



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

COUNTY OF VENTURA,

Employer,

and

VENTURA COUNTY PROFESSIONAL PEACE
OFFICERS ASSOCIATION,

Exclusive Representative.

Case No. LA-IM-234-M

PERB Order No. Ad-461-M

March 6, 2018

Appearances: Leroy Smith, County Counsel, and Matthew A. Smith, Assistant County Counsel, for County of Ventura; Rains Lucia Stern St. Phalle & Silver by Richard A. Levine, Attorney, for Ventura County Professional Peace Officers Association.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

GREGERSEN, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the County of Ventura (County) from an administrative determination (attached) by the Office of the General Counsel granting a request for factfinding by the Ventura County Professional Peace Officers Association (Association) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA)¹ and PERB Regulation 32802.² Concurrent with its appeal, the County has also requested that PERB stay

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

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

the administrative determination pending the Board's review of the appeal pursuant to PERB Regulation 32370.³

We have reviewed the case file in its entirety in light of the issues raised by the County's appeal and request for stay, and the Association's response thereto. We find the administrative determination to be generally well reasoned and in accordance with applicable law. We deny the County's appeal and request for stay, and adopt the administrative determination as the decision of the Board itself, except as supplemented by the discussion below.

FACTUAL AND PROCEDURAL HISTORY

On February 8, 2017, the Association filed a request for factfinding with the Board pursuant to MMBA section 3505.4 and PERB Regulation 32802. In its request, the Association asserted that it and the County have been unable to effect a settlement in the parties' negotiations regarding the Probation Agency's Firearm Manual (Firearm Manual), Chapter 6, governing the conduct of Armed Probation Officers, and that impasse had been declared on January 19, 2017.

By letter dated February 13, 2017, the County objected to the factfinding request. The County argued that the policy at issue in the Firearm Manual addressed the use of force by sworn staff. Citing *San Jose Peace Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935 (*City of San Jose*), the County argued that matters concerning use of force are not within the scope of representation and therefore not subject to factfinding under the MMBA.

³ PERB Regulation 32370 states that an appeal from an administrative decision will not automatically prevent the Board from proceeding in a case, but parties may seek a stay of any activity and "[t]he Board may stay the matter, except as otherwise provided in these regulations."

On February 15, 2017, the Office of the General Counsel issued an administrative determination approving the Association's request for factfinding. Relying on *Workforce Investment Board* (2014) PERB Order No. Ad-418-M (*WIB*), the Office of the General Counsel stated that it was not required to determine whether a matter is within the scope of representation before approving a factfinding request. Since the Office of the General Counsel's role is limited to determining whether the conditions of MMBA section 3505.4 and PERB Regulation 32802 have been met, the Office of the General Counsel stated that it was not empowered to determine whether the dispute or difference subject to factfinding is a matter within the scope of representation. As a result, the Office of the General Counsel approved the Association's request that the parties' bargaining dispute be submitted to a factfinding panel.

The County filed a timely appeal from this administrative determination, and the Association timely filed a response to the County's appeal.

DISCUSSION

MMBA section 3505.4, subdivision (a), provides as follows:

The employee organization may request that the parties' differences be submitted to a factfinding panel not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. . . .

PERB Regulation 32802 provides as follows:

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

- (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or
- (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

The timeliness of the Association's request is not in dispute. Instead, the dispute concerns whether, in addition to timeliness, the Office of the General Counsel must also determine whether the subject of a factfinding request is within the scope of representation before approving the factfinding request. At the center of this dispute is the Board's decision in *WIB, supra*, PERB Order No. Ad-418-M.

In *WIB, supra*, PERB Order No. Ad-418-M, the union filed a request for factfinding, asserting that it was unable to reach a settlement in negotiations over midterm layoffs. The Office of the General Counsel approved the union's request for factfinding. In its appeal, the employer challenged the sufficiency of the union's factfinding request, contending that the layoffs were economically motivated and thus beyond the scope of representation and that the union had "failed to demand bargaining over negotiable impacts or effects thereof." In rejecting the employer's challenge to the sufficiency of the request, the Board held:

In reviewing a factfinding request PERB relies on the parties' representations concerning the status of their bargaining and or mediation discussions and does not assess an employer's defenses to its duty to bargain. Nor does PERB determine whether the party seeking factfinding has articulated with sufficient clarity its position on the issue. There are matters properly left to clarifying discussions between the parties and for resolution in an unfair practice proceeding if either party files a charge.

(*Id.* at p. 33, fn. omitted.)

On appeal, the County requests that the *WIB* decision itself be overruled. The County argues that *WIB* focused too narrowly on the language of MMBA section 3505.4 while

disregarding the surrounding provisions and purpose of the MMBA. Citing *San Diego Housing Commission v. Public Employment Relations Board* (2016) 246 Cal.App.4th 1, review denied (July 13, 2016), the County argues that MMBA section 3505.4 must be read in conjunction with the other provisions of the MMBA to promote the Act's general purpose, which is to resolve disputes over matters *within the scope of representation*. As such, according to the County, the Office of the General Counsel must first assess whether the matter submitted to factfinding is a matter within the scope of representation.

Although we agree that factfinding is ultimately required only for disputes over matters within the scope of representation, we disagree that PERB is required in every case to make a definite determination to that effect before approving a factfinding request. Such a process is unwieldy and generally inconsistent with the time-sensitive nature of the factfinding process. (See *City & County of San Francisco* (2014) PERB Order No. Ad-415-M, p. 13.) While some matters such as wages and hours are expressly included within the scope of representation under the MMBA (§ 3504), the determination of whether a particular managerial decision is subject to negotiations can be legally and factually complex. The California Supreme Court has explained that there are three distinct categories of managerial decisions, each with its own implications for the scope of representation: (1) “decisions that ‘have only an indirect and attenuated impact on the employment relationship’ and thus are not mandatory subjects of bargaining,” such as advertising, product design, and financing; (2) “decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls,” which are “*always* mandatory subjects of bargaining” (emphasis added); and (3) “decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve ‘a change in the scope and direction of the enterprise’ or, in other words, the employer’s ‘retained

freedom to manage its affairs unrelated to employment.” (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272-273.)

“To determine whether a particular decision in this third category is within the scope of representation, the high court prescribed a balancing test, under which ‘in view of an employer’s need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.’” (*Id.* at p. 273.)

The present matter involves the content of the County’s Firearm Manual, a matter that is not specifically enumerated in the MMBA. The County argues that the matter is not within the scope of representation since it addresses the use of force by sworn staff citing *City of San Jose, supra*, 78 Cal.App.3d 935. The Association responds that because the Firearm Manual involves the use of deadly force standard applicable in the discharge of a firearm, it is a matter of employee safety and therefore within the scope of representation citing *Solano County Employees’ Assn. v. Solano County* (1982) 136 Cal.App.3d 256, 260. Determining whether the Firearm Manual is within the scope of representation is therefore not a straightforward legal issue and would require not only a review of the manual itself, but could require the consideration of additional evidence to explain the meaning of its terms and the circumstances in which it will be applied. The County appears to acknowledge this hurdle and suggests that the factfinding request should be denied until such time as a determination is made as to whether the matter is within the scope of representation. This is precisely the type of delay the Board in *WIB* cautioned against. The principal purpose of factfinding is to assist the parties in reaching a voluntary and prompt resolution to their dispute through intervention of a neutral. To *require* a preliminary determination as to whether a matter is within the scope of representation before

approving a factfinding request “would encourage both delay and gamesmanship, thus defeating the principal purpose of factfinding, namely, through intervention of a neutral to assist the parties in reaching a voluntary and prompt resolution.” (*WIB, supra*, PERB Order No. Ad-418-M, p. 33, fn. omitted.)

The County argues that a determination of whether the dispute concerns negotiable matters is required because the Board must determine “the existence of an actual impasse.” (Appeal, p. 4.) We disagree. The County relies on PERB Regulation 32802, subdivision (a)(2), which requires that one party has provided a written declaration of impasse. Determining whether there has been a written declaration of impasse is not the same as determining the existence of an impasse. Although we must determine the former, we do not determine the latter during a factfinding proceeding since the legislatively preferred method of resolving a party’s disagreement that an actual impasse exists is through an unfair practice charge, not a factfinding request. (*City of Salinas* (2018) PERB Order No. Ad-457-M, p. 6; *City & County of San Francisco, supra*, PERB Order Ad-415-M, pp. 13-14.)⁴

None of this is to say that the Board may *never* make a scope of representation determination in the context of a request for factfinding. We have held that “in the course of responding to a factfinding request, the Board has jurisdiction to decide all relevant and necessary factual and legal issues pertinent to that request.” (*City & County of San Francisco, supra*, PERB Order No. Ad-415-M, p. 12.) In the same case, however, we exercised our discretion not to decide disputed factual and legal issues that were also implicated in a pending unfair practice case between the same parties, determining that resolution of those issues was

⁴ The procedure is in contrast to that applicable to impasse procedures under the Educational Employment Relations Act (codified at § 3540 et seq.). Compare PERB Regulation 32792 with Regulation 32802.

“better suited to the unfair practice proceedings, with no resulting prejudice to the parties.”

(*Id.* at p. 14; see also *City of Folsom* (2015) PERB Order No. Ad-423-M, pp. 5-6.)

Here, too, we believe that unfair practice proceedings are better suited to resolving the legally and factually complex issue of whether the present dispute concerns a matter within the scope of representation. If after seeking clarification in negotiations, the County believes the dispute is entirely beyond the scope of representation, its remedy is to refuse to participate in factfinding, drawing a charge of violating MMBA section 3506.5, subdivision (e), and PERB Regulation 32603, subdivision (e).⁵ (*City of Salinas, supra*, PERB Order No. Ad-457-M, p. 5; *City of Folsom, supra*, PERB Order No. Ad-423-M, p. 6.) On the other hand, it is possible that by participating in the factfinding process (and with the assistance of the neutral factfinding panel chair), the County may be able to obtain sufficient clarification of the Association’s position to determine that the Association’s proposals do concern matters within scope.

Request for Stay

We deny the County’s request for a stay since the request is moot in light of this decision.

ORDER

The County of Ventura’s appeal from the administrative determination and request for stay in Case No. LA-IM-234-M are hereby DENIED.

Members Banks and Winslow joined in this Decision.

⁵ Section 3506.5, subdivision (e), provides that a public agency shall not “[r]efuse to participate in good faith in an applicable impasse procedure.” PERB Regulation 32603, subdivision (e), makes it an unfair practice for a public agency to “[f]ail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.”

PUBLIC EMPLOYMENT RELATIONS BOARD

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February 15, 2017

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County of Ventura
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Re: *County of Ventura and Ventura County Professional Peace Officers Association*
Case No. LA-IM-234-M
Administrative Determination

Dear Interested Parties:

On February 8, 2017, the Ventura County Professional Peace Officers Association (Association) filed a request for factfinding with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.¹ The Association asserts that it and the employer, County of Ventura (County) have been unable to effect a settlement in their current negotiations regarding the Probation Agency's Firearm Manual. Impasse was declared by a party on January 19, 2017.

By letter dated February 13, 2017, the County objected to the factfinding request. The County contends that the Firearm Manual is not a matter within the scope of representation. For the reasons discussed herein, the request for factfinding is approved.

Discussion

The Association describes the dispute as "arising from meet and confer negotiations ... for Probation Officers regarding content of Probation Agency's Firearm Manual, Chapter 6 governing conduct of Armed Probation Officers."

The County contends that this policy is not within the scope of bargaining. The policy addresses the use of force by sworn staff of the County's Probation Agency. Under *San Jose*

¹ The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

Peace Officer's Assn. v. City of San Jose (1978) 78 Cal.App.3d 935, matters concerning the use of force are a matter of managerial prerogative. Although the County sought the Association's input regarding the policy, it disagrees that this is a matter within the scope of representation under the MMBA.

In *Workforce Investment Board* (2014) PERB Order No. Ad-418-M, the Board concluded that the Office of General Counsel (OGC) is not required to determine whether a matter is within the scope of representation before approving a pending factfinding request. Rather, the OGC's role is limited to determining whether the conditions of MMBA section 3505.4 and PERB Regulation 32802 have been met. (*Id.* at pp. 32-33.) Therefore, the OGC is not empowered to determine, at this stage of the proceedings, whether the dispute or differences subject to factfinding is a matter within the scope of representation.

Next Steps

Each party must select its factfinding panel member and notify this office in writing of his/her name, title, address and telephone number no later than February 22, 2017.² Service and proof of service are required.

The résumés of seven factfinders, drawn from the PERB Panel of Neutrals, are being provided to the parties via electronic mail.³ The parties may mutually agree upon one of the seven, or may select any person they choose, whether included on the PERB Panel of Neutrals or not. In no case, however, will the Board be responsible for the costs of the chairperson.

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

Unless the parties notify PERB, on or before February 22, 2017, that they have mutually agreed upon a person to chair their factfinding panel, PERB will appoint one of these seven individuals to serve as chairperson.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision. (Cal. Code Regs., tit. 8, § 32360.) To be timely

² This deadline, and any other referenced, may be extended by mutual agreement of the parties.

³ The seven neutrals whose résumés are being provided are Don Becker, Robert Bergeson, Kenneth Cloke, Paul Crost, Fredric Horowitz, George Larney, and Philip Tamoush.

iled, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (Cal. Code Regs., tit. 8, § 32360, subd. (c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (Cal. Code Regs., tit. 8, § 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (Cal. Code Regs., tit. 8, § 32375).

Service

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

Extension of Time

A request for an extension of time in which to file an appeal or opposition to an appeal with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of

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the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (Cal. Code Regs., tit. 8, § 32132).

Sincerely,

Laura Z. Davis
Supervising Regional Attorney

LD