's premises].)

In these circumstances, and in the absence of any attempt by the County to show that it had narrowly drafted the rule and no reasonable alternative to the wording it chose, we find that the County violated the MMBA by maintaining ERP section 14(a)(3), irrespective of whether the County enforced this rule. (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2590, pp. 4-5; *Petaluma I*, *supra*, PERB Decision No. 2485, p. 51; *Long Beach Unified School District* (1987) PERB Decision No. 608, p. 12.)

[14] Precedent allows limited exceptions, based on special circumstances. (*Petaluma I*, *supra*, PERB Decision No. 2485, p. 46.) The County made no such showing here.

ORDER

Based upon the foregoing analysis and those portions of the proposed decision adopted as the Board's own decision, we find that the County of Tulare (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3506, 3506.5, subdivisions (a), (b), and (c), and 3507, as well as PERB Regulation 32603, subdivisions (a), (b), (c), and (f), by: (1) failing to provide relevant and necessary information to Service Employees International Union Local 521 (SEIU), and (2) maintaining section 14(a)(3) of the County's Employment Relations Policy.

Pursuant to Government Code section 3509, it is hereby ORDERED that section 14(a)(3) of the County's Employment Relations Policy is void and that the County, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to provide necessary and relevant information to SEIU pursuant to the requirements of the MMBA.

2. Interfering with union and employee rights to distribute literature and engage in other organizing activities in County buildings, in areas and at times that do not interfere with operations.

3. Prohibiting union organizing and distribution of union-related literature in County buildings to a greater degree than the County prohibits other non-official activity.

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

1. Within 10 workdays following the date this decision is no longer subject to appeal, submit to PERB's Office of the General Counsel (OGC) an unredacted copy of the report SEIU requested in 2014, which pertained to complaints of a hostile work environment in the County's Department of Child Support Services.

2. OGC will then determine if full disclosure of the unredacted report would constitute a serious violation of a significant privacy interest held by one or more third parties, and, if so, will balance each instance of such a privacy invasion against SEIU's need for the information in question. Solely in those cases in which the serious invasion of a significant privacy right outweighs SEIU's need for the information, OGC will make appropriate narrowly tailored redactions. If any such redactions are warranted, OGC shall endeavor to replace redacted names and information with descriptive but de-identified placeholders, thereby fostering SEIU's ability to understand and interpret the report to the greatest degree possible, despite the redactions.

3. Each party may aid OGC in the review detailed in paragraph B(2) by submitting a single written letter of no more than 10 pages. Any such letter from the County shall be filed with OGC, concurrently with the unredacted report, within 10 days after this decision is no longer subject to appeal, and any such letter from SEIU shall be filed with OGC within 20 days after this decision is no longer subject to appeal.

4. Within 30 days after this decision is no longer subject to appeal, OGC shall provide SEIU and the County with a copy of the report, with any narrowly

tailored redactions found appropriate, unless the parties have notified OGC that they have settled the matter within that timeframe.

5. Within 10 workdays following the date this decision is no longer subject to appeal, post at all locations where notices to employees represented by SEIU are customarily posted, copies of the notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 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 employees represented by SEIU. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

6. Written notification of the actions taken to comply with this Order shall be made to OGC. The County shall provide reports, in writing, as directed by OGC. All reports regarding compliance with this Order shall be concurrently served on SEIU.

Members Banks and Paulson joined in this Decision.

APPENDIX

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

After a consolidated hearing in Unfair Practice Case Nos. SA-CO-120-M and SA-CE-894-M, in which both the County of Tulare (County) and Service Employees International Union Local 521 (SEIU) had the right to participate, it has been found that the County violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3506, 3506.5, subdivisions (a), (b), and (c), and 3507, as well as PERB Regulation 32603, subdivisions (a), (b), (c), and (f), by: (1) maintaining section 14(a)(3) of the County's Employment Relations Policy, and (2) failing to provide relevant and necessary information to SEIU.

As a result of this conduct, section 14(a)(3) of the County's Employment Relations Policy (ERP) has been declared void, we have been ordered to post this Notice, and we will:

A. CEASE AND DESIST FROM:

1. Failing to provide necessary and relevant information to SEIU pursuant to the requirements of the MMBA.

2. Interfering with union and employee rights to distribute literature and engage in other organizing activities in County buildings, in areas and at times that do not interfere with operations.

3. Prohibiting union organizing and distribution of union-related literature in County buildings to a greater degree than the County prohibits other non-official activity.

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

1. Within 10 workdays following the date this decision is no longer subject to appeal, submit to PERB's Office of the General Counsel (OGC) an unredacted copy of the report SEIU requested in 2014, which pertained to complaints of a hostile work environment in the County's Department of Child Support Services.

2. OGC will then determine if full disclosure of the unredacted report would constitute a serious violation of a significant privacy interest held by one or more third parties, and, if so, will balance each instance of such a privacy invasion

against SEIU's need for the information in question. Solely in those cases in which the serious invasion of a significant privacy right outweighs SEIU's need for the information, OGC will make appropriate narrowly tailored redactions. If any such redactions are warranted, OGC shall endeavor to replace redacted names and information with descriptive but de-identified placeholders, thereby fostering SEIU's ability to understand and interpret the report to the greatest degree possible, despite the redactions.

3. Each party may aid OGC in the review detailed in paragraph B(2) by submitting a single written letter of no more than 10 pages. Any such letter from the County shall be filed with OGC, concurrently with the unredacted report, within 10 days after this decision is no longer subject to appeal. Any such letter from SEIU shall be filed with OGC within 20 days after this decision is no longer subject to appeal.

4. Within 30 days after this decision is no longer subject to appeal, OGC shall provide SEIU and the County with a copy of the report, with any narrowly tailored redactions found appropriate, unless the parties have notified OGC that they have settled the matter within that timeframe.

Dated: _____ COUNTY OF TULARE

By: _____
Authorized Agent

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF TULARE, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Respondent.	UNFAIR PRACTICE CASE NO. SA-CO-120-M PROPOSED DECISION (April 28, 2017)
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. COUNTY OF TULARE, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-894-M

Appearances: Renne Sloan Holtzman Sakai, by Erich W. Shiners and Charles D. Sakai, Attorneys, Kathleen Bales-Lange, County Counsel, and Jennifer M. Flores, Chief Deputy County Counsel, and Porter Scott, by John R. Whitefleet and Kevin Kreutz, Attorneys, for County of Tulare; Weinberg, Roger & Rosenfeld, by Kerianne R. Steele, and Sean D. Graham, Attorneys, for Service Employees International Union Local 521.

Before Christine A. Bologna, Administrative Law Judge.

PROCEDURAL HISTORY

These consolidated cases allege domination/interference of an exclusive representative, refusal to provide information, and maintenance of an unreasonable local rule by a public agency employer; and bad faith bargaining by a recognized employee organization in successor contract negotiations. The employer denies any

violations of law/unfair practices, and avers its conduct was protected and privileged. The union also disputes any liability.

On September 17, 2014, the County of Tulare (County) filed an unfair practice charge (charge) against Service Employees International Union, Local 521 (SEIU) (CO charge) (Case No. SA-CO-120-M). On November 4, Respondent SEIU requested an extension of time to file a position statement; Charging Party County did not agree to the extension; on November 6, the Public Employment Relations Board (PERB or Board) Office of the General Counsel/Regional Attorney granted the extension. On November 6, the County requested expedited processing of the charge (PERB Regulation 32147, subdivision (b),[1] and opposed SEIU's request for extension. On November 17, SEIU opposed the County's request to expedite; on November 21, SEIU filed a position statement responding to the charge. On December 29, the Regional Attorney denied the County's request to expedite the charge.

On November 24, 2014, SEIU filed a charge against the County (CE charge) (Case No. SA-CE-894-M). On December 31, Respondent County filed a position statement responding to the charge, including California Code of Civil Procedure section 426.15 (authorizing a special motion to strike a strategic lawsuit against public participation (anti-SLAPP statute).

On July 6, 2015, the PERB General Counsel/Board Agent issued an unfair practice complaint in the CE charge (CE complaint). The CE complaint alleged employer domination or interference with Charging Party's administration by

[1] PERB Regulations are codified at California Code of Regulations, title 8, section 31005 et seq.

Respondent County filing the CO charge against SEIU, claiming regressive bargaining and delays in final agreement, requesting relief of back pay for affected employees, and publicizing the charge and back pay remedy. The CE complaint also alleged that the County twice refused to supply SEIU with a written report of investigative findings on hostile work environment complaints, which SEIU requested three times; and maintained an unreasonable rule, Employment Relations Policy (ERP), sections 14 (a) (1) – (6), which restricted employee organizations or their members from organizing and distributing literature in County buildings, but not such conduct by individuals who were not members of an employee organization.[2] The CE complaint alleged violations of the Meyers-Milias-Brown Act (MMBA)[3] sections 3502; 3504.5; 3505; 3506; 3506.5, subdivisions (a), (b), (c), and (d); 3507; and 3509, subdivision (b); and PERB Regulations 32603, subdivisions (a), (b), (c), (d), and (g).[4]

On July 8, 2015, Charging Party County refiled its request for expedited processing of the CO charge based on issuance of the CE complaint and pending informal settlement conference. On July 10, the PERB Regional Attorney issued a

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[2] SEIU's CE charge also alleged that the County unilaterally changed employee wages; illegally promised benefits; discouraged support for SEIU; aided the agency fee rescission petition/election in SEIU-represented bargaining unit 3; and bypassed, undermined, and derogated SEIU's authority as exclusive representative. These claims were not included in the CE complaint.

[3] The MMBA is codified at Government Code section 3500 et seq. All statutory references are to the Government Code unless otherwise indicated.

[4] The CE complaint also alleged derivative violations of interference with the rights of bargaining unit employees to be represented by SEIU, and denial of SEIU's rights to represent unit employees.

complaint in the CO charge (CO complaint). The CO complaint alleged that while the County and Respondent SEIU were meeting and conferring from March to July 2014, SEIU made a regressive bargaining proposal on June 20; failed to prepare for bargaining sessions on May 8 and 29 and July 7, also violating the parties' negotiated ground rules; failed to present a substantive health and safety proposal, and a substantive response to the County's April 17 initial proposal on April 22; violated ground rules on presenting initial proposals and designated spokespersons on May 15 and July 21; spent unreasonable amounts of time caucusing on April 22, May 20, June 9 and 26, and June 7; and attempted to bypass, undermine, and derogate the authority of County representatives on May 21 and 22, June 17, and May 29.[5] The CO complaint alleged SEIU's failure and refusal to meet and confer in good faith with the County in violation of MMBA sections 3505 and 3509, subdivision (b), and PERB Regulation 32604, subdivision (c).

On July 28, 2015, Respondent SEIU answered the CO complaint, admitting it was an exclusive representative, denying all other claims, and asserting affirmative defenses. Respondent County answered the CE complaint on July 31, admitting SEIU was an exclusive representative and it was a public agency, admitting certain factual allegations,[6] denying all substantive claims, averring protected and/or privileged

[5] The County's CO charge also alleged that SEIU made burdensome information requests; attempted to bargain for additional employees it was seeking to represent in bargaining unit 2; and made false, misleading statements. These claims were not included in the CO complaint.

[6] The County admitted filing a charge on September 17, 2014 alleging that SEIU bargained in bad faith, and seeking, among other remedies, that employees be made whole for lost wages resulting from SEIU's unlawful conduct; SEIU requested

conduct, and asserting affirmative defenses; the County moved to strike two paragraphs in SEIU's answer that denied the County was a public agency and the parties were meeting and conferring.

An August 18, 2015 informal settlement conference in the CE and CO complaints did not resolve the disputes. A November 3-4 hearing in both cases was noticed on August 20.

On August 20, 2015, Respondent SEIU responded to the County's motion to strike, and filed an amended answer admitting the two paragraphs in the CO complaint. My August 24 order denied the County's motion to strike because the amended answer admitted the two allegations, but did not dismiss the motion as moot as SEIU urged.

On September 9, 2015, Respondent County filed a special motion to strike Charging Party SEIU's CE complaint based on the anti-SLAPP statute. On October 12, SEIU opposed the special motion to strike (anti-SLAPP), and requested official notice. On October 23, the County replied to SEIU's response-opposition; on October 25, SEIU opposed the County's reply and moved to strike it, and the County responded to SEIU's filing, requesting consideration of its reply.

On September 17, 2015, SEIU filed a subpoena duces tecum for 14 documents. On September 18, a PERB Administrative Law Judge (ALJ) signed 11 testimonial subpoenas. My September 21 order granted production of seven documents, and denied production of seven documents. On October 20, SEIU filed

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the investigative report on the three dates in the complaint; and the ERP section 14 (a) (3) language.

two subpoenas duces tecum, affidavits, and supplemental showing for documents. On October 7, the County moved to revoke seven testimonial subpoenas for the five member Board of Supervisors, County Administrative Officer (CAO), and County Counsel; SEIU opposed the motion October 21.

My October 27, 2015 order: (1) granted production of the same seven documents, and denied production of the same seven documents in the SEIU subpoenas duces tecum for the same reasons in my September 21 order, and additional ones; (2) granted the County's motion to revoke five subpoenas for the Supervisors, and denied the motion to revoke them for the CAO and County Counsel;[7] and (3) denied the County's special motion to strike the CE complaint (anti-SLAPP) as applying only to civil lawsuits filed in Superior Courts rather than

[7] Attorney-client, work product, and mental impression privileges were recognized; permissible areas of inquiry were identified.

administrative appeals,[8] unsupported by Court or PERB precedent,[9] overbroad,[10] procedurally deficient,[11] and including claims in the CO complaint.[12]

On October 28, 2015, SEIU moved to amend the CE complaint.[13] On October 29, the County opposed the motion.[14] My November 2 order denied the

[8] California Code of Civil Procedure section 425.16 text and terms.

[9] The three Court cases began in administrative forums; malicious prosecution lawsuits were filed in Superior Courts and appealed. The six PERB cases did not support the points urged or were inapplicable; none authorized the Board to adjudicate substantive motions under the anti-SLAPP statute.

[10] The CE complaint included the County's refusal to supply requested information and maintenance of an unreasonable rule, claims unrelated to its filing the CO charge of bad faith bargaining by SEIU.

[11] The special motion sought to strike Charging Party SEIU's complaint, but the PERB General Counsel issued the complaint. SEIU filed the CE charge. After investigation, the General Counsel found some charge allegations, but not all, to state a prima facie case of MMBA violations and issued the CE complaint. SEIU bears the burden of proving the CE complaint at the hearing.

[12] Like SEIU's CE charge, some, but not all, of Charging Party County's CO charge allegations were included in the PERB General Counsel-issued CO complaint as stating prima facie MMBA violations. The County has the burden of proving the CO complaint at hearing.

[13] To add allegations of unilateral change, and the County filed the CO charge during an agency fee rescission election in unit 3.

[14] The unilateral change amendment was prejudicial and untimely; the agency fee election amendment was duplicative and unnecessary.

motion/amendment as procedurally deficient, untimely, prejudicial to opposing party, and unsupported.[15]

On November 3 and 4, 2015, and January 4, 2016, formal hearing was held in Sacramento. On January 4, at the end of the CO case,[16] the County orally moved to amend the CO complaint to add an allegation that SEIU violated ground rules by attempting to bargain for unit 2 employees without the County's consent as a further indicator of bad faith bargaining; this claim was in the CO charge, not in the complaint, but all evidence alleged in the charge was in the hearing record. SEIU opposed the motion as an untimely amendment; the County responded it was seeking to amend to conform to proof; SEIU objected. The motion was denied as untimely/prejudicial.[17]

On March 30, 2016, the consolidated cases were submitted for decision after receipt of post-hearing briefs.[18]

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[15] The motion to amend did not contain an amended charge (PERB Regulation 32147), and was filed four business days before the hearing. The County requested a continuance of the hearing if the amendment was granted (PERB Regulation 32648).

[16] County case in chief, SEIU affirmative defense, County rebuttal, SEIU surrebuttal.

[17] Hearing transcript, volume III, pages 157-158.

[18] Both parties reargued claims in their CO and CE charges that were not in the complaints, and/or were in motions previously denied, while criticizing the other's attempt(s) to do so. SEIU argued unilateral change, agency fee rescission election, and illegal promise of benefits, and opposed the County including unit 2 claims and rearguing the anti-SLAPP special motion to strike. The County asserted its anti-SLAPP motion and sought reconsideration of the motion to amend to conform to proof, contesting SEIU's unilateral change claims and characterization of its unit 2 contentions. *Fns.* 2, 5, 8-12, 17, *supra*. The prior rulings are affirmed; these claims are not reconsidered or addressed further.

****PORTION OF PROPOSED DECISION ADOPTED BY BOARD STARTS HERE****

FINDINGS OF FACT

Jurisdiction

SEIU's and the County's answers to the CO and CE complaints admitted SEIU is an employee organization under section 3501, subdivision (a), and exclusive representative of an appropriate unit of employees under PERB Regulation 32016, subdivision (b); and the County is a public agency under section 3501, subdivision (c), and PERB Regulation 32016, subdivision (b).

Stipulations/Admissions

The County and SEIU answers to the complaints admitted: (1) the County and SEIU met and conferred under section 3505 from March 19 to July 2014; (2) on September 17, 2014, the County filed a charge against SEIU alleging bad faith bargaining and seeking that employees be made whole for lost wages; (3) on August 28, October 2, and October 7, 2014, SEIU requested an investigative report on complaints of a hostile work environment in the County Child Support Services Department, and the County refused to provide the report on September 9 and October 10; and (4) the County ERP section 14 (a) (3) states: "Employee organizations or any of their members shall neither directly nor indirectly . . . . engage in organizing activities, including distribution of literature within County buildings."

The parties stipulated to facts that: (1) the County and SEIU met and conferred over a memorandum of understanding (MOU) on March 19, April 17 and 22, May 8,

15, 20, and 29, June 9, 20, and 26, and July 7 and 21, 2014;[19] (2) on July 21, the parties reached a tentative agreement (TA) on a new MOU; (3) on July 28, SEIU members ratified the MOU; and (4) on July 29, the County Board of Supervisors approved the MOU.

On November 3, 2015, SEIU requested, and official notice was taken of PERB Case No. SA-OS-149-M (County, Group of Employees, and SEIU).[20] On August 27, 2014, a group of bargaining unit 3 employees filed an agency fee rescission petition. After investigation,[21] the PERB General Counsel ordered an election on November 12. Ballots were mailed on December 10 to be returned January 6, 2015, and tallied January 7; 128 ballots were cast, 110 to rescind. The election winner was no rescission.[22]

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[19] The CO complaint alleged SEIU spent an unreasonable amount of time caucusing on June 7, not one of the stipulated bargaining dates. SEIU argued that the parties did not negotiate on June 7, and for the allegation's dismissal. The parties' factual stipulation is deemed to correct the date to July 7.

[20] PERB may take official/administrative notice of matters within its files and records for generally accepted and readily identifiable facts. (*Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C; *Inglewood Unified School District* (2012) PERB Decision No. 2290; *City of Alhambra* (2010) PERB Decision No. 2139-M; *Antelope Valley Community College District* (1979) PERB Decision No. 97). The PERB case management records system/database identifies events in the representation case.

[21] PERB Regulations 61600-61630 require proof that 30 percent (30%) of unit employees desire a vote to rescind the existing agency fee provision. An October 21 Administrative Determination granted SEIU's request for extension of time to oppose the petition.

[22] Between 412 and 414 unit 3 employees were eligible to vote in the election. A majority, 207 to 208 votes, was required to rescind the existing agency fee

Background

SEIU has been the exclusive representative for 2400-plus employees in five County bargaining units under one MOU for several years.[23]

Shelline Bennett (Bennett)[24] has been County Chief Negotiator for SEIU bargaining units since 2011; she has bargained at least four MOUs with three SEIU Chief Negotiators.[25] Rhonda Sjostrom (Sjostrom)[26] has been County HRD Director since July 2013.

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provision. (PERB Regulations 61600-61630).

[23] Unit 1-Clerical and Related; Unit 3-Technical & Vocational; Unit 4-Social Services; Unit 6-Health Services; Unit 7-Supervisors & Staff Management. Article 1, Recognition, 2014-2015 MOU.

[24] Bennett is managing partner of Liebert Cassidy Whitmore in Fresno. She has been lead negotiator for over 100 contracts since 2006, and bargained the last three to four agreements with all County units.

[25] 2011-12, 2012-14, 2014-15, and 2015-17 agreements. The SEIU Chief Negotiators were Kristy Sermerscheim and Teneya Johnson (Johnson) for the first two contracts; SEIU Lead Internal Worksite Organizer Joanne Juarez-Salazar (Salazar) was Chief Negotiator in the last two agreements.

[26] Sjostrom has worked for the County for 28 years in analyst, personnel/human resources, supervisory and management positions in the County Administrative Office and Human Resource and Development Department (HRD). She has been on the County bargaining team for SEIU units since 2009. HRD is the employer representative in labor relations matters with SEIU. Article 6, Employee Organization Time Off, 2014-2015 MOU.

The 2012-2014 MOU expired June 30, 2014.[27] SEIU requested negotiations in January, and bargaining began March 19. SEIU team members were: Salazar;[28] Internal Worksite Organizer Mark Araiza (Araiza); Chapter President Greg Gomez (Gomez);[29] Kermit Wullschleger (Wullschleger);[30] Bryan "Ty" Inman (Inman);[31] Ryan Wilson (Wilson); Marcy Ramirez (Ramirez);[32] Linda Castillo (Castillo);[33] and Stephanie Souza (Souza).[34]

The County negotiating team members were Bennett, Sjostrom, and HRD Employee Relations Specialist Eric Martin (Martin).

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[27] All dates are 2014 unless otherwise noted.

[28] Salazar began working for SEIU in 2013. The 2014 negotiations were her first with a County workforce. She has 15 years public sector bargaining experience with California School Employees Association (public school classified employees), SEIU Local 1000 (state civil service), and California State University Employees Union Local 2579 (non-academic personnel). SEIU staff are non-voting team members.

[29] Chapter President Gomez was a unit 7 Information Technology Supervisor. *Fn*. 23, *supra*.

[30] Wullschleger is a Social Services Worker III with the Child Welfare Services Department, unit 4 representative, and 26-year County employee. The Chapter votes for team members, other than President, based on bargaining unit and employee job classifications (class). Wullschleger was on the 2005 and 2015-17 teams.

[31] Inman is a Self Sufficiency Counselor III with the Health and Human Services Department in Porterville, unit 4 representative, and 16-year County employee. Inman was on the 2012-14 and 2015-17 teams.

[32] Wilson and Ramirez were Child Support/Welfare Services Officers and unit 3 representatives.

[33] Castillo was a Dispatcher-unit 3 representative.

[34] Souza was a unit 1 representative in the County Assessor's Office.

When successor negotiations began in March, County bargaining unit 2 (Crafts and Trades) was not represented.[35] SEIU had filed a request for recognition; it was unclear when the Board of Supervisors would act on the representation petition.[36] At the May 20 public meeting, the Board approved the petition, formally certifying SEIU as unit 2 exclusive representative for 220-plus employees.

Lena Case (Case) joined the SEIU bargaining team at some point.[37]

CO Complaint: March 19-Ground Rules, Request for Information

On March 19, the first session, the County proposed 13 ground rules for SEIU negotiations in bargaining units 1, 3, 4, 6, and 7. Bennett presented and explained each, and asked for questions. After discussion, Bennett and Salazar signed the rules, unchanged.

The Chief Spokespersons for the County and SEIU were Bennett and Salazar, or their designees; Chief Spokespersons were responsible for TAs, scheduling

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[35] In 2013, unit 2 employees received 3% wage increases as unrepresented County workers.

[36] Sjostrom testified that the petition was filed at least 60 days before bargaining started. The Teamsters also sought recognition in unit 2. Mediation by a national organization resulted in an anti-raiding agreement, allowing SEIU to pursue recognition.

[37] Case was a unit 2 Custodian. Bennett testified that Case was at bargaining sessions before SEIU was recognized in unit 2, and she tried to clarify why Case was there. Sjostrom testified that Case entered negotiations after talks started but before SEIU recognition, and the County gave her release time. Salazar testified that Case was always on the SEIU team. Salazar assigned various roles to “Team Tulare County Community First” (Community First) members; Case was Co-Recruitment Coordinator. Case prepared a timeline of dates/events from May 29 through August 26, and took SEIU notes for May 29 and June 9 negotiations.

meeting dates, and coordinating communications. Formal proposals and counter-proposals were written, provided electronically if requested; the parties could trade ideas and verbally present hypothetical "what if" proposals; original concept proposals, and economic proposals in specific language, would be presented by the end of the fourth bargaining session, unless mutually agreed otherwise. Either party could call caucuses at any time; the number was unlimited; caucuses were not used to prepare for negotiations; Chief Spokespersons would estimate length and timely reconvene. Each party made and maintained their own bargaining notes; scribes could attend sessions.

At the end of the meeting, Salazar gave the County a written request for information on 55 bargaining items.

April 17-Response to Information Request, SEIU Concept Proposals, County Initial Proposal

April 17 negotiations began with the County's written response to SEIU's March 19 information request.[38] The County addressed each of the 55 items: providing information, agreeing to furnish reports, identifying website addresses, seeking clarification/explanation, and/or stating why information could/would not be provided (no report maintained/information did not exist, confidential/privileged, unduly burdensome).[39] The discussion took 90 minutes.

[38] The meeting was scheduled from 8:30 a.m. to 2:00 p.m., but started at 9:00 a.m.

[39] Bennett testified that County responses to SEIU requested information were discussed at three bargaining sessions.

After lunch, SEIU presented eight written concept proposals,[40] a 40-minute review.

The County provided its initial package proposal: 11 items,[41] status quo on other contract terms, and no wage increase. The parties set three May bargaining dates, then caucused. They debated whether the County claimed inability to pay salary increases or its policy was no raises, and if specific language in the County offer and its notetaker violated ground rules.

April 22-SEIU Failure to Present Substantive Response, Unreasonable Caucus Time

April 22 bargaining began at 1:40 and ended at 4:35 p.m.

SEIU caucused twice. The first, five minutes after talks started, took 90 minutes. After 40 minutes negotiating, its next was 35 minutes.[42]

SEIU gave the County eight more written concept proposals.[43] Its health and safety proposal would adopt language creating a stronger process and program.

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[40] Purpose; contracting out; communications and work access; employee organization time off; non-discrimination; appeal rights; salary increase; health insurance.

[41] One year term; management rights; employee benefit plan; addition/deletion/revision of health training, special pays, retirement, uniforms, flexibly allocated classes, merit increases, furlough, and transfers.

[42] Sjostrom prepared a caucus chart (start and end times, length of negotiating sessions, SEIU/County/undetermined caucuses and total times for each) from bargaining notes (her own, Martin's, County notetaker's) and sign-in sheets. SEIU argued that the County exhibit was unreliable, inaccurate, and misleading.

[43] Recognition; grievance and impasse procedures; health and safety; personnel files; probationary period; bilingual pay; dignity clause.

SEIU would bring subject matter experts on health and safety and finances to the bargaining table.

SEIU presented a written response to the County's April 17 initial proposal. It offered a three year term, and requested language for and additional information to respond to the remaining County articles.

May 8-SEIU Not Prepared for Bargaining, Ground Rules Violation

May 8 negotiations started at 9:15 a.m. and finished at 2:35 p.m.

SEIU took two caucuses; one for 31 minutes before lunch, and one for 15 minutes after lunch. The County had one caucus for 95 minutes, including lunch.

This fourth meeting was the deadline for original concept and proposed language on economic proposals in the ground rules.

After lunch, SEIU gave the County written proposals for 8.74% salary increases in one, two, or three-year contracts; offers and specific language in concept proposals; and a counterproposal on management rights.[44] Bennett asked if unit 2 was included. Salazar and Gomez responded they should be put on reserve, and dealt with later, to not delay agreement on units 1, 3, 4, 6, and 7. The parties also discussed two separate MOUs for the five units and unit 2.

SEIU would not bring a finance expert to negotiations; Salazar would coordinate with the County. Bennett said the County would bring its CAO/budget person to May 29 bargaining.

[44] 8.74% (one-year MOU); 5% in year one, 3.74% in year two (two-year); and 3%-year one, 3%-year two, 2.74%-year three (three-year). Language for recognition, purpose, contracting out, communications and work access, health insurance, reopener, term, and dignity clause.

The County responded to SEIU's salary proposal; direction from the Board of Supervisors was status quo for a one-year contract. Salazar asked if status quo meant no wage increases; Bennett said yes.

SEIU requested an extension to present original concept and economic proposals. The County agreed.

On May 12, Salazar sent four additional economic offers to the County team by electronic mail message (e-mail).[45]

SEIU argued that no evidence supported allegations it was not prepared for bargaining and violated ground rules on May 8. The County did not contend SEIU was unprepared for bargaining and violated ground rules on this date. The facts do not establish either claim.

This allegation is dismissed for failure of proof.

May 15-SEIU Ground Rules Violation, Presentation of Initial Proposals

May 15 bargaining commenced at 1:18 and concluded at 5:05 p.m.

The County took a 40-minute caucus. An undetermined 20-minute caucus was held. No proposals were exchanged. Bennett informed Salazar that the CAO would be at May 29 negotiations.

SEIU contended that no evidence supported this allegation. The County did not assert that any SEIU conduct on May 15 violated ground rules. The facts do not establish this claim.

This allegation is dismissed as unproven.

[45] Equity adjustments; four special pays; sick leave usage buy back; bilingual pay increases.

May 20-SEIU Unreasonable Caucus Time

May 20 bargaining opened at 1:10 and closed at 4:45 p.m. That morning, the Board of Supervisors recognized SEIU as exclusive representative for bargaining unit 2.[46]

Two caucuses were taken. The County called one for 25 minutes. An undetermined 55-minute caucus was held.

Salazar told the County she would like to set meet and confers for unit 2 separately; Bennett agreed. The parties discussed SEIU's proposals. Bennett met with the Board of Supervisors; the County's economic direction remained status quo, one-year contract, and no wage increases.

At the end of the session, the parties scheduled a May 27 meet and confer on the effects of layoffs for unit 2 employees in the Solid Waste Department. Gomez, Souza, and two unit 2 employees would represent SEIU; Sjostrom was to contact the Department Director; and Martin secured employee release time.

After the meeting ended, Bennett, Sjostrom, Salazar, and Gomez had a sidebar discussion (sidebar) about SEIU member/bargaining team member communications with the Board of Supervisors while the parties were negotiating.

On May 27, Bennett e-mailed Salazar that the CAO would be at May 29 negotiations to discuss County finances.

The facts do not establish that SEIU called or spent time in a caucus on May 20.

[46] Bennett testified that at the public meeting, Gomez stated SEIU members would contact Supervisors in a new MOU campaign.

This claim is dismissed as unsupported.

May 29-SEIU Not Prepared for Bargaining, Ground Rules Violation, Bypass of County Representative

May 29 bargaining started at 8:10 and stopped at 11:30 a.m.

After introductions, the County took a 15-minute caucus. SEIU then caucused for 18 minutes. An undetermined 25-minute caucus was held.

The CAO presented a shorter version of "State of County Finances" he had given before. SEIU team members asked questions. Salazar then inquired if the County's position was still status quo on wages, and a longevity/retention bonus was possible. Bennett stopped the CAO from answering, stating this was a bargaining subject/potential proposal, and he was not a negotiating team member.

The parties briefly discussed other topics. Bennett, Sjostrom, Salazar, and Gomez had a sidebar on SEIU bargaining team member communications with the Board of Supervisors. They returned to the table. Bennett commented there was a First Amendment right to speak; when team members present public comment during Board of Supervisors meetings, if Supervisors respond it could be direct dealing and an unfair practice, but if they say nothing it might be seen as unsympathetic.

June 9-SEIU Unreasonable Caucus Time

June 9 bargaining commenced at 8:23 and concluded at 10:50 a.m.

SEIU called one 47-minute caucus.

Bennett stated that the CAO focused on responding to SEIU financial documents; the Board of Supervisors' direction/County policy was still status quo and one-year contract to be conservative with finances; and the County was not asserting

inability to pay. The parties discussed the County's modified proposals on sick leave buy back and uniforms; all other economic items were status quo.

Salazar verbally offered a "what if" proposal for a one-time retention bonus, two to three thousand dollars ($2000-3000) for each employee, $6-9 million cost in a one-year contract. Bennett responded that the County would consider any and all offers. The parties discussed how the proposal could be presented to the Board of Supervisors before its next meeting.

The parties reviewed the County's written counterproposals.

At the end of the meeting, Salazar agreed to provide a written proposal on the one-time retention bonus by June 11, and formal offers for health and safety and non-discrimination by June 12.

Communications

On June 12, Salazar e-mailed a one-time $3000 lump sum bonus proposal for all SEIU-represented employees to the County team. On June 13, Bennett e-mailed Salazar to confirm that the offer was for all bargaining units except unit 2. On June 16, Salazar e-mailed Bennett that it included unit 2.

On June 17, Bennett called Salazar on her cellular telephone (cell phone) from Sjostrom's office.[47] She mentioned Wullschleger's "interesting" public comments. Bennett asked if the one-time $3000 bonus, 6%/$9.6 million, replaced SEIU's previous economic proposals. Salazar responded, "she thinks the $3000 takes all economics away," because "energy was building and employees would have money in their

[47] Bennett's phone was not on speaker mode, so Sjostrom heard only Bennett's statements. Bennett and Sjostrom took notes of the conversation.

pockets immediately." They discussed resolving pending charges and repairing relations.

On June 19, Bennett called Salazar. They discussed whether the one-time bonus included unit 2, and SEIU presenting an alternate multi-year offer at June 20 bargaining. Bennett told Salazar SEIU should narrow its proposals to be able to reach agreement, and get it to a Board of Supervisors meeting, before the MOU expired. Salazar requested an off-record discussion about the County's approach to SEIU negotiations.

June 20-SEIU Regressive Proposal

June 20 bargaining started at 8:20 and ended at 11:20 a.m.

The County caucused for 30 minutes.

Bennett stated that the County's June 9 counterproposal responded to all SEIU economic and non-economic proposals. She summarized her subsequent communications with Salazar about the one-time bonus, if it replaced all other SEIU economic offers, and Salazar's response that she believed so but had to confirm. Salazar replied that she had to discuss the issue with the team.

The parties had an off-record conversation, without notetakers, about SEIU's perception that the County did not like it.

The parties discussed the one-time $3000 bonus proposal. Salazar stated that it withdrew all SEIU economics except health reopener. Bennett asked if pending unfairs would be withdrawn; Salazar said yes. The County estimated the offer to cost $21 million, and asked if it included unit 2. Salazar responded that unit 2 was included in all SEIU proposals and negotiations once the County recognized it as exclusive

representative. Bennett replied that could be regressive bargaining. Salazar said SEIU did not want to be regressive, and would review its position.

SEIU responded to 15 of the County's counterproposals, agreeing to 11 and possibly another, and countering three. Its alternate multi-year economic offer was 4% increase in year one, 4% in year two, and automatic reopener in year three; automatic reopener if any County employee, including the Board of Supervisors, received a salary adjustment, and a one-time $1500 bonus; Salazar confirmed that the one-time bonus proposals did not include specialty pay, bilingual pay, and health reopener which remained on the table. Bennett stated that could possibly be regressive. Salazar replied that the issue would be discussed at a June 23 SEIU meeting. Bennett noted SEIU's significant movement on non-economic items in its counter; they were close.

Communications

On June 23, Bennett and Salazar discussed the status of bargaining by phone, which Bennett confirmed by e-mail. Salazar wanted to discuss economics at the next bargaining; SEIU had moved on non-economic items, but the County was still status quo, one-year contract. Bennett responded that the County moved on sick leave buy back and uniforms; it wanted clarification on SEIU's economic proposal(s); SEIU had given the County two offers, one with litigation remaining and one withdrawing it. The County understood the one-time bonus/6% to replace all SEIU economic proposals; on June 20, Salazar said it was in addition to health reopener, bilingual and specialty pay, and other possible salary offers. Bennett summarized her regressive comment and Salazar's response. Salazar asked that SEIU's offer, three-year term and

litigation withdrawn, be presented to the Board of Supervisors on June 24. Bennett awaited clarification on SEIU's proposal with litigation remaining.

On June 24, Salazar sent a response e-mail to Bennett. SEIU had submitted several salary proposals with various scenarios, including global settlement of outstanding litigation. The County had not given counterproposals to any, remaining fixed on an offer for status quo, 0% wages, one-year term. She understood the County was submitting SEIU's proposal for a two-year contract, 4% each year and $1500 bonus, to the Supervisors that day. Salazar later e-mailed the County team, attaching a proposed settlement document for pending litigation.[48]

June 26-SEIU Unreasonable Caucus Time

June 26 bargaining began at 8:20 a.m. and concluded at 3:15 p.m.

SEIU called four caucuses; one took 90 minutes, the next was 15 minutes, the third for 100 minutes included lunch, and the last was 20 minutes. The County held two caucuses for 17 and 23 minutes.

The parties exchanged numerous proposals and counterproposals, single and multi-year, bonuses and wage increases in varying amounts, global (resolving all pending litigation) and non-global (litigation remaining), and including (SEIU) and excluding (County) bargaining unit 2. The County proposed 2% wage increases for units 1, 3, 4, 6, and 7 following SEIU ratification and Board of Supervisors approval, and 1% in August 2015.

[48] The e-mail was received as a SEIU exhibit.

The County asked if the one-time $3000 bonus was a “stand-alone;” Salazar said no, it replaced only SEIU’s 8.74% proposed salary increase and not its other economic offers. Bennett stated that could be regressive because the salary increase moved from 5% to 7% in year one; the County was able to counter, but did not waive its rights that SEIU had regressed. The County then provided a written counter, 3% wage increases for the five units effective the first full pay period following ratification and approval.

Communications

On July 1, Salazar e-mailed the County team requesting information on total number of SEIU-represented employees and base salaries; employee and County dollar amounts paid for pension benefits; and the County’s costing analysis discussed at June 26 bargaining with an explanation. SEIU’s analysis of County-supplied figures showed costing for 3700 employees, far more than the number of workers in the five bargaining units and unit 2.

That day, Bennett e-mailed Salazar, asked where the 3700 figure came from, and responded to the other items (information already provided, estimates based on full-time equivalents multiplied by 1% plus roll-ups).

Salazar did not respond.

July 7-SEIU Unreasonable Caucus Time, Not Prepared for Bargaining, Ground Rules Violation

July 7 bargaining started at 8:20 a.m. and ceased at noon.

SEIU took two caucuses, ten and six minutes each. An undetermined 43-minute caucus was held.

Each party explained how it counted employees to cost their economic proposals. SEIU team member Wilson divided $11.1 million by 3000 to calculate the 3700 figure. County member Martin used roll-ups, which he explained and were 22% of total cost; and filled allocated positions, 3077 allocations with 2662 filled, including unit 2. Bennett stated that this information had been provided to SEIU in April.

Bennett asked if part of SEIU's global proposals included unit 2 since it was not part of the pending litigation. Salazar needed to talk to the team before responding.

SEIU provided a counterproposal on wage increases for a one year contract retroactive to July 1. Bennett responded that the County would not agree to retroactivity, and asked if SEIU's global and non-global proposals were its last, best, and final offers. Salazar had to talk to the team before answering.

SEIU gave another counter to fold existing unit 2 terms and conditions into its global proposal and requested another caucus. Bennett stated that SEIU had already taken one caucus, and caucuses were not intended to prepare for negotiations.

After the caucus, Bennett asserted that SEIU continued to add to its global proposal, including unit 2 although acknowledging it was not part of pending litigation, and the County did not waive any of its rights. Salazar responded that the SEIU proposal was not its last, best, and final offer, and it was still negotiating a counter. She then withdrew unit 2 from SEIU's salary increase and bonus proposal for the five units, and asked to schedule separate negotiations. The parties agreed to meet on unit 2 ground rules on July 21 after bargaining for the five units ended.

<u>July 21-SEIU Ground Rules Violation, Designated Spokesperson</u>

July 21 bargaining began at 1:05 and ended at 4:02 p.m.

The County called three caucuses for 30, 54, and ten minutes. A 35-minute undetermined caucus was held.

The County rejected SEIU's global settlement proposal; it would not give a counterproposal or further discuss it. The County also declined SEIU's July 7 offer for wage increases, bonus, and bilingual pay. SEIU team member Wilson verbally presented a counter, 3% increase retroactive to July 1, one-time $500 bonus, and one-year contract. After the County returned from caucusing, Bennett responded that the Board of Supervisors would not agree to both a wage increase and bonus, or retroactivity.

The parties signed a TA, including a 3% wage increase, before adjourning.

2014-15 MOU

SEIU ratified the one-year agreement on July 28. The Board of Supervisors approved the contract on July 29; Sjostrom, Salazar, and Gomez signed it that day.

SEIU-represented employees in the five bargaining units received 3% wage increases in September 2 paychecks.[49]

[49] The timing was based on the County pay period calendar and processing times for payroll inputting, transmission, and payday issuance of checks. Ratification and approval was in pay period 17 (July 27-August 9); pay period 18 (August 10-18) was the first full pay period following; payday was September 2. Sjostrom testified that ratification and approval would have to occur before the end of pay period 14 (June 15-28) to take effect the first pay period after MOU expiration (pay period 15, June 29-July 12, payday July 22). She did not recall if these timelines were communicated to SEIU during 2014 bargaining.

Failure to Present Substantive Health and Safety Proposal

SEIU did not present substantive health and safety or non-discrimination proposals to the County after Salazar agreed to do so by June 12.

Salazar testified that SEIU made a conscious decision not to pursue its concept health and safety proposal as a substantive one. Although important, the membership mandate was salary increases; the County did not share its concern there was a problem; SEIU had a limited amount of "political capital;" and it did not want to risk an impasse.

SEIU Bypass of County Representatives-May 21-22, June 17

There was at least one sidebar between County (Bennett, Sjostrom) and SEIU (Salazar, Gomez) negotiators on SEIU member/bargaining team member communications with the Board of Supervisors during negotiations.[50]

[50] Salazar testified there was one sidebar but did not recall the date. Neither she nor Gomez made any promises/assurances not to speak directly to Supervisors; they told the County that members' First Amendment rights to speak on public policy issues would be honored. Bennett remembered three sidebars. The first, May 8, generally discussed communications with the Board of Supervisors and bargaining team members not dealing directly with them. Next was May 20, when Bennett stated that members have First Amendment rights to speak to Supervisors in open session but not directly deal on proposals/items on the bargaining table; Gomez gave assurances that SEIU team members would not speak to Supervisors about the specifics being negotiated. The last, May 29, raised issues after a SEIU team member communicated with a Supervisor about bargaining items, followed by a table discussion on SEIU team members' public comment at Supervisors' meetings. Sjostrom recalled two sidebars on May 20 and 29; in one, Gomez stated it was not SEIU's intent for team members to cross the line/talk to individual Supervisors. Sjostrom's May 29 bargaining notes do not reflect that Gomez said anything during the sidebar, but Salazar would not go against the democratic process of allowing member speech.

On May 21, SEIU bargaining team member Wullschleger sent an e-mail to Phillip Cox (Cox), Chairman, Board of Supervisors, that five to ten individuals who live or work in District 3 wanted to meet and share their vision for making the County a better community. Cox e-mailed Wullschleger, responding that their past meeting was not during negotiations; it was inappropriate for any Supervisor to meet with him during bargaining; if he said anything in a meeting that could be misconstrued, he could be removed from a final compensation decision for SEIU; and he would meet with the group after negotiations ended.

On May 22, Wullschleger e-mailed Cox in reply, copying the other four Supervisors. When County-hired attorney Bennett, HR Director Sjostrom, and Martin informed the bargaining team that the Board of Supervisors (BOS) continued to offer a one-year contract and 0%, he perceived a lot of disrespect from the BOS and CAO. "We the People" (County workforce)[51] had not received a "COLA" in six years, and the BOS and CAO had the temerity to offer 0% and a one-year contract?[52] There has never been such a punitive and condescending message in his 25 years with the County. Ground rules precluded the 2005 team from speaking with the BOS but no such ground rules were agreed upon with this team; the decision not to speak with SEIU team members was his alone. Cox sent a return e-mail to Wullschleger that day; the BOS has had a no contact rule during negotiations for years; he would meet

[51] Wullschleger testified that this meant SEIU-represented employees, where no progress was being made after months of bargaining.

[52] The BOS and CAO received substantial raises/more than 10% in 2013; unrepresented employees 3%, and management raises, but SEIU-represented employees received nothing.

with the public, but drew the line on employee family members, SEIU-represented employees, or another lobbying union's members.

At the June 17 Board of Supervisors meeting, SEIU bargaining team members Wullschleger, Case, and Castillo, and SEIU staff Courtney Hawkins (Hawkins) presented public comment.

Wullschleger spoke first, identifying himself as a SEIU negotiating team member representing units 1, 2, 3, 4, and 7, 3200 employees. He read a letter to be sent to State legislators and other elected officials requesting an investigation into gross mismanagement of taxpayer money,[53] and for the joint legislative audit committee to approve a state audit.

Case appeared next. She was a 13-plus year County custodian.[54] In 2014, a select few are coming out of hard times faster than the majority of County employees. In making decisions to spend money on computers, chairs, vehicles, and furniture, remember a high percentage of County employees have not seen a pay increase in over six years. Try to compensate hard-working, dedicated County employees.

[53] BOS approval of three raises totaling 9% for themselves in 2012-2013; 10% 2012 and 3% 2013 raises for the CAO; $250,000 life insurance policies for BOS and executive management and 10% annual equity adjustments for executive management; and distributing additional/surplus money to the BOS, CAO, and Health and Human Services Administration. Employees only received $10,000 life insurance policies and 5% adjustments in their first two years with the County.

[54] A County job used to mean security, benefits, and a long career. The 2008 recession brought layoffs/furloughs, took away all other compensation, increased workload, and lowered employee morale.

Hawkins was the third speaker, representing 3200 employees. He wanted to talk to Supervisors as men about being on the side of right. County employees suffered through "merit freeze increases" and no "COLAs" while the BOS gave themselves three raises. That was not right, and the BOS was on the wrong side of wrong. Employees deserved to grow along with Supervisors. As men on the right side of right, consider County workers.[55]

Castillo addressed the Supervisors last. She was a County employee since 2001, and a negotiating team member. Consider investing in your community. Enough is enough when the majority of the County workforce is denied raises for seven years but Supervisors receive 9% raises in one year; the BOS grants the CAO over 10% in 2012 and 3% in 2013; BOS and CAO allow $280,000 purchases of office chairs, and change rules allowing executives to receive up to 10% raises, while employees get 5% step raises when they start work; Supervisors give 2013 raises to themselves, elected officials, confidential clerical workers, professionals, mid-management and executive management, department heads, and probation; the CAO hires an Assistant CAO for $140,000 per year; and the "HHSA" employee incentive survey does not include equity adjustments.

Wullschleger testified that he was not trying to bargain with Cox or other Supervisors, and did not make negotiating proposals.[56]

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[55] A Supervisor asked Hawkins if he was on the negotiating team; Hawkins said no. All members of the Board of Supervisors were male.

[56] He wanted to educate them about how frustrated County employees were with their conduct. The purpose was to persuade them that increases should be on

In June, Community First[57] petitions addressed to each Supervisor and the CAO were circulated in the community by SEIU staff and bargaining team members. The petitions stated that the Board of Supervisors and CAO were offering a 0% raise in 2014-2015 to hardworking County employees who had not received a raise for seven years. Residents were asked to sign if they agreed that County workers deserved a living raise. Signed petitions were presented at a Board of Supervisors meeting, and to State legislators in Sacramento, in late June.

CE Complaint: County Charge against SEIU

On August 21 or 22,[58] the County Counsel's office published an agenda item to be considered at the August 26 Board of Supervisors meeting. The item requested direction and authorization to file a charge alleging bad faith bargaining by SEIU. It included a memorandum (memo); July 29 meeting agenda item requesting Supervisors' approval of the County-SEIU MOU for bargaining units 1, 3, 4, 6, and 7 retroactive to July 1 through June 30, 2015; draft charge; and two May 21 Wullschleger-Cox e-mails.

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the table; it was unacceptable to instruct Bennett to offer a one-year contract and 0% as the only County offer.

[57] County workforce, and their families, friends, neighbors, church members, and supporters.

[58] County Counsel Kathleen Bales-Lange (Bales-Lange) testified that the posting was 72 hours prior to/on the Thursday before the Tuesday meeting. Bales-Lange has been County Counsel since 1996.

Bales-Lange presented the agenda item during the August 26 Board of Supervisors meeting,[59] stating the reasons for filing the charge in her memo and draft charge, and her opinion that they supported the requested action. Individual Supervisors and the CAO asked questions which she, the Chief Deputy County Counsel, or Sjostrom answered;[60] the Supervisors discussed the responses.

The Chairman asked if others wanted to speak. SEIU Organizing Coordinator Johnson asked the Supervisors to not go forward; it was not SEIU's intent to oppose the County/ Supervisors; it wanted to fix and repair the relationship with the County; and the County should not use community dollars to pursue the action. Araiza[61] stated there would be no lost employee wages if the Supervisors had approved retroactive pay.

The Board of Supervisors unanimously approved filing the charge. The County filed it on September 17, three weeks later.

County Administrative Office staff responded to local media inquiries about the agenda item before and after the August 26 meeting. Area newspapers[62] published articles about the charge, in print and online, before and after the August 26 meeting and September 17 filing.

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[59] The meeting started at 9:00 a.m. and ended at 1:25 p.m.; the Board met in closed session from 11:55 a.m. until it adjourned.

[60] Bales-Lange could not answer most questions.

[61] Araiza was identified as a County employee in meeting minutes. Bales-Lange knew he was SEIU staff.

[62] Visalia Times-Delta, Valley Voice, Fresno Bee, Porterville Recorder.

SEIU Activity Pre and Post-Charge

Salazar, Wullschleger, and Inman testified that SEIU members were actively involved and engaged from May to July in 2014 bargaining-related activities. New members joined and new leaders were identified; attendance at membership meetings, rallies, picnics, and other SEIU-sponsored events (writing letters, signing posters, distributing flyers, circulating petitions) was at an all-time high; and employees volunteered to plan, carry out, and participate in these functions.

After the County filed the charge, leaders and/or members did not return Salazar's calls, or explain why their participation in SEIU stopped. Turnout was low at a "kickoff" rally for 2015 bargaining. When Wullschleger asked for assistance in responding to the charge, people who participated in the past did not want to be involved, but others were willing to help. There was not the same campaign/community outreach for 2015 negotiations; momentum, enthusiasm, and interest in 2015 bargaining and SEIU activities was not the same. Wullschleger continued to be involved in SEIU; Inman did not participate in SEIU functions for a few months. As bargaining team members, Wullschleger and Inman were demoralized by and/or took the County's action personally; Inman was not intimidated by the County filing the charge, unlike other employees.

SEIU Request for Information

On August 28, two days after the Board of Supervisors approved filing the CO charge against SEIU, and one day after the unit 3 agency fee rescission petition was filed, Araiza sent an e-mail to Sjostrom requesting the finalized "Child Support"

report.[63] On September 10, Araiza e-mailed Sjostrom, asking for a "eta" when he could expect the report. Sjostrom responded that day, "This is a confidential personnel report."

On October 2, Johnson wrote to Sjostrom, reiterating the request for the final report from the "Child Support Department Visalia office" on "workplace harassment and discrimination claims/reports by SEIU members."[64] SEIU's interest in the report outweighed any confidentiality, which the County had not supported with any facts. SEIU was entitled to the report to investigate a possible violation of Article 9, Non-Discrimination, of the MOU; the County's refusal to provide the information denied SEIU's right to represent members under Article 1, Recognition. The report was requested by October 10.

On October 7, Avila wrote to Sjostrom, demanding the "hostile work environment" report in the Child Support Department "presented to the County by the investigator," within ten workdays in written/electronic format.[65] As the legal representative of miscellaneous County employees, SEIU believed the report may contain information imperative to representation of members in the Department. The report should be mailed to the Contract Enforcement Department in Bakersfield. If the

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[63] Salazar identified the unit 3 representatives on the 2014 SEIU bargaining team. Wilson and Ramirez were employees in the same job class, and Castillo was a dispatcher, but their departmental employer(s) were not identified.

[64] The letter was copied to SEIU Region 5 Director; SEIU stewards in the Child Support Department; Chapter President Gomez; Araiza; Contract Enforcement Specialist Vicki Avila (Avila); and attorney Sean Graham.

[65] The letter was copied to the Contract Enforcement Department Director and the same individuals as Johnson's October 2 letter except Gomez and Johnson.

report was not received, SEIU would seek all legal remedies to ensure representation members were entitled to.

On October 10, Deputy County Counsel Jennifer Mendoza wrote[66] to Avila about "SEIU's request for the hostile work environment report in the County Department of Child Support Services (DCSS)." No investigative reports would be released. The information requested was subject to the deliberative process privilege and legally exempt from disclosure.[67] The County did not waive its rights to assert these exemptions/privileges to inspection of the records. SEIU did not identify how the information was relevant to its representation of represented employees in the Department. If SEIU disagreed, it could provide further legal authority to support its position.[68]

County ERP

The County ERP has 18 sections. Section 14, "Unfair Labor Practices," prohibits specified direct or indirect actions by employee organizations or any of their members in sections (a) (1)-(6), and by County or management employees in sections (b) (1)-(4).

The CE complaint allegations (paragraphs 12-15) cite the text of section 14 (a) (3), and refer generally to sections 14 (a) (1)-(6). The complaint further alleges that

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[66] The letter was copied to Johnson and Sjostrom.

[67] Citing article 1, section 1 California Constitution (right to privacy); sections 6253, subdivision (a), 6254, subdivision (c) and (k), and 6255, subdivision (a) (Public Records Act); and Evidence Code section 1040 (official information privilege).

[68] The parties stipulated to submit the SEIU requests and County responses as exhibits, forego witness testimony, and present written argument.

the County does not have a local rule restricting such conduct by individuals who are not members of an employee organization.

Respondent County's answer admitted the section 14 (a) (3) language, and denied all other allegations.[69]

Subsequent Events

The County and SEIU bargained and reached agreement on a one-year MOU for bargaining unit 2 after contract negotiations for the other five SEIU units concluded; Bennett and Salazar were the Chief Negotiators. Salazar did not recall the economics or effective date.

Salazar testified that after the 2014-2015 MOU was settled, additional equity adjustments were received in the five SEIU units.

SEIU and the County reached agreement before the 2014-2015 contract expired on a two-year successor MOU; 4% wage increases, 3% on July 1, 2015, and 1% July 1, 2016, were received by SEIU bargaining unit employees. Negotiations started in March; Salazar and Bennett were the Chief Negotiators. Wullschleger and Inman were on the SEIU bargaining team, participating at the same level as in 2014 and prior years.

****PORTION OF PROPOSED DECISION ADOPTED BY BOARD ENDS HERE****

ISSUES

1. Did SEIU bargain in bad faith with the County during 2014 successor negotiations?

[69] The parties stipulated to submit the County ERP as an exhibit, not call witnesses, and brief the issue.

2. Did the County dominate or interfere with the administration of SEIU by filing the CO charge in September?

3. Did the County unlawfully refuse to provide information requested by SEIU in September and October?

4. Did the County maintain an unreasonable local rule, ERP 14 (a) (3)?

CONCLUSIONS OF LAW

Burden of Proof

A charging party must prove the allegations of a complaint by a preponderance of the evidence. (*California State University (San Francisco)* (1986) PERB Decision No. 559-H; PERB Regulation 32178.) Proof by a preponderance of the evidence requires a party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, fn. 22, citing Evidence Code section 500, Law Revision Commission comments.)

Preponderance of the evidence has also been defined by the courts as "evidence that has more convincing force than that opposed to it" (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314 (*Glage*), in terms of the probability of truth; or such evidence, which when weighed against opposing evidence, has the greater probability of truth. (*California Correctional Peace Officers Association v. State Personnel Bd.* (1995) 10 Cal.4th 1133.) If the evidence is so evenly balanced that one is unable to say that evidence on either side of an issue preponderates, the finding on that issue must be against the party who has the burden of proving it. (*Glage*.)

Charging Parties County and SEIU must meet their burden of proving the allegations in the complaints issued on their CO and CE charges.

Surface Bargaining

The MMBA requires public agencies and recognized employee organizations/exclusive representatives to "meet and confer promptly upon request by either and continue for a reasonable period of time to exchange information, opinions, and proposals, and endeavor to reach agreement on matters within the scope of representation." (Section 3505; *Jefferson School District* (1980) PERB Decision No. 133 (*Jefferson*); *National Labor Relations Board (NLRB) v. General Electric Co.* (2d Cir. 1969) 418 F.2d 736.)[70] The meet and confer process does not bind a public agency to any particular result, but rather requires both parties to seriously consider and attempt to resolve their differences. (*Los Angeles County Civil Service Com. v. Superior Court of Los Angeles County* (1978) 23 Cal.3d 55.) Good faith bargaining "involves a procedure for meeting and negotiating, the externals of collective bargaining, and a bona fide intention, the presence or absence of which must be discerned from the record." (*General Electric Co. (New York, N.Y.)* (1964) 150 NLRB

[70] *Jefferson* interpreted provisions of the Educational Employment Relations Act (EERA), section 3540 et seq. Where California public sector labor relations statutes are similar or contain analogous language, agency and court analyses under one statute are instructive for others. (*Redwoods Community College Dist. v. PERB* (1984) 159 Cal.App.3d 617). Private sector precedent construing the National Labor Relations Act (NLRA), 29 U.S.C. section 151 et seq., and the Agricultural Labor Relations Act, Labor Code sections 1140-1166.3, are also persuasive in considering parallel or comparable clauses in PERB-administered laws. (*McPherson v. PERB* (1987) 189 Cal.App.3d 293; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608; *Moreno Valley Unified School Dist. v. PERB* (1983) 142 Cal.App.3d 191).

192 (*General Electric Co.*), *aff'd. NLRB v. General Electric Co., supra,* 418 F.2d. 736; *Dublin Professional Fire Fighters v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9 (*City of Placentia*).)

In determining whether a party has violated its statutory bargaining obligations, PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro Valley*); *Muroc Unified School District* (1978) PERB Decision No. 80 (*Muroc*); *Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton*).) The statutory scheme of collective bargaining involves a procedural duty shared equally by the employer and exclusive representative. (*Los Angeles Unified School District* (2013) PERB Decision No. 2326.[71] Thus, the courts and PERB have construed the requirement that parties meet and confer in good faith to mean a subjective attitude demonstrating a genuine desire to reach agreement. (*City of Placentia, supra,* 57 Cal.App.3d 9); *Pajaro Valley*). In establishing the presence or absence of good faith, the Board and courts review the totality of the circumstances, making a factual determination of all bargaining conduct to establish whether there are sufficient objective indicia of a subjective intent to participate in good faith in the bargaining process and reach agreement, or of an intent to subvert, frustrate, or avoid the bargaining process. (*City of Placentia*; *State of*

[71] The same standards for evaluating a bargaining violation by a public employer apply to the conduct of an employee organization/exclusive representative. (*Regents of the University of California* (2010) PERB Decision No. 2105-H; *The Regents of the University of California* (1992) PERB Decision No. 922-H.)

California (Board of Prison Terms) (2005) PERB Decision No. 1758-S; *Contra Costa Community College District* (2005) PERB Decision No. 1756; *Oakland Unified School District* (1982) PERB Decision No. 275 (*Oakland II*); *Pajaro Valley*.) The entire course of negotiations, including the parties' conduct at and away from bargaining, is examined to determine whether there is a serious attempt to reconcile differences and reach common ground. (*City of Placentia*; *City of San Jose* (2013) PERB Decision No. 2341-M (*San Jose*); *University of California, Lawrence Livermore National Laboratory* (1995) PERB Decision No. 1119-H; *Pajaro Valley*; *Stockton*.)

As the name implies, surface bargaining occurs when a party approaches negotiating obligations superficially, without the required intent to work toward or achieve agreement. The totality of circumstances test applies to surface bargaining, where a party "goes through the motions of negotiations, weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement," thereby displaying a lack of a genuine desire to reach agreement. (*City & County of San Francisco* (2007) PERB Decision No. 1890-M (*San Francisco*); *Oakland II, supra,* PERB Decision No. 275; *Davis Unified School District, et al.* (1980) PERB Decision No. 116; *Muroc, supra,* PERB Decision No. 80.) In surface bargaining cases, specific conduct may appear proper when viewed in isolation, but if considered in the history of negotiations, may also demonstrate that a party was not bargaining with the requisite subjective intent to reach agreement. (*City of Placentia, supra,* 57 Cal.App.3d 9; *Muroc*.)

In construing the eight public sector collective bargaining statutes it administers, PERB, and NLRB under the NLRA, have found the following conduct to be "indicia" of

bad faith surface bargaining: (1) entering negotiations with a “take it or leave it” attitude (*General Electric Co., supra,* 150 NLRB 192, *enfd*. *NLRB v. General Electric Co., supra,* 418 F.2d 736, *cert.den.* 397 U.S. 965); (2) failure to exchange reasonable proposals, offer counterproposals, explain positions, and reconcile differences (*San Jose, supra,* PERB Decision No. 2341; *Compton Community College District* (1989) PERB Decision No. 728 (*Compton*); *Gonzales Union High School District* (1985) PERB Decision No. 480 (*Gonzales*); *Jefferson, supra,* PERB Decision No. 133; (3) reneging on ground rules (*Stockton, supra,* PERB Decision No. 143); (4) insistence on conditions before starting and/or during negotiations (*Lake Elsinore School District* (1986) PERB Decision No. 603); (5) negotiator’s lack of authority which delays and/or thwarts the bargaining process (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22; *Oakland Unified School District* (1983) PERB Decision No. 326 (*Oakland III*); *Stockton*); (6) refusal to provide information (*Stockton*); (7) dilatory or evasive conduct and cancelling, missing, or failing to prepare for scheduled negotiating sessions (*Oakland III; Stockton*); (8) refusing to discuss a mandatory subject bargaining or conditioning its discussion on prior agreement on other subjects (*San Jose*; *San Ysidro School District* (1980) PERB Decision No. 134 (*San Ysidro*); (9) committing separate unfair practices at/away from the table (*San Jose*; *Beaumont Unified School District* (1984) PERB Decision No. 429); and (10) making regressive proposals or reneging on tentative agreements (TAs) (*Campbell Municipal Employees Association v. City of Campbell* (1982) 131 Cal.App.3d 416; *Stockton*; *Santa Ana Unified School District* (1978) PERB Decision No. 73.)

PERB has rejected a categorical rule that one indicia of bad faith does not establish it as inconsistent with the totality of circumstances test to assess surface bargaining. It does not account for the potentially detrimental effect that one act, by itself, may have on the course of negotiations or the parties' bargaining relationship; its formulaic nature detracts from the ultimate question raised in every surface bargaining case – whether the conduct, viewed in its totality, was sufficiently egregious to frustrate negotiations or avoid agreement. (*San Jose, supra,* PERB Decision No. 2341-M; *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S; *State of California, Department of Personnel Administration* (1989) PERB Decision No. 739-S.)

The willingness to exchange reasonable proposals and attempts to reconcile differences during the bargaining process indicate an intent to bargain in good faith. (*Gonzales, supra,* PERB Decision No. 480; *Oakland Unified School District* (1981) PERB Decision No. 178 (*Oakland I*). A flat refusal to reconcile differences by failure to offer counterproposals may demonstrate bad faith if no explanation or rationale supports the party's position. (*Oakland I*). Total inflexibility in bargaining positions, if coupled with other indicia, may show bad faith. (*Fremont Unified School District* (1980) PERB Decision No. 136, *vacated Fremont Unified School District* (1982) PERB Decision No. 136a.)

The duty to bargain does not compel either party to make concessions; insistence on a firm position is not necessarily bad faith. The law requires parties to maintain a sincere interest in reaching an agreement; if the reasons for insisting on a particular position or contract term are questionable but the beliefs are sincerely held,

they may be maintained although they produce a stalemate. (*Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797; *City of Placentia, supra,* 57 Cal.App.3d 9; *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles* (1973) 33 Cal.App.3d 1; *State of California (Department of Corrections & Rehabilitation, Department of Personnel Administration)* (2010) PERB Decision No. 2115-S; *Berkeley Unified School District* (2008) PERB Decision No. 1954; *Trustees of the California State University* (2006) PERB Decision No. 1842-H; *City of Fresno* (2006) PERB Decision No. 1841-M; *County of Riverside* (2004) PERB Decision No. 1715-M; *Oakland II, supra,* PERB Decision No. 275.) Bargaining in good faith obliges the parties to explain the reasons for a particular bargaining position with sufficient detail to permit negotiations to proceed on the basis of mutual understanding. (*Jefferson, supra,* PERB Decision No. 133.) The failure to make a counterproposal, by itself, does not violate the bargaining duty. Where the employer has made objections to previous proposals, a subsequent offer seeking the same thing is predictably unacceptable, and a counterproposal with the same or different response is not required. (*Regents of the University of California* (2010) PERB Decision No. 2094-H (*UC Regents*).)

Unlike the private sector, under MMBA section 3505.1, negotiators for a public employer are not authorized to make binding commitments; an agreement reached in bargaining by the public agency representative(s) and exclusive representative(s) is not binding. Once agreement is reached, employer and employee organization representatives must jointly prepare a MOU and present it to the agency governing body for adoption. (*City of Clovis* (2009) PERB Decision No. 2074-M). Ultimate

determinations must be made by the governing body. (*Bagley v. City of Manhattan Beach, supra*, 18 Cal.3d 22; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765; *United Public Employees v. City and County of San Francisco* (1987) 190 Cal.App.3d 419.) Once the MOU is presented to the governing body, the employer's negotiator(s) have no further duty to affirmatively support the agreement.

PERB has disfavored employers' attempts to evade agreements reached by their representatives in bargaining. Although a negotiator may legitimately discuss issues and offer proposals that must be ratified by the principal thereafter, the absence of authority which delays and thwarts the bargaining process shows bad faith bargaining. (*State of California (Department of Personnel Administration)*, *supra*, PERB Decision No. 2078-S; *State of California (Department of Personnel Administration)* (2006) PERB Decision No. 1836-S; *Oakland III, supra,* PERB Decision No. 326; *San Ramon Valley Unified School District* (1979) PERB Decision No. 111.) The bargaining representative is also responsible for recommending any TAs reached at the negotiating table to its principal. (*Placerville Union School District* (1978) PERB Decision No. 69 (*Placerville*).)

PERB found no conditional bargaining where the employer sought the union's support of legislation for acceptance of its economic demands. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S; *Fremont Unified School District, supra,* PERB Decision No. 136.) An employer's wage offer conditioned on the union's acceptance of it within a specified time limit was not bad

faith bargaining. (*Trustees of the California State University* (2006) PERB Decision No. 1871-H.)

Conditions or burdens on bargaining may also arise from the substance of agreements with other bargaining units. Parity/"me too" agreements where the employer agrees to increase the salaries/benefits of one bargaining unit in accordance with any future increases granted to another unit arguably burden the second unit with increases to both units. Parity/me too clauses are not *per se* violations of the bargaining duty, but are viewed in the context of the totality of circumstances surrounding all the negotiations. (*Banning Unified School District* (1985) PERB Decision No. 536, *affd. Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799; *Los Angeles Unified School District* (1995) PERB Decision No. 1079.) An employer's failure to offer a benefit negotiated with one bargaining unit to another unit does not constitute bad faith bargaining. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2085-S.)

Across-the-board concession proposals to bargaining units are also examined under the totality of circumstances test to determine whether they amount to unlawful "coalition" bargaining or permissible "coordinated" bargaining. (*Compton, supra,* PERB Decision No. 728; *Gilroy Unified School District* (1984) PERB Decision No. 471.) A charging party must prove that the other party refused to bargain unless the bargaining units met jointly, or settlement of one contract was conditioned on the settlement of another agreement. Where an employer sought across-the-board concessions from all of its bargaining units, but did not suggest or insist on joint bargaining with the other units, and each unit met and negotiated separately and was

free to accept or reject the proposals independently from the others, coalition bargaining was not established; instead, the employer engaged in permissible "hard bargaining" with the charging party. (*County of Solano* (2014) PERB Decision No. 2402-M (*Solano County*).)

The cases often require PERB to distinguish between unlawful bad faith bargaining and lawful hard bargaining. (*Oakland II, supra,* PERB Decision No. 275; *Solano County, supra,* PERB Decision No. No. 2402-M; *National Labor Relations Board (NLRB) v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229 (*Herman Sausage*).) While a party may not merely go through the motions of bargaining, it may lawfully maintain a position on any issue; adamant insistence on a negotiating position is not necessarily refusal to bargain in good faith. (*City of Placentia, supra,* 57 Cal.App.3d 9; *Oakland II*.) The obligation to bargain in good faith does not require the yielding of positions fairly maintained. (*Herman Sausage*.) An employer engaged in legal hard bargaining, despite refusing to move from its position, where its proposal was supported by rational arguments communicated to the union during negotiations. (*UC Regents, supra,* PERB Decision No. 2094-H; *California State University* (1990) PERB Decision No. 799-H; *Oakland I, supra,* PERB Decision No. 178.)

<u>Regressive Bargaining</u>

The duty to bargain in good faith requires the parties to demonstrate a desire to reach agreement. (*Pajaro Valley, supra,* PERB Decision No. 51). Conduct that moves parties away from, rather than toward agreement, may be considered bad faith. (*Contra Costa Community College District*, *supra*, PERB Decision No. 1756; *County of Riverside*, *supra*, PERB Decision No. 1715-M). Reneging on prior tentative

agreements (*State of California (Department of Personnel Administration)*, *supra*, PERB Decision No. 1836-S; *Newark Unified School District* (2007) PERB Decision No. 1895; *Chino Valley Unified School District* (1999) PERB Decision No. 1326; *Charter Oak Unified School District* (1991) PERB Decision No. 873 (*Charter Oak*); *Compton, supra,* PERB Decision No. 728; *Stockton, supra,* PERB Decision No. 143; *San Ysidro, supra,* PERB Decision No. 134; *Placerville, supra,* PERB Decision No. 69), and withdrawal of proposals (*Charter Oak*; *Alhambra City and High School Districts* (1986) PERB Decision No. 560 (*Alhambra*)) are examples of regressive behavior. (*City & County of San Francisco* (2009) PERB Decision No. 2064-M.) Negotiators have an implied obligation not to "torpedo" a proposed collective bargaining agreement or undermine the bargaining process. (*State of California (Department of Personnel Administration)* (2003) PERB Decision No. 1516-S; *Fresno County Office of Education* (1993) PERB Decision No. 975; *Alhambra*.)

Bypass/Direct Dealing – Employee Organization

An exclusive representative must deal with the employer's chosen representative on matters within the scope of representation, and avoid direct negotiations with the public entity; direct dealing interferes with the employer's right to select its own negotiators. (*Westminster School District* (1982) PERB Decision No. 277 (*Westminster*).) An exclusive representative's attempt to bypass the employer's authorized negotiators and bargain directly with the public agency by presenting proposals or concessions violates the duty to negotiate in good faith. "Advocacy support" of working conditions at a public meeting of the employer is a permissible exercise of an exclusive representative's right to represent employees in

employment relations. (*Sierra Joint Community College District* (1983) PERB Decision No. 345 (*Sierra*); *San Ramon Valley Unified School District* (1982) PERB Decision No. 230 (*San Ramon*).)

The employer may lawfully prohibit negotiations at a public meeting, but may not ban mere advocacy which relates to subjects being negotiated. (*Westminster, supra,* PERB Decision No. 277). An employer policy denying an exclusive representative's right to speak at its public meetings on any matter related to negotiations, grievances, arbitrations, and/or personnel matters is overly broad, and violates protected employee and employee organizational rights. (*San Ramon, supra,* PERB Decision No. 230). Comments urging the employer to become involved in bargaining are permitted if the exclusive representative is not attempting to circumvent, bypass, and/or undermine the employer's designated negotiator, and remains willing to bargain with that representative. (*County of Inyo* (2005) PERB Decision No. 1783-M (*Inyo*); *Westminster*.)[72]

Employee organizations have the right to represent their members at public meetings of the employer, and the same statutory right to participate at public agency meetings as the general public. (*Westminster*; *supra,* PERB Decision No. 277; *San*

[72] In *Inyo*, the Board reversed the dismissal of a charge where the exclusive representative attempted to circumvent management negotiators by communicating with the Board of Supervisors on several occasions. In *California State University* (1987) PERB Decision No. 621-H, PERB found a prima facie case where the union president sent two settlement proposals not offered to employer negotiators to the Board of Trustees; in *California State University* (1987) PERB Decision No. 621a-H, the Board vacated its decision at the parties' request after they reached agreement on a new contract.

PERB and NLRB precedent establish that an exclusive representative is entitled to information enabling it to sufficiently understand and intelligently discharge its duty to represent bargaining unit members. "Relevant and necessary" information must be furnished for representing employees in contract negotiations, and policing

the administration of an existing agreement in grievance processing. (*Stockton, supra,* PERB Decision No. 143; *Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista*); *NLRB* v. *Acme Industrial Co.* (1967) 385 U.S. 432; *Labor Bd. v. Truitt Mfg. Co.* (1956) 351 U.S. 149; *Procter & Gamble Mfg. Co.* v. *NLRB* (8th Cir. 1979) 603 F.2d 1310))

There is no duty to provide information absent a request for it. (*City of Los Altos* (2007) PERB Decision No. 1891-M; *Los Angeles Unified School District* (1990) PERB Decision No. 835; *Oakland II, supra,* PERB Decision No. 275.)

Information related to mandatory subjects of bargaining is presumed to be relevant, and must be disclosed unless the employer can demonstrate it is plainly irrelevant or a provide a compelling reason for nondisclosure. (*Solano County, supra,* PERB Decision No. 2402-M; *State of California (Departments of Personnel Administration and Transportation)* (1997) PERB Decision No. 1227-S (*State of California*); *Regents of the University of California* (1991) PERB Decision No. 891-H; *Stockton, supra,* PERB Decision No. 143.) The Board and courts have also found various types of information relevant when requested for collective bargaining or contract administration. (*Stockton*–health insurance costs; *Trustees of the California State University* (2004) PERB Decision No. 1591-H and *Trustees of the California State University* (1987) PERB Decision No. 613-H (*CSU Trustees*)–wage survey data; *Oakland Unified School District* (1985) PERB Decision No. 540–salary information; *Newark Unified School District* (1991) PERB Decision No. 864–staffing and enrollment projections; *Mt. San Antonio Community College District* (1982) PERB Decision No. 224–names of employees disciplined for protected activities, and names and

home addresses of former employees to determine their potential for reinstatement or back pay; *Modesto City Schools and High School District* (1985) PERB Decision No. 479 (*Modesto*)–rating sheets to evaluate transfer candidates; *California State University, Sacramento* (1982) PERB Decision No. 211-H–employee personnel file for grievance representation; *Azusa Unified School District* (1983) PERB Decision No. 374–seniority lists and lists of employees affected by reduction in work hours; *Oakland Unified School District* (1983) PERB Decision No. 367–seniority lists, transfers, reduction in hours, and information on subcontracting unit work; *Oakland III, supra,* PERB Decision No. 326–lists of employees to be laid off, including job classes, location, bumping rights, and date and duration of layoff; *State of California (Department of Veterans Affairs)* (2004) PERB Decision No. 1686-S (*State of California* (*DVA*)–investigative reports and witness statements where hostile and unsafe work environment or racial discrimination alleged; *Trustees of the California State University* (2006) PERB Decision No. 1876-H–parking fees, availability, and allocations; *Chula Vista, supra,* PERB Decision No. 834–leave and personnel records; *Town of Paradise* (2007) PERB Decision No. 1906 (*Paradise*) and *Bakersfield City School District* (1998) PERB Decision No. 1262–wages and circumstances for mandatory on-call employees; *Compton Community College District* (1990) PERB Decision No. 790–part-time employees names and home addresses for agency fee purposes; *County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal.4th 905, *Golden Empire Transit District* (2004) PERB Decision No. 1704-M, *San Bernardino City Unified School District, supra,* PERB Decision No. 1270, *Bakersfield City School District*, *supra*, PERB Decision No. 1262,

and *State of California (Department of Personnel Administration)* (1992) PERB Decision No. 948-S–employee home addresses and telephone numbers.)

PERB uses a liberal standard, similar to a discovery-type standard, to determine the relevance of the requested information. If the employer questions the relevance of the information, the union must provide an explanation. (*Regents of the University of California* (2006) PERB Decision No. 1870-H; *State of California, supra,* PERB Decision No. 1227-S; *Modesto, supra,* PERB Decision No. 479.) If the relevance of the information is rebutted by the employer, the exclusive representative must establish how it is relevant to its representational responsibilities such as negotiations or contract administration. (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H (*UC Davis*); *CSU Trustees, supra,* PERB Decision No. 613-H; *San Diego Newspaper Guild* v. *NLRB* (9th Cir. 1977) 548 F.2d 863.)

Information request cases turn on the particular facts involved, so each request is analyzed separately. (*Chula Vista, supra,* PERB Decision No. 834). Failure to provide requested information is a per se violation of the duty to bargain in good faith. The employer has a duty to exercise reasonable diligence in gathering information requested and providing it in a useful form. (*Paradise, supra,* PERB Decision No. 1906-M; *State of California (Department of Corrections)* (2000) PERB Decision No. 1388-S; *Los Angeles Unified School District* (1990) PERB Decision No. 860; *California State University*, *supra*, PERB Decision No. 799-H; *Chula Vista*.)

That an employer ultimately furnishes the information does not excuse an unreasonable delay in supplying it; unreasonable delay in providing requested information is tantamount to a failure to produce the information at all. (*Chula Vista,*

supra, PERB Decision No. 834). A delay may be found reasonable when it is justified by the circumstances and the union is not prejudiced. (*City of Burbank* (2008) PERB Decision No. 1988-M, citing *Union Carbide Corp*. (1985) 275 NLRB 197.)

An employer need not comply with a request for information if the request is unduly or excessively burdensome. (*State of California, supra,* PERB Decision No. 1227-S; *Chula Vista, supra,* PERB Decision No. 834; *Los Rios Community College District* (1988), PERB Decision No. 670 (*Los Rios CCD*); *Stockton, supra,* PERB Decision No. 143.) The employer must assert its concerns and both parties must bargain in good faith to ameliorate them. The employer cannot simply ignore the request. The employer bears the burden of proving this defense.

Information sought for non-bargaining unit employees is not presumed relevant, and the exclusive representative must demonstrate that it is relevant and necessary to its representational duties. (*State of California (Department of Consumer Affairs)* (2004) PERB Decision No. 1711-S (*State of California* (*DCA*).)

An employer does not breach its duty to provide relevant and necessary information when it partially complies with an information request, and the union fails to communicate its dissatisfaction, follow up, reassert/renew, or clarify its request. (*Los Angeles Superior Court* (2010) PERB Decision No. 2112-I; *County of Sierra* (2007) PERB Decision No. 1915-M; *City of Fresno*, *supra*, PERB Decision No. 1841-M; *Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778; *Trustees of the California State University* (2004) PERB Decision No. 1732-H; *State of California (DCA), supra,* PERB Decision No. 1711-S; *Oakland Unified School District*, *supra*, PERB Decision No. 367.) Where an employer is on notice or clearly

understands that its partial response is unsatisfactory, the request need not be repeated. (*Los Angeles Unified School District* (2015) PERB Decision No. 2438.) The information request must demonstrate the employer has possession of the documents (*State of California (Department of Mental Health)* (1999) PERB Decision No. 1328-S), and be worded as specifically as possible because the right to information is not a fishing expedition (*State of California, supra,* PERB Decision No. 1227-S).

The employer is not obligated to provide requested information when it and the union have equal access to the same information from the same source; the employer must inform the requestor of the location of the information (*UC Davis, supra*, PERB Decision No. 2101-H). The employer does not deny the exclusive representative its right to information where the requested information is not available to the employer, or does not exist at the time of the request. (*Solano County, supra,* PERB Decision No. 2402-M; *City of Pinole* (2012) PERB Decision No. 2288-M *(Pinole*); *Los Angeles Superior Court*, *supra*, PERB Decision No. 2112-I; *UC Regents, supra,* PERB Decision No. 2094-H; *State of California, supra,* PERB Decision No. 1227-S.) There is no obligation for the employer to disclose details about the rationale or thought process behind its managerial decisions (*Pinole*; *Ventura County Community College District* (1999) PERB Decision No. 1340; *City of Fresno v. Fresno Firefighters* (1999) 71 Cal.App.4th 82.)

Under MMBA section 3506.5, subdivision (c), knowingly providing an exclusive representative with inaccurate information regarding the financial resources of the public employer, whether or not in response to a request for information, is a refusal or failure to meet and negotiate in good faith and an unfair practice.

It is well-established that a union's right to relevant and necessary information is not absolute. Constitutional rights of personal privacy may limit otherwise lawful demands for production of information held in confidence. The employer bears the burden of demonstrating that disclosure would compromise privacy rights. In *Detroit Edison Co.* v. *NLRB* (1979) 440 U.S. 301, the U.S. Supreme Court stated: "A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." Thus, the NLRB developed a balancing test to weigh a union's need and interest in obtaining relevant employee information against privacy and confidentiality interests. PERB has adopted the same balancing test to apply to employer claims that employee confidentiality prevails. (*City of Redding* (2011) PERB Decision No. 2190-M (*City of Redding*); *Los Rios CCD, supra,* PERB Decision No. 670; *Modesto, supra,* PERB Decision No. 479), and approved the practice of redacting confidential information before providing relevant information to the exclusive representative. (*City of Redding*; *Chula Vista, supra,* PERB Decision No. 834).

In *State of California (DVA), supra,* PERB Decision No. 1686-S, the Board ordered production of an investigative report, prepared by a special investigator, concerning allegations of a supervisor's hostile work environment as relevant and necessary for the exclusive representative to represent its members in being free from racial discrimination and a hostile work environment, and to work in a safe workplace. As to presumptive relevance, PERB rejected the employer's argument that the

information was sought for use in an extra-contractual forum.[73] Moreover, *Paradise, supra,* PERB Decision No. 1906-M, requires production of requested information relevant and necessary to effectively administer the agreement even absent a specific grievance filed by the union against the employer.

State of California (DVA), supra, PERB Decision No. 1686-S, also denied California Public Records Act (CPRA)[74]-based defenses "standing alone" to requests for information;[75] the investigative report was not a confidential personnel record, and the supervisor whose alleged misconduct was being investigated had no expectation

[73] The contract between the exclusive representative and the State employer contained an anti-discrimination clause, but violations could only be filed as complaints, and not grieved or arbitrated.

[74] Section 6250 et seq.

[75] *Trustees of the California State University*, *supra*, PERB Decision No. 1591-H.

of privacy in the report;[76] and redacting employee names or identities eliminated privacy problems while providing the basic information sought.[77]

State of California (DVA), supra, PERB Decision No. 1686-S emphasizes that the information requested, an investigative report into allegations of racial discrimination and a hostile work environment, was not sought by the exclusive representative for release to the general public, but for the purpose of representing its bargaining unit members. *State of California (DVA)* also instructs that where defenses related to confidentiality are raised, the facts of the individual case must be examined.

Reasonable Rule

The stated purpose of MMBA section 3500, subdivision (a), is to

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

[76] The employer raised both the constitutional privacy argument, premised on the right of the supervisor to non-disclosure of negative information in personnel records because the report implicated his right to informational privacy, and the CPRA-personnel files confidentiality defense. The proposed decision found that the subject matter of the investigative report was not one in which the supervisor would have a reasonable expectation of privacy, and the report could be redacted if there were any provisions involving expectations of privacy. The Administrative Law Judge (ALJ) applied the balancing test, concluding that any interest in confidentiality was outweighed by the interest in disclosure for the purpose of the exclusive representative's right to represent bargaining unit employees. The proposed decision cited NLRA cases that unions could be trusted to be discreet in inspecting confidential personnel files.

[77] In *Teamsters Local 856 v. Priceless LLC* (2003) 112 Cal.App.4th 1500, the court held that employee salaries contained in personnel files could be disclosed as long as employee names were redacted. In *Pennsylvania Power Co.* (1991) 301 NLRB 1104, the NLRB found that the contents of informants' statements, although not their identities, were subject to disclosure.

> those organizations in their employment relationships with public agencies.

Section 3507, subdivision (a), allows public agencies to adopt reasonable rules and regulations for the administration of employer-employee relations, including recognition of employee organizations and exclusive representatives, access of employee organization officers and representatives to work locations, and use of official bulletin boards and other means of communication by employee organizations, after consulting with exclusive representatives. Under section 3507, subdivision (d), both employees and employee organizations may challenge local rules or regulations of a public agency as violating MMBA by filing charges.

A basic rule of statutory construction considers a regulation/rule in harmony with the purposes, provisions, and policies of the statute. (*Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506; *State of California (Department of Personnel Administration)* (1993) PERB Order No. Ad-246-S.) In examining a local rule, the inquiry is not whether PERB would find a different rule more reasonable, or if an existing rule is unreasonable measured against an arbitrary standard, but whether the rule conflicts with or frustrates the express provisions of MMBA or is consistent with and effectuates them. (*County of Orange* (2010) PERB Decision No. 2138-M (*Orange County II*); *City of San Rafael* (2004) PERB Decision No. 1698-M.) The burden of proof is on the party attacking the reasonableness of the rule under MMBA section 3507, subdivision (d); the Board presumes that the local rule is reasonable absent proof to the contrary. (*San Francisco*, *supra*, PERB Decision No. 1890-M.)

MMBA authorizes a considerable degree of local regulation; where it sets a standard, local divergence is not allowed. The question is whether the rule is consistent with and effectuates MMBA purposes. MMBA-established standards "may not be undercut by contradictory rules or procedures that would frustrate its purposes." (*County of Imperial* (2007) PERB Decision No. 1916-M; *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191; *International Federation of Professional & Technical Engineers v. City and County of San Francisco* (2000) 79 Cal.App.4th 1300; *Huntington Beach Police Officers Association v. City of Huntington Beach* (1976) 58 Cal.App.3d 492; *Los Angeles County Firefighters Local 1014 v. City of Monrovia* (1972) 24 Cal.App.3d 289.)

In *Orange County II, supra,* PERB Decision No. 2138, citing *County of Orange* (2006) PERB Decision No. 1868-M (*Orange County I*), PERB held that a party lacks standing to challenge a local rule when the public agency employer has not applied or enforced the rule to its detriment within the six month statute of limitations before the charge was filed. In *Orange County I*, the Board explained the reason for requiring a new wrongful act within the statutory period:

> Absent a meaningful limitation period, these rules would be subject to challenge at any time with little or no burden to the charging party. . . . local rules, if subjected to perpetual vulnerability, will likely be thrown into a state of flux and . . . create chaos, not stability, in labor-management relations. . . . the viability and integrity of local rules, which the Legislature deliberately sought to protect, would be significantly compromised.

PERB distinguished its earlier case, *Long Beach Unified School District* (1987) PERB Decision No. 608 (*Long Beach*), where the only way to test access regulations was to

violate them and risk discipline; in *Orange County I*, the employee organization needed only to file the representation petition within a reasonable time.

If the complaint alleges that the local rule is unreasonable as applied, the claim that it is also facially invalid cannot be raised for the first time on appeal. (*Fresno County Superior Court* (2008) PERB Decision No. 1942-C.)

Employer Domination/Interference

To prove a violation of MMBA sections 3502; 3503; and 3506.5, subdivision (d); and PERB Regulation 32603, subdivision (d); a charging party must demonstrate that the employer's conduct tends to interfere with the internal activities of an employee organization, or tends to influence the choice between employee organizations. (*West Contra Costa County Healthcare District* (2011) PERB Decision No. 2164-M (*West Contra Costa*); *County of Monterey* (2004) PERB Decision No. 1663-M (*Monterey*); *Redwoods Community College District* (1987) PERB Decision No. 650 (*Redwoods*); *Santa Monica Community College District* (1979) PERB Decision No. 103 (*Santa Monica*).) Only an employee organization has standing to make this claim. (*State of California (Department of Corrections)* (1993) PERB Decision No. 972-S.)

Proof that an employer intended to unlawfully dominate or assist an employee organization, or influence employees' free choice is not required; the employer's intent in taking the challenged action is irrelevant. (*Monterey, supra,* PERB Decision No. 1663-M; *Redwoods, supra,* PERB Decision No. 650; *Santa Monica, supra,* PERB Decision No. 103; *Azusa Unified School District* (1977) EERB[78] Decision No. 38.) Nor

[78] Before January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

is it necessary to prove that employees actually changed membership as a result of the employer's acts. (*West Contra Costa, supra,* PERB Decision No. 2164-M.) The threshold test is "whether the employer's conduct tends to influence [free] choice or provide stimulus in one direction or the other." (*Santa Monica*). The test then requires an examination of the totality of circumstances in each case (*Oak Grove School District* (1986) PERB Decision No. 582); the line between prohibited domination or interference and permitted cooperation is "fuzzy," and PERB considers how employees would view the employer's conduct. (*Monterey; Redwoods*.)

An employer's agreement to a contract term providing release time for union representatives to process grievances is not unlawful support or assistance. (*Los Rios Community College District* (1991) PERB Decision No. 867.) An employer providing information to employees about local rules governing the decertification process is not unlawful assistance. (*Golden Gate Bridge Highway & Transportation District* (2004) PERB Decision No. 1669-M.) An employer did not show preferential treatment to an employee organization petitioning to decertify the incumbent. (*West Contra Costa, supra,* PERB Decision No. 2164-M.)

The issue arises most often in the context of organizing, conducting representation elections, and employer-established forums or councils. (*Victor Valley Community College District* (2003) PERB Decision No. 1543; *Santa Clarita Community College District (College of the Canyons)*, *supra*, PERB Decision No. 1506; *Long Beach Community College District* (1998) PERB Decision No. 1278; *Ventura Community College District* (1994) PERB Decision No. 1073; *State of California (Departments of Personnel Administration, Mental Health and*

Developmental Services) (1985) PERB Decision No. 542-S; *Clovis Unified School District* (1984) PERB Decision No. 389; *Electromation v. NLRB* (7th Cir. 1994) 35 F.3d 1148; *Tri-County Roofing, Inc.* (1993) 311 NLRB No. 188.)

In *State of California (Department of Corrections)* (1999) PERB Decision No. 1308-S, the Board upheld the dismissal of a Ralph C. Dills Act (Dills Act) section 3519, subdivision (d) charge,[79] adopting the General Counsel/Regional Attorney warning and dismissal letters. Union[80] officers and job stewards were ordered to answer questions as witnesses during an internal affairs (IA) investigation into the conduct of the Union Chapter President, and denied representation during those IA interviews. PERB upheld the dismissal for failure to state a prima facie case. The warning letter stated:

> CCPOA attempts to make an end run around the contractual grievance procedure by alleging unlawful domination. Section 3519, [subdivision] (d) does not address interference with Union activities or discrimination based on protected activities. Those allegations are properly analyzed under section 3519, [subdivisions] (a), (b), and (c). Section 3519 [subdivision] (d) prohibits the State from interfering with the formation or administration of any employee organization. It does not prohibit the State from discriminating or interfering with protected rights. CCPOA fails to present any facts demonstrating the State urged employees to support another employee organization or attempted to financially support another employee organization. CCPOA fails to provide any support for its contention that questioning employees about their union

[79] Dills Act section 3519, subdivision (d), and MMBA section 3506.5, subdivision (d), contain identical language.

[80] Charging Party California Correctional Peace Officers Association (CCPOA).

activities constitutes unlawful interference with the administration of the union.

CO Complaint

The CO complaint alleges 17 indicia of SEIU bad faith bargaining in 2014. Three claims have been dismissed for failure of proof.[81] The remaining allegations must be evaluated within the context of 12 negotiations, five e-mails, and three phone calls between the parties in five months, which produced a successor 2014-2015 MOU for bargaining units 1, 3, 4, 6, and 7 with wage increases, one-year County-SEIU contract for unit 2 shortly thereafter, and two-year 2015-2017 successor agreement with larger raises for the SEIU-represented units successfully bargained before the one-year contract(s) expired.

Contract Language

Article 2, Purpose, of the 2014-2015 MOU states that the contract document sets forth the parties' full understanding reached as a result of good faith bargaining. SEIU contends that this language is a County admission that SEIU bargained in good faith during successor negotiations, requiring dismissal of the complaint. The County responds that the parties did not exchange article 2 proposals or discuss it; the

[81] May 8 failure to adequately prepare for bargaining/ground rules violation; May 15 unreasonable caucus time; May 20 ground rule violation/presentation of initial proposal.

language is not an explicit waiver of its right to pursue the CO charge; and the parties' subsequent agreement does not moot the controversy, mandating a decision.

Sjostrom testified that article 2 was "carry-over" from prior MOUs; if neither SEIU nor the County proposed any change to expired contract language, it continued in the new agreement.

The County did not make any article 2 proposals. On April 17, SEIU made a concept proposal to recognize shared community values; on May 8, it made a substantive offer to add language to article 2 on six specific items valued and advocated by County workers. Article 2 was not in the parties' July 21 TA. The 2014-2015 MOU does not contain any additional language from either SEIU's concept or substantive article 2 proposals, but only the prior contract terms.

SEIU's defense is rejected as not supported by the evidence.

Health and Safety Proposal

The County argues that SEIU's failure to make a substantive health and safety proposal after requesting "reams of information" on the issue diverted bargaining staff from important issues, demonstrated a pattern of delay, prolonged/hampered negotiations, and unnecessarily consumed time. SEIU asserts it was not required to make any proposal, did not give promises or assurances it would present a written offer, made a concept proposal, and the bargaining process worked properly.

On April 22, the third meeting, SEIU gave the County a concept proposal to strengthen the health and safety program/process. At June 9 bargaining, the sixth session, Salazar stated SEIU would provide a formal proposal on health and safety by June 12. No proposal was made, then or ever, before negotiations ended.

There is no evidence that the County ever asked about or even mentioned SEIU's failure to present a substantive health and safety proposal on or after June 12. Salazar's testimony about SEIU's reasons for not pursuing health and safety in favor of higher priority salary increases is credited.

This claim is dismissed.

Response to Initial Proposal

The County avers that SEIU's April 22 written response to its April 17 initial proposal was not meaningful or responsive, demonstrating lack of preparation for bargaining and attempt to buy time. SEIU replies that it was early in bargaining, and the response requested an explanation of and additional information to understand the County's offer.

The complaint does not allege SEIU's lack of preparation for bargaining on April 22 but on three other dates. At the second negotiation, after SEIU provided eight concept proposals, the County presented its opening offer. SEIU responded at the next session, proposing a three-year term to the County's one-year duration, and eight additional concepts. The parties were at the beginning of negotiations.

Virtually all SEIU responses to the items in the County proposal used similar and/or duplicative language. But there is no evidence that the County ever asked for further information or clarification from SEIU. This single incident, given the overall context and timing/totality of circumstances, was not sufficiently egregious to frustrate negotiations or avoid agreement; the parties continued to bargain and reached a MOU.

This claim is dismissed.

Unreasonable Caucus Time – April 22, June 9 and 26, July 7

On April 22, SEIU caucused twice for two hours and five minutes during the three-hour session. On June 9, it caucused once for 47 minutes in a two-hour, 30 minute negotiation. On June 26, SEIU caucused four times for two hours, 45 minutes of the six-hour meeting, and the County caucused twice for 40 minutes. On July 7, it caucused twice, 16 minutes total.

Bennett testified that 2014 SEIU bargaining caucuses were much longer than prior negotiations. Salazar denied using caucuses to prepare for negotiations. The parties' bargaining notes reflect only one County statement to SEIU about its caucuses, Bennett's remark on July 7, the next to last session, that SEIU had already caucused and caucuses were not intended to prepare for negotiations.

Ground rule 7 stated that either party could call caucuses at any time, the number was unlimited, caucuses were not to be used to prepare for negotiations, and Chief Spokespersons would estimate length and make every effort to reconvene within that time. The County drafted the 13 ground rules, captioned "County Proposal," and Bennett presented them to the SEIU team at the first meeting.

The County does not claim that SEIU spent unreasonable time caucusing on the four dates alleged in the complaint. It cites only the May 29 SEIU caucus as demonstrating lack of preparation for bargaining as a ground rule 7 violation. The complaint does not allege unreasonable caucus time by SEIU on May 29, however. SEIU asserts that its caucuses complied with ground rule 7, unreasonably long caucuses do not violate MMBA, and PERB cannot possibly regulate caucus time.

This claim is dismissed as abandoned by the County and for failure of proof.

Failure to Prepare for Bargaining/Ground Rules Violation – May 29, July 7

The County argues that SEIU's request to caucus at the beginning of May 29 bargaining shows its lack of preparation because it knew the CAO would attend to discuss budget issues; the caucus violated ground rule 7 as it was used to prepare for negotiations. SEIU responds that its team was prepared, did not use the caucus to prepare for bargaining, and no County team member complained SEIU was unprepared that day.

The County contends that SEIU's inadequate preparation for July 7 bargaining was demonstrated twice. First, Bennett asked if SEIU global proposals for pending litigation included unit 2; she later inquired if the SEIU global and non-global offers were its last, best, and final ones. Both times, Salazar responded that she had to talk to the team before responding; as an experienced negotiator, Salazar should have been able to answer the questions herself.

SEIU replies to the County's claims that it was unprepared on July 7. SEIU disputes it took a long caucus; there was disagreement on the number of employees in the SEIU bargaining units; and the County made its first proposal for a wage increase at the prior June 26 negotiation. Caucus time was necessary and appropriate.

The 13 ground rules do not mention preparation for bargaining other than the ground rule 7 caveat not to use caucuses to prepare for negotiations. On May 29, the County caucused first for 15 minutes, followed by SEIU's 18-minute caucus, about the same amount of time. On July 7, the two SEIU caucuses were brief, before and after both sides explained how they counted employees in costing economic proposals.

Bennett's questions and Salazar's responses were after this discussion, and before and after SEIU presented two counterproposals on retroactivity and unit 2. After returning from the second caucus, Salazar answered both inquiries. SEIU's proposals were not its last, best, and final offer, it was still negotiating a counter, and unit 2 was not included in its economic proposals for the five units but would be bargained separately.

Both claims are dismissed as unsupported by the evidence.

Regressive Proposal

The complaint alleged a, or one, SEIU regressive proposal on June 20.

The County asserts that SEIU made four regressive proposals to include bargaining unit 2 in prior offers; two on June 20 to place unit 2 in successor MOU and global proposals for the five units; on June 26 for unit 2 wage increase and bonus; and to extend successor contract terms and conditions of employment to unit 2 on July 7. SEIU made two more regressive proposals costing more than its prior offers. On June 20, SEIU stated that its one-time bonus did not include health reopener, specialty pay or bilingual pay; on June 26, it proposed wage increases and a bonus for its represented units.

SEIU responds that the parties were entertaining many economic proposals simultaneously; they continued to make progress in bargaining once its bonus offer was clarified on June 26; and one inadvertent regressive proposal is not bad faith bargaining. The County replies that SEIU conceded its one-time bonus proposal was regressive, and it initiated a chain reaction of regressive proposals.

On June 17, Salazar told Bennett that she thought the $3000 replaced all economics. At June 20 bargaining, after Bennett summarized her conversation with Salazar about the one-time bonus proposal, Salazar responded that she needed to discuss it with the team. The parties discussed the offer. Salazar stated the one-time $3000 bonus proposal withdrew all SEIU economics except health reopener, all charges would be withdrawn, and unit 2 was included. Bennett responded that including unit 2 could be regressive bargaining. Salazar replied that SEIU did not want to be regressive, and would review its position. SEIU presented a multi-year counterproposal to the June 9 County counter, 8% salary increases and $1500 bonus; Salazar confirmed that the bonuses did not include specialty or bilingual pay, or health reopener. Bennett said that could possibly be regressive. Salazar replied that SEIU would discuss the issue on June 23, and Bennett noted SEIU's significant movement on non-economic items, bringing them close.

After June 20, Bennett and Salazar discussed the County and SEIU proposals by phone and in several e-mails. The parties had three more negotiations on June 26, July 7, and

July 21, where further proposals and counterproposals were exchanged; they reached agreement and signed the TA on July 21.

It is found that SEIU made a regressive economic proposal on June 20, first excluding health reopener, then exempting bilingual and specialty pays from its one-time bonus offer. It is also found that this conduct, viewed within the entire context and timing/totality of the circumstances, was not sufficiently egregious to frustrate negotiations/avoid agreement since the parties reached TA a month later.

This claim is dismissed.

Ground Rules Violation/Designated Spokesperson

The County avers that SEIU violated ground rules 5 (Chief Spokesperson) and 6 (Proposals) on July 21 when team member Wilson made a formal verbal proposal to Bennett because Chief Spokesperson Salazar was responsible for making written formal proposals.

SEIU retorts that ground rule 5 does not restrict other bargaining team members from speaking or presenting proposals at the table; the complaint alleges only violation of ground rules on designated spokespersons, not ground rule 6; and Wilson had expertise in numbers.

Ground rule 5 identified Bennett and Salazar, or their designees, as County and SEIU Chief Spokespersons, and their responsibilities for three duties (TAs, scheduling meetings, coordinating communications). Ground rule 6 required parties to make written formal proposals and counterproposals, with economic proposals in specific language.

Salazar testified that she asked Wilson to "verbalize" an economic proposal at July 21 negotiations because he was great at numbers. Wilson also explained how SEIU costed its economic proposals on July 7. At both sessions, Wilson acted as the authorized designee of the SEIU Chief Spokesperson within the meaning of ground rule 5.

After the County verbally rejected both SEIU's global settlement proposal and its July 7 economic offer, Wilson orally presented SEIU's counterproposal for a 3% wage increase retroactive to July 1, one-time $500 bonus, and one-year contract.

After caucusing, Bennett verbally responded that the Board of Supervisors would not agree to both salary increases and a bonus, or retroactivity. Bennett for the County, and Salazar and Gomez for SEIU, then signed a TA for 3% raises.

Ground rule 6 required written formal proposals and counterproposals by the parties, the County and SEIU bargaining teams. Wilson, as a SEIU team member, was a party authorized to present formal offers and counters. His verbal presentation of a formal SEIU counter followed the County's oral rejection of prior SEIU proposals, and was verbally rejected by Bennett after a County caucus. The parties then TA'd.

Within the overall context and timing/totality of circumstances, Wilson's verbal SEIU counterproposal was at most a technical violation of ground rule 6. It was not sufficiently egregious to frustrate negotiations/avoid agreement since the parties signed a TA that day.

This claim is dismissed.

Bypass of County Representatives

The County argues that at May 29 negotiations, SEIU made a proposal directly to the CAO, not a designated County bargaining team member, when Salazar asked if the County was still status quo on wages and a longevity/retention bonus was possible. SEIU responds that Salazar's question(s) were appropriately directed to the CAO as the County's budget expert; the County did not tell SEIU it could not ask about the viability of certain economic proposals; further questions were not posed after Bennett stopped any response; and it was a harmless inquiry at the bargaining table. The County replies that Salazar discussed specific bargaining proposals, not

mere budget questions, with the CAO; she knew he was not on the County team; and the communication was not immunized because it was made at the table.

The County also asserts that the May 21-22 e-mail exchange between Wullschleger and Chairman Cox, one day after the May 20 County-SEIU sidebar on SEIU member communications with the Board of Supervisors, directly attempted to meet privately with and persuade Supervisors to offer SEIU a more favorable wage proposal. After Cox and other Supervisors declined to meet until after negotiations ended, Wullschleger, Case, Castillo, and Hawkins[82] used the June 17 public comment period to directly communicate with the Board of Supervisors about bargaining proposals, and increase the County's wage offers to SEIU. At the same time, SEIU was circulating community petitions urging the CAO and Supervisors to give County workers a living wage, not the 0% then offered, which were presented to the Supervisors. SEIU's egregious comments at public meetings, in media, and to citizens attempted to undermine County negotiators and undermine the bargaining process.

SEIU responds that Wullschleger asked Cox to meet with a group of constituents over general concerns of unfairness and disrespectful treatment of County employees. Wullschleger and fellow SEIU supporters made only general comments about the sad state of County-SEIU labor relations. Hawkins wanted to speak to Supervisors on a human level. The County Counsel testified that the e-mails

[82] The County contends that Hawkins' statement to speak to the Supervisors as men was an attempt to directly deal with the all-male Board of Supervisors because both of the County negotiators were female. Martin, a man, was the third County team member.

were only on terms and conditions of employment. None of these communications made proposals, referenced offers then being negotiated, or attempted to bargain with Supervisors. The SEIU bargaining team did not promise the County that its membership would not exercise First Amendment rights, and understood direct dealing was prohibited. The County acknowledged SEIU members' First Amendment free speech rights. All these communications were First Amendment and MMBA-protected speech.

The County replies that although SEIU members/representatives did not make formal proposals or refer to specific SEIU offers, implied proposals were directly communicated to the Supervisors. Wullschleger's May 21-22 e-mails attempted to persuade Cox and other Supervisors to propose wage increases for SEIU. Bargaining team members Wullschleger, Case, and Castillo, and SEIU staff Hawkins, urged the Board of Supervisors, the principal, to grant salary raises to SEIU after the County's designated bargaining agents had not offered them.

At the May 29 bargaining session, after SEIU team members asked questions and the CAO responded to them, Salazar posed one, no more than two, question(s) about the County's position on wages and a possible bonus. Bennett immediately stopped the CAO from answering, explaining the reason. The CAO followed her direction, and did not respond; the SEIU team did not inquire further. The parties then discussed other matters.

These facts do not establish SEIU direct discussion of specific bargaining proposals with the CAO on May 29, or attempt to do so. This claim is dismissed for failure of proof.

The June 17 SEIU bargaining team and staff public comments to the Board of Supervisors qualify as permissible advocacy related to subjects being negotiated. The parties had met eight times, and four more sessions were scheduled. On June 9, the County made its first economic offer, modifying sick leave buy back and uniforms; all other economics were status quo, including no salary raise. The County did not make a wage increase proposal to SEIU until June 26, after the meeting.

This claim is dismissed as unproven.

Although Wullschleger sent the e-mail to Cox the day after the May 20 County-SEIU sidebar, he was not a participant, and there is no evidence those discussions were communicated to him. The sidebar followed by discussion at the bargaining table occurred at the next meeting on May 29, after the Wullschleger-Cox e-mails ended.

When Wullschleger initiated the e-mail exchange with Cox, the County and SEIU had met six times over two months; substantive bargaining had just started. Wullschleger testified that he did not try to bargain with or make negotiating proposals to Cox or other Supervisors, but admitted his purpose was to persuade the Board of Supervisors to direct the County to put money on the table. His May 22 e-mail responding to Cox' refusal to meet during negotiations, sent to all Supervisors, clearly demonstrates this intent, naming the County bargaining team and referring to its current economic proposal. Although Wullschleger was on the SEIU bargaining team, he was not part of the prior day's sidebar. There is also no evidence that any SEIU representative authorized him to directly contact Cox or other Supervisors about bargaining. The May 29 sidebar about SEIU member communications with the Board

of Supervisors, confirmed at the table, was a direct result of the Wullschleger-Cox e-mails, after they ended.

It is found that Wullschleger's e-mails to Cox were not protected speech, but unprotected efforts to convince Cox and other Supervisors to direct County negotiators to offer SEIU wage increases. This was improper direct dealing and bypass of designated County bargaining representatives, although there is no evidence that SEIU knew about these communications until they concluded. Cox's timely and direct refusal to become involved brought an abrupt halt to this and further attempted end-runs. It is also found that this conduct, viewed within the entire context and timing/totality of the circumstances, was not sufficiently egregious to frustrate bargaining or avoid agreement; the parties were in the early stages of bargaining, continued to negotiate, and reached agreement.

This claim is dismissed.

CE Complaint

The CE complaint alleges three MMBA violations. SEIU must prove the elements of each unfair practice.

Employer Domination/Interference

The complaint alleges that by filing the CO charge, seeking a back pay/make whole remedy, and publicizing both, the County dominated or interfered with SEIU's administration.

SEIU's remaining arguments[83] are that member engagement suffered disastrous consequences from the County's actions. The 2014 Community First petition and contract campaign produced high membership participation in SEIU events, many employees for the first time. This involvement ceased once the CO charge was filed. Employees were demoralized and did not participate in 2015 bargaining-related activities at the same level. It was also difficult for SEIU to keep experienced leaders involved.[84]

The County's residual responses[85] are that SEIU did not mount the same community focused campaign for 2015 negotiations which could equally account for any decrease in member involvement. Wullschleger was discouraged but continued to participate in SEIU, while Inman did not attend SEIU functions for a few months. But both served on the 2015 SEIU bargaining team. SEIU-represented employees were not negatively impacted as they received 3% raises in 2014, 3% in 2015, and 1% in 2016 under negotiated MOUs. Hurt feelings are not legally cognizable harm.

The evidence does not support a finding that the County's conduct tended to interfere with SEIU internal activities, influence free choice between employee organizations, or provide stimulus in one direction or another. MMBA section 3506.5, subdivision (d), prohibits a public agency employer from interfering with the formation or administration of an employee organization, not discriminating or interfering with

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[83] *Fn.* 18, *supra*.

[84] SEIU cited the testimony of Salazar, Wullschleger, and Inman in its opening brief, and did not present additional argument in the reply brief.

[85] *Fn.* 18, *supra*.

protected employee rights. SEIU does not contend, and there is no evidence that the County's action encouraged SEIU bargaining unit employees to support another employee organization.

This claim is dismissed for failure of proof.

Refusal to Provide Information

The complaint alleges that SEIU requested the written report of the County's findings from the investigation of hostile work environment complaints three times on August 28, October 2, and October 7; and on September 9 and October 10, the County refused to provide a copy of the report.

SEIU asserts that the County's refusal to provide the DCSS investigative report into hostile work environment claims denied necessary and relevant information for it to represent bargaining unit 3 employees in ascertaining whether workplace harassment and discrimination was continuing, or had been successfully abated. *City of Redding, supra,* PERB Decision No. 2190, requires production of similar investigative reports with witness names and other identifying information redacted/deleted to address confidentiality concerns.[86]

The County answers that SEIU did not establish the relevancy of its information request for non-bargaining unit DCSS employees; employee privacy and confidentiality interests outweighed SEIU's interest in the report; its refusal was justified by unique circumstances, the pending agency fee rescission election; and the

[86] SEIU's reply brief incorporated arguments in its opening brief, and did not further address the claim.

categorical rule of *City of Redding, supra*, for production of redacted investigative reports should not be applied.

The County's October 10 refusal to provide the DCSS investigative report to SEIU was based on deliberate process privilege, confidentiality under the Public Records Act, Evidence Code official information privilege, and the California Constitutional right to privacy. The evidence does not support, and the County does not argue deliberative process or official information privileges, or state constitutional individual privacy rights, in post-hearing briefing. These justifications for non-disclosure do not meet an employer's burden to demonstrate that disclosure of requested information would compromise employee privacy rights, and are therefore rejected. The Public Records Act defenses were rejected in *City of Redding, supra*, and other Board precedent cited in it, and must be followed here.

City of Redding, supra, also directs that when defenses related to confidentiality are raised, the facts of the individual case must be examined. In this case, the agency fee rescission petition had been filed by a group of unit 3 employees, and was under investigation by the PERB General Counsel when SEIU requested the DCSS report in August, September, and October. The General Counsel ordered an election on November 12. The County's defense that it was required to maintain strict neutrality between the competitors during a potential pre-election period is therefore accepted.

This claim is dismissed.

Unreasonable Rule

The complaint alleges that County ERP section 14 (a) (3) restricts employee organizations and their members from engaging in organizing activities, including

distribution of literature, within County buildings, but does not restrict such conduct by individuals who are not employee organization members.

SEIU avers that the County's maintenance of ERP section 14 (a) (3) unlawfully restricts it and its members' rights to organize, solicit, and distribute literature during non-work time in non-work areas of County buildings. The local rule also discriminates against employee organizations and their members by prohibiting their organizing activities, while permitting non-members, such as the agency fee rescission petitioner, to engage in them, thereby affording non-members greater communication and associational rights. SEIU is not required to attempt to violate the ERP to demonstrate that the County would enforce it. (*Long Beach*, *supra*, PERB Decision No. 608.)

The County responds that SEIU lacks standing to challenge the reasonableness of ERP section 14 (a) (3) because it did not file a charge or test enforcement of the local rule within the six-month statute of limitations. (*Orange County II, supra*, PERB Decision No. 2138-M; *Orange County I, supra*, PERB Decision No. 1868-M.) The party challenging the local rule bears the burden of proving it is unreasonable, and SEIU did not present any evidence to meet this burden. (*County of Imperial*, *supra*, PERB Decision No. 1916-M; *San Francisco*, *supra*, PERB Decision No. 1890-M.)

SEIU cannot raise a facial challenge to the local rule for the first time in its post-hearing briefs. (*Fresno County Superior Court*, *supra*, PERB Decision No. 1942-C.)

The pertinent inquiry is not whether PERB would find a different local rule more reasonable, or if the rule is unreasonable measured against an arbitrary standard, but

whether the rule conflicts with or frustrates express MMBA purposes, or is consistent with and effectuates them. (*Orange County II, supra*, PERB Decision No. 2138-M; *County of Imperial*, *supra*, PERB Decision No. 1916-M; *City of San Rafael*, *supra*, PERB Decision No. 1698-M.) The Board presumes that a local rule is reasonable absent proof to the contrary. (*San Francisco*, *supra*, PERB Decision No. 1890-M.) If a complaint alleges that a local rule is unreasonable as applied, a facial invalidity claim cannot be raised for the first time on appeal. (*Fresno County Superior Court*, *supra*, PERB Decision No. 1942-C.)

In *Orange County II, supra*, PERB Decision No. 2138-M, citing *Orange County I, supra*, PERB Decision No. 1868-M, PERB held that a party lacks standing to challenge a local rule when the employer has not applied or enforced the rule to its detriment within the statutory limitations period. The Board distinguished *Long Beach, supra*, PERB Decision No. 608 as a case where the only way to test the local access rules was to violate them and risk discipline. In *Orange County I*, by contrast, the employee organization only needed to file a representation petition within a reasonable amount of time, the six month statute of limitations.

Neither party presented evidence on this allegation, but SEIU as Charging Party bears the burden of persuasion and proof. SEIU relies solely on *Long Beach, supra*, PERB Decision No. 608 in arguing that ERP section 14 (a) (3) is unreasonable; that case was distinguished by later Board precedent. SEIU presented no evidence to meet its burden of demonstrating the unreasonableness of the local rule. The complaint alleges only unreasonable application of the ERP to restrict employee organizations and their members from organizing and distributing literature in County

buildings, but not limit the same conduct by non-member individuals. SEIU's contention that the ERP also prevents employee organizations and their members from organizing, soliciting, and distributing literature in non-work areas of County buildings during non-work time is an impermissible and untimely facial challenge to the local rule.

This claim is dismissed as unproven and contrary to PERB precedent.

CONCLUSION

The CO complaint fails because the County did not prove any of the indicia of bad faith bargaining alleged by a preponderance of the evidence under the totality of circumstances test.

In the CE complaint, SEIU did not meet its burdens of persuasion and proof that the County dominated or interfered with its administration, or maintained an unreasonable rule, ERP section 14 (a) (3). The County's refusal to provide the DCSS investigative report to SEIU did not violate MMBA because the pending agency fee rescission petition and election required its strict neutrality. Because SEIU has not discharged its burdens in the substantive allegations, the derivative violations of interference with the rights of bargaining unit employees to be represented by SEIU, and denial of its rights to represent unit members, necessarily fail as well.

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in these matters, the complaint and underlying charge in Case No. SA-CO-120-M, *County of Tulare v. Service Employees International Union Local 521*, and the

complaint and underlying charge in Case No. SA-CE-894-M, *Service Employees International Union Local 521 v. County of Tulare*, are hereby DISMISSED.

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

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

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

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