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STATE OF CALIFORNIA — EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Division of Administrative Law
1031 18th Street
Sacramento, CA 95811-4124
Telephone: 916-324-0143
Fax: (916) 327-7955

January 27, 2015

Re: *Service Employees International Union Local 521 v. County of Madera*
Case No. SA-CE-650-M

Dear Parties:

Attached is the Public Employment Relations Board (PERB or Board) agent's Proposed Decision in the above-entitled matter.

Any party to the proceeding may file with the Board itself a statement of exceptions to the Proposed Decision. The statement of exceptions shall 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
E-File: PERBe-file.Appeals@perb.ca.gov

Pursuant to California Code of Regulations, title 8, section 32300, an original and five copies of the statement of exceptions must be filed with the Board itself within 20 days of service of this decision. A document is considered "**filed**" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, § 32135, subd. (a); see also, Cal. Code Regs., tit. 8, § 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of California Code of Regulations, title 8, section 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, 32091, and 32130.)

The statement of exceptions shall be in writing, signed by the party or its agent and shall: (1) state the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identify the page or part of the decision to which each exception is taken; (3) designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception; and (4) state the grounds for each exception. Reference shall be made in the statement of exceptions only to matters contained in the record of the case. An exception not

specifically urged shall be waived. A supporting brief may be filed with the statement of exceptions. (Cal. Code Regs., tit. 8, § 32300.)

Within 20 days following the date of service of a statement of exceptions, any party may file with the Board itself an original and five copies of a response to the statement of exceptions and a supporting brief. The response shall be filed with the Board itself at the address noted above. The response may contain a statement of any exceptions the responding party wishes to take to the proposed decision. Any such statement of exceptions shall comply in form with the requirements of California Code of Regulations, title 8, section 32300. A response to such exceptions may be filed within 20 days. Such response shall comply in form with the provisions of this section.

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and 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).)

Any party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response thereto a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument. (Cal. Code Regs., tit. 8, § 32315.) All requests for oral argument shall be filed as a separate document.

A request for an extension of time within which to file any document with the Board itself shall be in writing and shall be filed at the headquarters office at least three days before the expiration of the time required for filing. The request shall state the reason for the request and, if known, the position of each other party regarding the extension. Service and proof of service pursuant to California Code of Regulations, title 8, section 32140 are required. Extensions of time may be granted by the Board itself or an agent designated by the Board itself for good cause only. (Cal. Code Regs., tit. 8, § 32132, subd. (a).)

Unless a party files a timely statement of exceptions to the proposed decision, the decision shall become final. (Cal. Code Regs., tit. 8, § 32305.)

Very truly yours,

Shawn P. Cloughesy
Chief Administrative Law Judge

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1031 18th Street, Sacramento, CA 95811-4124.

On January 27, 2015, I served the Letter regarding Case No. SA-CE-650-M on the parties listed below by

_X_ placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid.

___ personal delivery.

___ facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

___ electronic service (e-mail).

Kerianne R. Steele, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

Woodrow C. Whitford, Deputy County Counsel
County of Madera
200 W. 4th Street
Madera, CA 93637

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 27, 2015, at Sacramento, California.

B. Buddingh'
(Type or print name)

(Signature)

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. COUNTY OF MADERA, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-650-M PROPOSED DECISION (January 27, 2015)

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union Local 521; Cota Cole LLP by Dennis Cota and Carolyn J. Frank, Attorneys, for County of Madera.

Before Christine A. Bologna, Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges unilateral change/failure to bargain in good faith in implementing furloughs and repudiating contractual wage increases, and bypass of the exclusive representative. The employer denied committing any unfair practices or violations of law; contract language and fiscal emergency permitted its actions; and it offered to bargain but the union would not agree.

On January 6, 2010, Charging Party Service Employees International Union, Local 521 (Local 521) filed an unfair practice charge (charge) against the County of Madera (County).[1] On July 1, the Public Employment Relations Board (PERB or Board) Office of General Counsel issued a unfair practice complaint (complaint) alleging that in November and December 2009, the County failed and refused to meet and confer in good faith when it: (1) unilaterally changed policy by implementing furloughs two days a month, and (2) bypassed,

[1] On June 21, the County filed a position statement responding to the charge.

derogated, and undermined Local 521's authority by sending two memoranda (memo) to bargaining unit employees,[2] in violation of the Meyers-Milias-Brown Act (MMBA) sections 3503, 3505, 3506, and 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a), (b), and (c).[3] The County answered the complaint on July 19, admitting two allegations, averring other actions, denying all substantive claims, and asserting 13 affirmative defenses.

On August 19, 2010, Local 521 filed a request to amend the complaint to add allegations of unilateral change/contract repudiation of two and one-half percent (2.5%) contractual wage increases. At the August 24 informal settlement conference, the parties reached a tentative settlement and placed the cases in abeyance.[4] On September 2, the County informed the PERB General Counsel/Board Agent that the settlement agreements were not approved by the Board of Supervisors, and requested a formal hearing.

On September 7, 2010, Local 521 renewed its request to amend. On September 15, the Administrative Law Judge (ALJ) issued a notice of formal hearing, and referred the motion to amend the complaint to the PERB General Counsel/Regional Attorney for determination. The County did not file a response. On September 22, an amended complaint issued, which added six allegations. On October 7, the County answered the amended complaint.[5]

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[2] The complaint also alleged derivative violations of denial of Local 521's right to represent unit employees, and interference with unit employees' rights to be represented by the Union.

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

[4] *American Federation of State, County and Municipal Employees (AFSCME) v. County of Madera*, PERB Case No. SA-CE-642-M, was also placed in abeyance pending ratification of the tentative agreements by the County Board of Supervisors and the Unions.

[5] The amended complaint alleged the same derivative violations. The amended answer admitted four allegations, and made the same averments, denials, and affirmative defenses.

On March 7, 2011, the County filed a motion to consolidate PERB Case Nos. SA-CE-642-M and SA-CE-650-M and continue the hearing. On March 16, the ALJ denied consolidation and granted the continuance.[6]

Formal hearing was held on May 3 and 4, 2011 in Sacramento. On May 3, the County filed its trial brief and motions to dismiss the unilateral change/contract repudiation and bypass/direct dealing allegations; Local 521 opposed the motions, filing three PERB decisions. The parties stipulated to correct paragraph 3 of the amended complaint to replace the references to Section 12.01.00 of the Service Memorandum of Understanding (MOU) with Section 13.01.00, and to Section 15.01.00 of the Professional MOU with Section 16.01.00. Local 521 orally moved to amend the complaint to allege that the County also implemented furloughs in Fiscal Year (FY) 2010-11 as a continuing course of conduct. On May 4, the ALJ denied the County's motion to dismiss the contract repudiation allegations;[7] took the County's motion to dismiss the bypass/direct dealing claims under submission; and took Local 521's motion to amend under submission.

The case was submitted for decision after receipt of post-hearing briefs on August 26, 2011. On January 2, 2013, Local 521 requested official notice of *City of Long Beach* (2012) PERB Decision No. 2296-M (*Long Beach*). On January 7, the ALJ informed the parties that the City of Long Beach (City) had appealed the Board decision to the Second District Court of Appeal, and requested letter briefs on three issues. The briefs were received on February 11, and the case was resubmitted for decision.

[6] Local 521 opposed consolidation. AFSCME initially took no position, then opposed consolidation. A continuance was granted because the County Director of Human Resources (HR Director) was not available for the hearing.

[7] The parties' stipulation and a witness' testimony on receipt of the 2.5% cost of living adjustment (COLA) were in the evidentiary record.

Motion to Amend

In *Riverside Unified School District* (1985) PERB Decision No. 553, the Board set the standard for ruling on a motion to amend a complaint.

> Absent undue prejudice to the opposing party, where a timely amendment is closely related to the allegations in the pending complaint, the amendments should be allowed. However, where a timely amendment has only a tenuous relation to the pending complaint or is wholly unrelated, prejudice is more likely because the respondent would have to defend against an unanticipated claim.

A charging party must also allege facts that the proposed amendment is timely, i.e., the unfair practice occurred no more than six months before the filing the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) The statute of limitations for new allegations in an amendment begins to run on the date of the amendment, unless the new allegations relate back to the original allegations in the charge. (*County of Santa Barbara* (2012) PERB Decision No. 2279-M.) An amendment relates back to the initial charge when it clarifies facts alleged in it, or adds a new legal theory based on facts originally alleged. (*Ibid.*)

The issue is whether the County's decision to implement furloughs in FY 2010-11 is closely related to its decision to implement furloughs in FY 2009-10. On December 8, 2009, the County Board of Supervisors determined that the fiscal emergency it declared on July 7 required furloughs for FY 2009-10, beginning January 1, 2010, and ending June 30; the Supervisors would decide later if furloughs were necessary in FY 2010-11. On June 8, 2010, the Board of Supervisors revisited the issue; its review of County finances revealed that the situation was worse than when it declared a fiscal emergency in July 2009. The Supervisors decided that furloughs were again necessary in FY 2010-11. The Supervisors made two independent determinations on the need for furloughs in two different FYs. The two

furloughs resulted from two separate decisions by the Supervisors. Thus, the FY 2010-11 furloughs were not simply a continuation of the FY 2009-10 furloughs.

Because the FY 2010-11 furloughs are distinct from those in FY 2009-10, they do not relate back to the allegations in the original charge. The statute of limitations began to run on June 8, 2010 when the County Board of Supervisors decided to implement furloughs in FY 2010-11. Local 521 orally moved to amend the complaint to add the FY 2010-11 allegations almost a year later, at the start of the May 3, 2011 hearing. It provided no justification for the delay, arguing only that joint exhibits/County documents addressed these claims. Under the circumstances, Local 521's motion is untimely and therefore denied.[8]

Official Notice

On December 4, 2012, the Board issued *Long Beach, supra,* PERB Decision No. 2296-M. On January 2, 2013, Local 521 requested official notice of the decision; on January 3, the City appealed it; and the parties submitted letter briefs on February 11. On August 29, 2014, the Court of Appeal issued its unpublished, nonprecedential decision denying the appeal and affirming the decision. (*City of Long Beach v. Public Employment Relations Bd.* (August 29, 2014, B245981) [nonpub. opn.].) The City took no further action, and the decision is final.

[8] The result would be the same even if the FY 2010-11 furloughs are considered unalleged violations. Unalleged violations must meet the following criteria: (1) adequate notice to and opportunity to defend by respondent; (2) acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) unalleged violation has been fully litigated; and (4) all parties have the opportunity to examine and be cross-examined on the issue. (*County of Riverside* (2010) PERB Decision No. 2097-M (*County of Riverside*); *Fresno County Superior Court* (2008) PERB Decision No. 1942-C.) The unalleged violation must also occur within the applicable statute of limitations. (*County of Riverside.*) The allegations on implementation of the FY 2010-11 furloughs are neither intimately related to the FY 2009-10 furloughs, nor part of the same course of conduct. Also, the claims were not timely raised. Finally, they were not fully litigated at the hearing, although evidence was received about both furloughs and FY 2011-12 furloughs.

PERB may take official notice of matters within its files and records so long as the parties are given adequate notice and an opportunity to submit supplementary argument on the matters. (*Antelope Valley Community College District* (1979) PERB Decision No. 97.) The Board has officially noticed its own records for generally accepted or readily verifiable facts involving one or more of the parties in the case. (*Regents of the University of California (San Francisco*) (2014) PERB Decision No. 2372 [official notice of charging party's previous unfair practice charge against respondent]; *Inglewood Unified School District* (2012) PERB Decision No. 2290 [notice of school district's statements in its prior request for impasse determination]; *Long Beach Community College District* (2007) PERB Order No. Ad-369 [notice of correspondence between charging party and PERB Appeals Assistant].)

Although the legal issues in *Long Beach*, *supra*, PERB Decision No. 2296-M may be similar, the parties, circumstances, number of furlough days, and contracts are different. Local 521 points to the City's declaration of fiscal emergency and implementation of furloughs, but these are not generally accepted or readily verifiable facts appropriate for official notice. To the extent that Local 521's request for official notice of *Long Beach* seeks to add its finding of facts to this evidentiary record, it is denied. As a precedential Board decision, however, the *Long Beach* findings, analysis, and legal conclusions are binding on all Board agents, so official notice is not necessary.

FINDINGS OF FACT

Jurisdiction

Respondent County admitted it is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a); and Local 521 is the exclusive representative of an appropriate unit of employees under PERB Regulation 32016, subdivision (b), including the County Service and Professional bargaining units.

Background

The County workforce has 1500-1600 employees. There are about 13 County bargaining units, including the two Professional and Service units represented by Local 521, and an unrepresented management group.[9]

Tom Abshere (Abshere) is Director of Local 521. Andy Christiansen (Christiansen) is a Local 521 Internal Worksite Organizer. Gene Garcia (Garcia) was a SEIU representative. Sharon Diaz (Diaz) is a Social Worker in the Professional unit, and President of County Professional Employees of Madera County (COMPA), a Chapter of Local 521.[10] Juan Rivera (Rivera) is an employee in the Service unit, and President of Service Employees of Madera County (SEMC), a Local 521 Chapter. Both Diaz and Rivera signed the November 1, 2007-December 31, 2010 and January 1-December 31, 2011 MOUs for their units.[11]

Dr. Kenneth Caves (Caves) has been the County's Chief Negotiator for 16 years. Lindsey Daniel (Daniel) was a contract consultant hired by the County Chief Administrative Officer (CAO) in December 2009 to assist in negotiations; Daniel was on the County bargaining team negotiating furloughs and other topics with the Local 521 Professional and Service units from December 20 through the end of January 2010.

[9] AFSCME represents the Clerical and Technical units. The other units are Communication Dispatcher, Mid-Management, Deputy Sheriff, Correctional Officer, Police Officer Management, three Probation units (Officer, Administrator, Management), and Post Graduate Licensed Professional/Assistant District Attorney.

[10] Diaz has worked for the County for 18 years as an Account Clerk, Eligibility Worker, Employment and Training Officer, and Social Worker. She has been President of COMPA for two years, and was Secretary-Treasurer for two years.

[11] On April 16, 2010, Local 521 proposed an extension of the two MOUs for one year, through 2011. The County communicated its proposal to the Board of Supervisors on May 4. On November 30, the Supervisors ratified the contracts.

Lonn Boyer (Boyer) was the County HR Director in FYs 2008-09 and 2009-10. Adrienne Calip (Calip) was appointed HR Director on January 4, 2011.[12] Susan Carter (Carter) has worked as a Senior Personnel Analyst since December 2008.[13] Boyer, Calip, and Carter were on the County bargaining team negotiating furloughs and other subjects with the Professional and Service units in FYs 2009-10 and 2010-11, and participated in other meetings with Local 521 and other exclusive representatives.

Stell Manfredi (Manfredi) was the CAO for 19 years until he retired in September 2009.[14] Steven Rodriguez (Rodriguez) succeeded Manfredi as CAO, serving until June 2010. Current CAO Eric Fleming (Fleming) was appointed June 23, 2010.[15] Kevin Fries (Fries) has been Chief Assistant CAO since October 1, 2009.

The County's Economic Downturn

The County's projected budget for FY 2009-10 was approximately $180 million. About $100 million were "subvented" funds received from State and Federal governments or other outside sources; the County does not have any discretion on how this money is spent. The remaining $80 million were non-subvented/general funds (GF), which the County can use at its discretion.

In May 2009, the County Board of Supervisors learned that it faced a $13 million decline in discretionary GF revenues in FY 2009-10. This was a 15% decrease, substantial for the County. CAO Manfredi foresaw the County's future budgetary problems in

[12] Calip has worked for the County Department of Human Resources (HRD) since June 2004 as an Analyst and Assistant HR Director.

[13] Carter has worked for HRD since September 2001.

[14] Manfredi worked for the County for 38 years.

[15] Fleming was the Assistant CAO from August 2005 until his promotion.

FY 2008-09, and began taking actions to alleviate them. The County implemented several measures to close the gap between revenue and expenditures, including layoffs and borrowing from other restricted funds. A $6 million shortfall remained.

On June 29, 2009, the County invited exclusive representatives to a "Coalition of Unions" (Coalition) meeting. Local 521 Service and Professional unit representatives attended. The County's financial situation, and need to cut expenses to eliminate the $6 million deficit, were discussed. CAO Manfredi told the unions he would recommend that the Board of Supervisors implement layoffs, but furloughs were not then contemplated. HR Director Boyer gave an overview of the layoff process, and discussed procedures and timelines for any reduction in workforce.

On July 7, 2009, the County Board of Supervisors adopted a resolution declaring a state of fiscal emergency for FY 2009-10 based on the projected revenue shortage. As a result:

> all County departments must drastically reduce expenditures and the County Administrator, Human Resources Director, and County Counsel shall take all steps necessary to protect the County fiscally during the term of the emergency, including but not limited to reduction of workforce, modification of existing memorandums of understanding and termination of programs.

On August 18, 2009, the County Board of Supervisors received an updated report regarding the revenue shortfall in FY 2009-10. The revised County Auditor budget figures showed that the County now faced a $10 million dollar shortage in GF discretionary revenues, not the $6 million previously projected. The increased deficit followed adjustment of the County's cash balance from $8 million to $1.9 million due to decreased taxes and other revenues not realized in FY 2008-09.

On September 9, 2009, the County convened a second Coalition meeting to discuss the budget situation. CAO Rodriguez informed exclusive representatives about the increased

revenue shortfall, and the possibility that the County could implement layoffs and up to four days of monthly furloughs as cost-saving measures. Rodriguez told the unions that the Board of Supervisors requested six bargaining units, including Local 521 Service and Professional units, to defer the 2.5% COLA increases scheduled January 2010 in their MOUs[16] to save jobs and avoid furloughs. Rodriguez wanted to meet with the units after he met with the Supervisors on September 15.

On September 16, 2009, the County held separate meetings with Local 521 Service and Professional bargaining units.[17] Chief Negotiator Caves asked each unit to agree to defer the 2.5% COLA raises; the County could not guarantee that deferring the COLAs would prevent the need for layoffs; and the Board of Supervisors was not interested in furloughs. The parties discussed subvented departments; union representatives asked questions which Caves agreed to look into. Although the Professional unit would not agree to anything, each unit responded that it would get back to the County with cost savings alternatives by early October before Caves met with the Supervisors.

On October 28, 2009, Christiansen hand-delivered a letter to Chief Negotiator Caves. Local 521 could not agree to defer the COLA raises due to the County's inability to guarantee any concession, but was willing to discuss the matter further. On November 3, Caves presented Local 521's response to the County Board of Supervisors; the Supervisors directed Caves to continue working with each bargaining unit and seek the deferrals. There was no

[16] The other four units were the two AFSCME Clerical and Technical, Mid-Management, and Communication Dispatcher. The three Probation units were asked to defer 2% COLA increases in January 2010 and January 2011 to July 2011. The unrepresented management group had agreed to give up their January 2010 and January 2011 COLAs. The Board of Supervisors had deferred any of its increases to July 2011.

[17] Caves and Assistant HR Director Calip were the County representatives at both meetings. Diaz, Christiansen, and four others represented Professionals. Rivera, Christiansen, and an employee represented Service.

County commitment to require furloughs; they were an option being explored by the CAO and HRD.

On November 12, 2009, the County held a third Coalition meeting to present the need for cost reductions in the current FY. CAO Rodriguez asked the bargaining units to reconsider deferring the COLA increases and provide other cost savings ideas. On November 19, HR Director Boyer sent an electronic mail message (e-mail) to representatives, including Diaz and Christiansen, advising that one unit had suggested furloughs, and requesting other proposals, ideas, and options.

On November 24, 2009, the County Board of Supervisors authorized the CAO to issue a notice to all County employees of a potential furlough program of up to four days per month. On November 25, HR Director Boyer sent a memo/e-mail to all County employees, "Proposed Implementation of a Furlough Program," stating:

> As a follow-up action taken by the Board of Supervisors during their November 24, 2009 meeting, this correspondence serves as official notice of the potential that the County may implement a furlough program to address the budget shortfall.
>
> As stated during the November 24, 2009 meeting, this notice is meant to inform County employees of a potential furlough program, and should not be interpreted as final direction or authority of the Board of Supervisors.
>
> On December 8, 2009, the Board of Supervisors is anticipated to consider options to address the budget shortfall.
>
> Thank you for your patience and understanding during this difficult time, and please feel free to contact our office if you have any questions.

On December 1, 2009, CAO Rodriguez presented the County Board of Supervisors with a budget status update and recommendations to address the deficit. On December 8, the Supervisors declared that the County was at impasse with its bargaining units over the

January 2010 COLA increases, and adopted a resolution staying/deferring them.[18] The resolution also furloughed employees two days a month, beginning January 2010. The furloughs resulted in a 9.23% reduction in employee wages, and County savings of $2.8 million each FY; $600,000 came from Local 521 Service and Professional employee furloughs.[19]

On December 9, 2009, Christiansen sent a letter by facsimile transmission (fax) to CAO Rodriguez, copying the County Board of Supervisors, objecting to the Supervisors' declaration of impasse, deferral of the 2.5% COLA raises, and imposition of furloughs in certain departments as violating the MMBA. The MOUs did not expire until December 31, 2010. Local 521 would not "open" the Professional and Service MOUs for renegotiations, but was willing to meet and discuss ideas from both sides to deal with the current financial situation.

On December 11, 2009, HR Director Boyer sent an e-mail to Christiansen, copying Chief Negotiator Caves, asking to schedule a December 16 meet and confer on the impact of furloughs. Also on December 11, Boyer sent a memo/e-mail to all County employees, "Frequently Asked Questions Concerning the Furlough Program," stating:

> Below is a list of the most frequently asked questions (FAQs) and answers regarding furloughs. As other questions develop, the list will be updated, as appropriate. Many of the details of furlough scheduling will be worked out within departments at the organizational level. Specific information will be provided to employees by each department.

[18] The unrepresented management COLAs were also deferred.

[19] Although the furloughs affected both units, only GF/non-subvented employees were actually furloughed. Diaz estimated that one-third of the Professional unit was GF and subject to furloughs; her department, Social Services, was subvented, and she was not furloughed. Former CAO Manfredi testified that represented County employees were 50%-50% subvented and GF. Carter testified that County records show 63 of 203 Professional employees were furloughed, 31% of the unit; and 36 of 81 Service employees were furloughed, 44%.

The memo set forth 31 questions and answers, describing the specifics of the furloughs: number of days per month (two); which employees were affected (all regular employees in nonsubvented/GF departments); when furloughs would start and end (2000, no guarantee when funding would allow an end); how furloughs would be scheduled (each department would develop a schedule); and the County's rationale for implementing furloughs (necessary to mitigate $5 million GF shortfall and preserve jobs).

On December 15, 2009, the County Board of Supervisors adopted an order rescinding its December 8 declaration of impasse and deferral of the COLAs; staff was ordered to meet and confer with the bargaining units, and return with other options to address the budget shortfall by January 5, 2010. Local 521 Service and Professional employees received their COLA raises effective January 1, 2010 on the last working day of January, as originally scheduled in the two MOUs.

On January 5, 2010, the County Board of Supervisors considered four budget options presented by CAO Rodriguez. The Supervisors approved directing staff to meet with the bargaining units to achieve the necessary cost reductions; removed the option of outsourcing of grounds maintenance work on County property; and delayed consideration of COLA deferrals and issuance of layoff notices until January 19 and 26.[20]

On January 19, 2010, the County Board of Supervisors granted 2.5% COLA increases effective January 2010 to the two AFSCME bargaining units, Local 521 Professional and Service units, and Communications Dispatchers; approved 2% COLAs for the three Probation units; and deferred the 2.5% Mid-Management COLAs under their side letter agreement. The

[20] The Supervisors also approved two early retirement plans to minimize potential layoffs. One plan was available to all County employees, and one was limited to GF employees. Both plans were later limited to unrepresented management employees.

Supervisors also authorized issuing layoff notices to all County employees, with follow-up on the actual layoffs proposed on February 2.

The County and Local 521 met several times during the rest of FY 2009-10 to discuss ways to alleviate the County's budget deficit.[21] Although furloughs were raised at these sessions, there was little substantive discussion. The parties did not reach agreement on furloughs before the end of FY 2009-10.[22]

The County's financial condition has not improved since FY 2009-10. The County Board of Supervisors declared a fiscal emergency for FY 2010-11 on May 11, 2010; on June 8, the Supervisors approved two furlough days each month in GF departments for that FY. The Board of Supervisors declared a fiscal emergency for FY 2011-12 on March 29, 2011. On May 3, HR Director Calip notified exclusive representatives that the Supervisors would consider approval of a furlough program for FY 2011-12 on June 21; the unions should contact Carter if they wished to meet and confer in May and June with Chief Negotiator Caves on the impact of furloughs.

ISSUES

1. Did the County make unlawful unilateral changes in policy or practice in work hours when it implemented furloughs in FY 2009-10?

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[21] On January 6, Abshere, Christiansen, Diaz, Rivera, and four others met with County representatives Daniel and Carter in a MOU Negotiation. On January 20 and 28, Abshere and four others, and Abshere, Christiansen, Diaz, Rivera, and two others met with Daniel and Calip in Impact Negotiations. On April 16 and May 11, Garcia, Diaz, and Rivera met with Caves and Calip and Caves and Carter in Negotiations. Rodriguez convened a fourth Coalition meeting on March 10; Boyer held a fifth Coalition meeting on April 7. On January 12 and May 4, Caves, Boyer, Calip, and Carter provided the Board of Supervisors with updates on their meetings with exclusive representatives.

[22] Carter testified that four County employees were laid off in 2008; one was a Professional or Service worker. In 2009, nine Professional or Service of 38 County employees were laid off. In 2010, two County employees were laid off; neither was Professional or Service.

2. Did the County make unlawful unilateral changes in policy or practice in wages when it repudiated/rescinded contractual 2.5% COLA increases scheduled for January 2010?

3. Did the County's November 25 and December 11, 2009 memos to Professional and Service bargaining unit employees unlawfully bypass, undermine and/or derogate the authority of Local 521 as exclusive representative?

CONCLUSIONS OF LAW

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.) Preponderance of the evidence has been defined by the courts as "evidence that has more convincing force than that opposed to it." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314 (*Glage*).) Preponderance of the evidence is usually defined in terms of the probability of the truth, or such evidence, which when weighed against opposing evidence, has the greater probability of truth. (*California Correctional Peace Officers 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*.)

Waiver

During bargaining, the parties may waive their right to meet and confer by including a comprehensive provision on the subject in the final memorandum of understanding (MOU). (*Placentia Unified School District* (1986) PERB Decision No. 595.) Any waiver of the statutory right to bargain must be clear and unmistakable. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74 (*Amador Valley*); *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun USD*); *Union of Public Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482.). For a waiver by

contract to be effective, the matter must have been fully discussed, and the union must have consciously yielded to it. (*Compton Community College District* (1989) PERB Decision No. 720.) There must be evidence of an intentional relinquishment of the union's rights. (*San Francisco Community College District* (1979) PERB Decision No. 105 (*San Francisco CCD*); *Los Angeles Community College District* (1982) PERB Decision No. 252; *State of California (Department of Forestry and Fire Protection)* (1993) PERB Decision No. 999-S; *State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1296-S; *California State Employees Association v. PERB* (1996) 51 Cal.App.4th 923 (*CSEA v. PERB*).)

If the contract language is clear, it is interpreted according to its plain meaning; if the language is ambiguous, extrinsic evidence, such as bargaining history, may be considered in interpreting the agreement. (*Clovis Unified School District* (2002) PERB Decision No. 1504; *Marysville*.) Public policy disfavors waivers by inference. The employer bears the burden of proving this affirmative defense. (*Long Beach Community College District* (2003) PERB Decision No. 1568; *Fullerton Joint Union School District* (2004) PERB Decision No. 1633.)

Unilateral Change

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. (*Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton*).) 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. (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9 (*City of Placentia*); *Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*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 to frustrate or avoid the bargaining process. (*City of Placentia*; *State of 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; *Pajaro Valley*.) Looking at the entire course of negotiations, the parties' conduct is examined to determine whether there was a serious attempt to resolve differences and reach common ground. (*Pajaro Valley*; *City of Placentia*; *Stockton*.)

A unilateral modification in terms and conditions of employment within the scope of negotiations is a per se refusal to negotiate. (*National Labor Relations Board* [NLRB] *v. Katz* (1962) 369 U.S. 736;[23] *Pajaro Valley*, *supra*, PERB Decision No. 51; *Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*).) A pre-impasse unilateral change in a matter within the scope of representation violates the duty to meet and negotiate in good faith, because unilateral changes are inherently destructive of employee rights. (*San Mateo County Community College District* (1979) PERB Decision No. 94 (*San Mateo CCD*).) Unilateral changes are considered "per se" violations if the exclusive representative establishes the following criteria by a preponderance of the evidence: (1) the employer breached or altered the parties' written agreement or past practice; (2) the action was taken before the employer notified the exclusive representative and gave it an opportunity to request negotiations; (3) the change was not merely an isolated breach of the contract or practice, but amounted to a change of policy that had a generalized effect or continuing impact upon terms and conditions of

[23] In interpreting the MMBA, it is appropriate to look for guidance from cases interpreting the National Labor Relations Act (NLRA) and California labor relations statutes with parallel provisions. (*Firefighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

employment of bargaining unit members; and (4) the change in policy concerned a matter within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160 (*Walnut Valley*); *Grant*; *Fairfield-Suisun USD*, *supra*, PERB Decision No. 2262; *County of Santa Clara* (2013) PERB Decision No. 2321-M; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813.)

Charging Party Local 521 must show that the change in policy had a generalized effect or continuing impact upon terms and conditions of employment of certificated bargaining unit members. In *Grant*, *supra*, PERB Decision No. 196, PERB observed that "a change in policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members."

It is also the effect of the employer's action, not necessarily "the period of duration" of the act that determines whether it is a unilateral change. (*San Jacinto Unified School District* (1994) PERB Decision No. 1078.) PERB has also rejected the argument that the temporary nature of the change is a controlling factor, finding that "it is irrelevant whether the [change] was intended to be permanent or only temporary. The relevant point is that the new procedures constituted a change from any system that existed previously." (*Trustees of the California State University (San Marcos)* (2004) PERB Decision No. 1635-H.)

A charging party has the burden of showing the employer's previous practice or policy; it must also show that the employer has, without first providing an opportunity to negotiate, departed from the previous policy or practice. (*Oak Grove School District* (1985) PERB Decision No. 503; *City of Commerce* (2008) PERB Decision No. 1937-M; *San Francisco Unified School District* (2009) PERB Decision No. 2057.)

To determine if a matter is within the scope of representation under MMBA, PERB has applied the three-part test established by the California Supreme Court in *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623: (1) Does the management action have a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees? If not, there is no duty to meet and confer. (2) Does the significant and adverse effect arise from the implementation of a fundamental managerial or policy decision? If not, then the meet and confer requirement applies. (3) If both factors are present, the Board uses a balancing test. The action is within the scope of representation only if the employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action challenged. (*City of Alhambra* (2010) PERB Decision No. 2139-M.)

Mootness

The PERB standards for a case to be found moot are exacting. In *Amador Valley*, *supra*, PERB Decision No. 74, the Board defined mootness:

> A case in controversy becomes moot when the essential nature of the complaint is lost because of some superceding act or acts of the parties. Mere discontinuance of wrongful conduct does not ordinarily end the underlying controversy. There must be evidence that the party acting wrongfully has lost its power to renew its conduct. In cases clarifying the parties' rights and obligations under a new law, the public interest is served by deciding the underlying issue. [Cit. omitted.]

PERB further stated:

> If any material question remains to be answered, the case is not moot and an appeal will not be dismissed.

Amador Valley held that the later reversal or rescission of a unilateral action or subsequent negotiation on the subject of a unilateral action does not excuse the violation. (See also *Marin Community College District* (1980) PERB Decision No. 145.)

In *County of Riverside* (2004) PERB Decision No. 1577a-M, the Board cited *California School Employees Association and its Shasta College Chapter #381 (Parisot)* (1983) PERB Decision No. 280a that "because of changed conditions, the relief originally sought cannot be granted" does not necessarily moot a case.

In *Oakland Unified School District v. PERB* (1981) 120 Cal.App.3d 1007, the appellate court upheld the Board decision (*Oakland Unified School District* (1980) PERB Decision No. 126) that the parties' entry into a collective bargaining agreement subsequent to the hearing and decision did not moot the unilateral change litigated before PERB, as the issue was never negotiated and the contract was silent on it.

The Board has held that where the essential nature of the charge is one party's conduct during negotiations, the fact that the parties subsequently finalized an agreement does not render the matter moot. (*City & County of San Francisco* (2009) PERB Decision No. 2041-M.) In *County of Sacramento* (2008) PERB Decision No. 1943-M (*Sacramento Co.*), PERB found that the County's reversal of position and restoration of the status quo before the new policy went into effect did not cure the unlawful unilateral policy change.

In *San Mateo County CCD*, *supra*, PERB Decision No. 94, the Board explained that unilateral actions are disfavored: (a) because of their destabilizing and disorienting impact on employer-employee affairs; (b) they derogate the representatives' negotiating power and ability to perform as an effective representative in the eyes of the employees and undermine exclusivity; (c) such action denigrates negotiations consistent with statutory design under the public sector labor statute(s); and (d) the conduct unfairly shifts community and political pressure to employees and their organizations, and simultaneously reduces the employer's accountability to the public.

Bypass/Direct Dealing

An employer may not communicate directly with employees to undermine or derogate the representative's exclusive authority to represent bargaining unit members. (*Muroc Unified School District* (1978) PERB Decision No. 80 (*Muroc*).) An employer may not communicate proposals to employees before first submitting them to the exclusive representative, seek to bargain directly with employees, or invite them to abandon their representative to achieve better terms directly from the employer. (*City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M (*San Diego*); *Diablo Water District* (2003) PERB Decision No. 1545-M; *Trustees of the California State University* (2006) PERB Decision No. 1871-H (*CSU Trustees*); *United Technologies Corp.* (1985) 274 NLRB 1069.) An employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (*San Diego; Walnut Valley*, *supra*, PERB Decision No. 160; see also *Muroc* ["It is well settled that an employer may not communicate directly with employees to undermine or derogate the representative's exclusive authority to represent unit members."]) In addition, an employer may not "engage in a campaign to disparage the exclusive representative's negotiators so as to drive a wedge between the union representative and the bargaining unit employees." (*CSU Trustees; Safeway Trails, Inc.* (1977) 233 NLRB 1078.)

To establish that an employer has unlawfully bypassed the exclusive representative, a Charging Party must demonstrate that the employer dealt directly with its employees: (1) to create a new policy of general application; or (2) to obtain a waiver or modification of existing policies applicable to those employees. Once a policy has been established by lawful means, an employer has the right to take necessary actions, including consulting with employees, to

implement the policy. (*San Diego, supra,* PERB Decision No. 2103-M; *Walnut Valley, supra,* PERB Decision No. 160; *County of Fresno* (2004) PERB Decision No. 1731-M.)

An employer does have the right to "express its views on employment related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate" (*Rio Hondo Community College District* (1980) PERB Decision No. 128 (*Rio Hondo*).) Thus, employers may communicate with their employees about labor relations matters as long as the communication does not contain a threat of reprisal or force, or promise of benefit. (*Rio Hondo*; *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S (*Department of Personnel Administration*).)

An employer is free to communicate with employees in a noncoercive manner by accurately reporting the status of negotiations or the nature of proposals exchanged. (*Department of Personnel Administration, supra,* PERB Decision No. 2078-S; *City of Fresno* (2006) PERB Decision No. 1841-M; *Muroc, supra,* PERB Decision No. 80; *NLRB v. General Electric Co.* (2nd Cir. 1969) 418 F.2d 736, cert.den. (1970) 397 U.S. 965; *Proctor & Gamble Mfg. Co.* (1966) 160 NLRB 334.) The communication must be: (1) factually accurate; (2) cannot be made for the purpose of derogating the exclusive representative's authority; and (3) in light of the surrounding conduct, must not evidence an attempt to avoid or frustrate the negotiating process. (*Muroc*; *California State University* (1989) PERB Decision No. 777-H (*CSU*).) An employer may not engage in a campaign of communications designed "to undermine the exclusive representative in the eyes of bargaining unit employees." (*CSU*; *Muroc.*)

FY 2009-10 Furloughs – Waiver by Contract

The County argues that it could unilaterally implement furloughs based on the "Management Rights" clauses in the Service and Professional MOUs. Both contracts contain substantially similar language, stating:

> 5.01.00 The EMPLOYER retains the exclusive right to manage the COUNTY. All the rights, powers, functions and authority of the EMPLOYER which it had prior to the time the [exclusive representative] became certified as Representative of the EMPLOYEES of the EMPLOYER and which are not limited or modified by specific provisions of this [MOU], are retained by the EMPLOYER. The EMPLOYER specifically retains the right to manage and supervise its EMPLOYEES as follows:
>
> (a) To hire, promote, transfer, assign, classify positions, retain EMPLOYEES, and to suspend, demote, discharge or take other disciplinary actions against EMPLOYEES.
>
> (b) To lay off, or demote EMPLOYEES from duties because of lack of work, lack of funds, in the interest of economy, or other legitimate reasons.
>
> (c) To determine the policies, standards, procedures, methods, means and personnel by which COUNTY operations are to be conducted.
>
> (d) To take whatever actions may be necessary to carry out the mission of the COUNTY in situations of emergency.
>
> [¶ ... ¶]
>
> (f) Nothing in this policy shall be construed to interfere with the COUNTY'S right to manage its operations in the most economical and efficient manner consistent with the best interest of all the citizens, taxpayers, and EMPLOYEES of Madera County.

No language in Section 5.01.00 constitutes a clear waiver of Local 521's right to bargain over furloughs. Section 5.01.00 reserves to the County those rights and powers not otherwise limited or modified by specific provisions of the MOU.

Workday and workweek are governed by Section 13.01.00 of the Service MOU and Section 16.01.00 of the Professional MOU, both stating that the workday will be eight hours and the workweek will be five days, "unless mutually agreed upon in writing." The unilateral implementation of these furloughs, which necessarily required a change in two workweeks per month as defined in Section 13.01.00 or Section 16.01.00, was not mutually agreed to in writing, and is therefore outside of the County's retained rights under Section 5.01.00. The County did not produce any evidence to show otherwise.

The County also asserts that its ability to unilaterally implement furloughs falls within its power to suspend, demote, discharge, and lay off employees in Section 5.01.00(a) and (b). But furloughs are fundamentally different than suspensions, demotions, discharges, and layoffs, which alter an employee's current job status for disciplinary reasons or lack of funds/lack of work. Furloughs reduce employee hours, but the employee's job status is unchanged but less compensation is received. Nothing in the MOUs indicates that Local 521 agreed to include furloughs within the job actions identified in Sections 5.01.00(a) and (b), and no evidence demonstrated to the contrary.

Similarly, the language in Section 5.01.00(f) regarding the County's right to manage its affairs in the "most economic and efficient manner consistent" with the "best interests" of its constituents lacks the specificity required for a valid waiver. It does not mention furloughs, and no evidence was presented that the parties intended such language to allow the unilateral implementation of furloughs.

Finally, the County relies on the language in Section 5.01.00(d) that permits it to take "whatever actions may be necessary" in "emergency situations." Its July 2009 declaration of a fiscal emergency was sufficient to trigger the sweeping language of Section 5.01.00(d); this July 2009 determination not only authorized unilateral action for FY 2009-10, but also the two

following FYs in which it again declared fiscal emergencies. Local 521's similar argument in its motion to amend i.e., that FY 2010-11 was a continuing violation, was opposed by the County, and rejected. The County cannot have it both ways.

Such a broad waiver of the right to bargain must be set forth explicitly in the MOU or find support in other evidence. The contract language is ambiguous. It is unclear whether "emergency" refers to extraordinary, catastrophic events, such as natural disasters and terrorist attacks, or to ongoing crises, such as fiscal deficits during a multiple year recession. The County offered no evidence regarding the parties' intent in drafting or negotiating Section 5.01.00(d). It is unlikely that Local 521 would agree to such an expansive relinquishment of its statutory right to bargain furloughs without a full discussion. Neither party presented any evidence of bargaining history.

The County did not meet its burden of establishing that Local 521 waived its right to bargain over furloughs.[24]

FY 2009-10 Furloughs - Unilateral Change

MMBA section 3505 provides:

> The governing body of a public agency, . . . or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment . . . and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

(Emphasis added.)

[24] The County cites dicta in *Prof. Engineers in Cal. Government v. Schwarzenegger* (2010) 50 Cal.4th 989. The Supreme Court stated that an employer can, by bargaining with the exclusive representative, retain for itself the right to implement mandatory furloughs. (*Id.* at 1040-1041.) The case did not rely on any contract language, but on ratification of the State budget by the California Legislature which included the furloughs proposed by Executive Order. The decision is consistent with PERB precedent, and highlights that waiver of the statutory bargaining obligation turns on analysis of the relevant contract language.

MMBA section 3504 defines the scope of representation as:

> The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

(Emphasis added.)

Local 521 has met its burden of establishing a prima facie case of unlawful unilateral change. There is no dispute that the County's December 8, 2009, decision to implement furloughs constituted a change in policy since furloughs did not exist before this action. Furloughs are within the scope of representation because they relate directly to employee wages and hours, specifically enumerated as negotiable subjects in MMBA section 3504. (*San Ysidro School District* (1997) PERB Decision No. 1198 [reduction in hours within scope of bargaining]; *Oakland Unified School District* (1985) PERB Decision No. 540 [same].) The furloughs had a continuing impact and generalized effect on employees because they reduced employee monthly salaries by 9.23% beginning January 2010.

The County also failed to give Local 521 adequate notice and opportunity to bargain over furloughs. Although CAO Manfredi met with all of the County's unions in June 2009, the County did not make a specific proposal regarding furloughs, and took the position that it was not contemplating them at the time. At the next Coalition meeting in September 2009, CAO Rodriguez mentioned the possibility of furloughs and layoffs, but the emphasis was deferral of the COLA increases in January 2010 to avoid furloughs and save jobs.

The County did not even discuss furloughs with Local 521 until after it decided to implement them on December 8, 2009. It did not present any concrete proposals to Local 521

in writing or verbally during the two bargaining sessions in September 2009, one for each unit, making only vague assertions that layoffs, furloughs, or other concessions may or may not be necessary depending on Local 521's agreement to defer its COLA raises. Although the County met with Local 521 after making a firm decision to implement the furloughs, those bargaining sessions do not cure the failure to bargain before implementing a change a negotiable item.

FY 2009-10 Furloughs - Fiscal Emergency

The County argues that because it faced a fiscal emergency, it was permitted to act unilaterally under MMBA section 3504.5, subdivisions (a) and (b), which state:

> (a) Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing board of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions.
>
> (b) In cases of emergency when the governing body or the designated boards and commissions determine that an ordinance, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or the boards and commissions shall provide notice and opportunity to meet at the earliest practicable time following the adoption of the ordinance, rule, resolution, or regulation.

In *Calexico Unified School District* (1983) PERB Decision No. 357 (*Calexico*), the Board held that to establish a defense to bargaining based on business necessity, the employer must establish "an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action." (*Id.* at p. 20, citing *San Francisco CCD, supra*, PERB Decision No. 105.) In *San Francisco CCD, supra*, PERB Decision No. 105, PERB concluded that an employer's legitimate economic concerns

over reductions in local property tax revenues after Proposition 13 passed did not authorize it to act unilaterally or relieve it of the obligation to bargain. Even when faced with an economic reversal of unknown proportions, the employer was not permitted to take unilateral actions on matters within the scope of representation without first bringing its concerns about those matters to the negotiating table. (*Ibid.*) The Board has similarly ruled in cases where employers relied on financial emergency as a defense to taking unilateral action. (*San Francisco Community College District* (1980) PERB Decision No. 146; *Oakland Unified School District* (1994) PERB Decision No. 1045; *City of Davis* (2012) PERB Decision No. 2271-M.)

In *Santa Clara County Correctional Peace Officers Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1024 (*Santa Clara Peace Officers*), the county unilaterally reduced employee hours in an effort to bridge a $15 million budgetary shortfall, asserting that the deficit was an emergency under Section 3504.5. (*Id.* at 1032.) The Court of Appeal rejected the employer's defense, noting that the shortage did not constitute an imminent and substantial threat to public health, and emphasizing the county was able to meet with the union three times before implementing. (*Id.* at 1033.) The Court characterized the circumstances as more in the nature of foreseeable budget cuts than a temporary emergency requiring immediate response. (*Ibid.*)

The parties dispute who has the burden of proving the existence or non-existence of a fiscal emergency. PERB treats the existence of a fiscal emergency as an affirmative defense for which the employer has the burden of proof. (*Calexico, supra*, PERB Decision No. 357.) In *Santa Clara Peace Officers*, *supra*, 224 Cal.App.4th 1016, 1032, the Court of Appeal also placed the burden of proof on the employer to show the existence of a financial emergency.

The County relies on *Sonoma County Organization of Public/Private Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267 (*SCOPE*), in contending that Local 521 has the burden of establishing a fiscal emergency did not exist. The county adopted an ordinance to prevent employees from rolling sickouts and strikes, placing any employee engaged in such activity on unpaid administrative leave. (*Id.* at 272.) The employer characterized the work stoppages as emergencies because they detrimentally impacted its ability to provide critical services, including medical treatment at the hospital. (*Id.* at 278.) The Court of Appeal upheld the county's unilateral implementation of the ordinance (*Id.* at 279.), stating that the employer's declaration of emergency must be given great deference, and was sufficient to constitute prima facie evidence of the existence of an emergency. (*Id.* at 275.) The burden was on the union to rebut the presumption that the ordinance was valid. (*Id.* at 276.)

This case is distinguishable from *SCOPE, supra,* 1 Cal.App.4th 267, based on the nature of the emergencies. In *SCOPE*, the Court of Appeal noted that the MMBA does not define "emergency;" traditionally, the term's accepted definition required an "unforeseen situation calling for *immediate* action," which often involved an "*imminent* and substantial threat to public health or safety." (Emphasis added.) (*Id.* at 276-277.) Based on that understanding, the employees' job actions in *SCOPE* were emergencies having immediate impact on the welfare of county residents. The County's fiscal emergency here lacks the requisite immediacy to be given the same deference. Nothing in *SCOPE* suggests that a budgetary shortfall, no matter how severe, constitutes an emergency giving an employer *carte blanche* to implement changes to existing terms and conditions of employment. The County's July 7, 2009 declaration of a fiscal emergency does not set forth any specific facts demonstrating an imminent threat to the public welfare. Thus, the County's declaration alone does not itself establish an emergency.

The County's actions are also devoid of any immediacy demonstrating an emergency. Although a fiscal emergency for FY 2009-10 was declared on July 7, 2009, CAO Manfredi saw the problem developing in FY 2008-09, and began taking action to mitigate the damage. Even after declaring an emergency, the County did not implement furloughs until December 8, five months later. During that time, it met with Local 521 and other employee organizations several times to discuss furloughs, layoffs, and other measures to counteract the financial deficit. Like *Santa Clara County Peace Officers, supra,* 224 Cal.App.4th 1016, this was not a temporary situation requiring immediate action but more akin to foreseeable budget cuts. Therefore, the County's argument that an emergency justified its unilateral implementation of furloughs is rejected.

2.5% COLA Deferral - Mootness

The County argues that the allegations regarding deferral of the COLA raises/contract repudiation should be dismissed as moot because it rescinded its initial decision to defer them. Local 521 correctly notes that the County did not raise mootness as an affirmative defense in its answer or amended answer.

The County's amended answer did raise its January 19, 2010 action rescinding its earlier December 8, 2009 decision to defer the 2.5% COLA increases when it admitted paragraph 10 of the amended complaint. Further, there was no showing of prejudice to Local 521. (*Beverly Hills Unified School District* (1990) PERB Decision No. 789.) The County raised the issue prior to the hearing, and Local 521 was afforded the opportunity to make arguments and examine witnesses on the claim at the hearing. The factual basis of the County's defense is not disputed, and Local 521 was able to fully brief it before submission of the case for decision. Therefore, the defense is not waived.

The County's mootness defense rests on the fact that it rescinded its initial decision to defer the 2.5% COLA increases, and they went into effect as scheduled in January 2010. This rescission did not eliminate the fundamental nature of the allegations, that the County took unilateral action to defer the COLAs, then unilaterally decided not to defer them, without satisfying its statutory obligation to meet and confer with Local 521 on a mandatory bargaining subject. Nothing suggests that the County has not lost its ability to make future unilateral changes to terms and conditions of employment within the scope of representation. Under these circumstances, it benefits the parties to make a determination regarding their ongoing rights and obligations. Therefore, the issue is not moot, and a decision will be reached on the merits.

2.5% COLA Deferral - Unilateral Change

Three factors of unilateral change have been established by Local 521. There is no dispute that the 2.5% COLA increases were within the scope of representation because they affected employee wages. (MMBA sec. 3504.) The County admitted an existing policy on wage increases, the 2.5% salary adjustments effective January 1, 2010 in the two MOUs, and that it changed this policy in December 2009 by rescinding the 2.5% contractual wage increases set to begin in January 2010, in its amended answer to the amended complaint (paras. 9 and 10).

The record also reflects that the County did not provide Local 521 with an adequate opportunity to bargain over the 2.5% COLA raises. The County first proposed deferral of the COLAs at the September 9, 2009 Coalition meeting, and met with the Service and Professional bargaining units on September 16. The two September meetings, one purely informational and directed to all bargaining units, are insufficient to establish adequate opportunity for good faith bargaining. The County's proposals at those two meetings were the same, its demand that

Local 521 voluntarily give up contractually required pay raises with no guarantees against further reductions. These proposals were predictably declined in Local 521's October 28 letter, which invited the County to bargain further over the COLAs. The County took no further action in response. Before deferring the COLAs on December 8, it did not meet with Local 521 nor did it present any further proposals. Christiansen sent the letter objecting to deferral of the COLAs the next day, December 9. On December 15, the County rescinded its prior deferral of the COLAs. On January 19, 2010, the County affirmatively granted them.

The remaining issue is the impact of the County's decision to rescind its deferral of the 2.5% COLA increases one week after deferring them. A unilateral change must have a generalized effect or continuing impact on bargaining unit employees. (*Grant, supra,* PERB Decision No. 196.) The County's December 8, 2009 decision to defer the COLAs had no effect on Local 521 Professional and Service bargaining unit employees due to its subsequent rescission of that action on December 15. The COLA deferral decision was in effect for only one week in December; it was rescinded before January 2010 when the COLAs were scheduled to take effect; and the COLAs were affirmatively granted to the two units in January. The undisputed evidence showed that Service and Professional employees received the COLAs in January 2010 as required by the MOUs. Any change in policy was at most *de minimis,* and did not have the requisite generalized impact on the bargaining unit to constitute an unlawful unilateral change.

This allegation is dismissed.

Bypass/Direct Dealing – November 25 and December 11, 2009 Memos

Local 521 asserts that the November 25 and December 11, 2009 memos are similar to the employer communication in *CSU, supra*, PERB Decision No. 777-H. The employer issued a bargaining "Wrap Up," a summary of meetings with the exclusive representative. (*Ibid.*)

The University asserted that the Wrap Up's statements on its acceptance of salary proposals were an accurate representation of the parties' negotiations. (*Ibid.*) PERB found that the Wrap Up was unlawful because it contained inaccurate information, giving the impression that the employer would unilaterally fix the salary rate and effective date of any raise regardless of the outcome of negotiations. (*Ibid.*) The implication was that the salary raise and implementation date were within the sole control of the University, and not subject to bilateral negotiations with the exclusive representative. (*Ibid.*)

The County's November 25, 2009 memo was permissible employer speech. It did not contain any coercive statements or promises of benefits. It was a neutral statement of the County's position at the time, that furloughs *may* be necessary. Unlike *CSU, supra*, PERB Decision No. 777-H, there was no implication that the County would take any specific action on furloughs. The memo did not mention negotiations with Local 521, and included no language suggesting that furloughs or any other actions are foregone conclusions.

The December 11, 2009 memo fell squarely within the employer communication found objectionable in *CSU, supra*, PERB Decision No. 777-H. Despite ongoing negotiations with Local 521, the memo presented the County's furlough plan as *a fait accompli*. Although bargaining continued for the remainder of FY 2009-10, the memo effectively sent the message that negotiations would be futile since the County had already taken final action. The memo also informed employees that all future decisions on scheduling furloughs, a subject within the scope of representation, would be decided by the employee and his/her employing department, not the County and Local 521, the designated bargaining representatives under MMBA. The overall effect of the County's December 11 memo is to derogate Local 521's position as the exclusive representative, and unlawfully bypass the Union to set the terms and conditions of employment for furloughs directly with its represented bargaining unit employees.

REMEDY

Government Code section 3541.5, subdivision (c), incorporated within MMBA section 3509, subdivisions (a) and (b),[25] authorizes PERB:

> to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

The County unilaterally implemented furloughs in FY 2009-10 without satisfying its statutory bargaining obligation to the exclusive representative on December 8, 2009; and bypassed, undermined, and derogated the authority of Local 521 as exclusive representative when it distributed the December 11, 2009 furlough memo to all County employees, including the Professional and Service bargaining unit employees represented by the Union. By this conduct, the County failed to negotiate in good faith with Local 521 in violation of MMBA section 3505. By the same conduct, the County denied the right of Local 521 to represent bargaining unit employees, and interfered with the rights of unit employees to be represented by the Union in violation of MMBA sections 3503, 3506, and 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a), (b), and (c). It is appropriate to order the County to cease and desist from such activities in the future. (*Rio Hondo Community College District* (1983) PERB Decision No. 292.)

After finding unlawful unilateral changes, PERB generally orders employers to restore the status quo ante as it existed prior to the violation(s) and rescind its unilateral action/order(s). (*Sacramento Co.*, *supra*, PERB Decision No. 1943-M; *Desert Sands Unified*

[25] Section 3509, subdivision (a) provides that the powers and duties of PERB described in Government Code section 3541.3 shall also apply to the MMBA. Section 3509, subdivision (b) describes the unfair practice jurisdiction of PERB. Government Code section 3541.3, subdivision (i) empowers PERB to investigate unfair practice charges, and to take any action and make determinations as PERB deems necessary to effectuate the policies of this chapter.

School District (2004) PERB Decision No. 1682 (*Desert Sands*); *Santa Clara Unified School District* (1979) PERB Decision No. 104.) In *CSEA v. PERB*, *supra*, 51 Cal.App.4th 923, 946, the Court of Appeal stated:

> Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members' exclusive representative an opportunity to meet and confer over the decision and its effects. (See, e.g. *Oakland Unified School District v. PERB* (1981) 120 Cal.App.3d 1007, 1014-5). This is usually accomplished by requiring the employer to rescind the unilateral change and to make the employees "whole" from losses suffered as a result of the unlawful change.

It is appropriate to order the County to rescind the FY 2009-10 furloughs and reinstate the terms and conditions of employment for Local 521 Professional and Service bargaining unit employees prior to the December 8, 2009 resolution implementing the furloughs in January 2010. (*Desert Sands, supra,* PERB Decision No. 1682.) It is also appropriate that the County be ordered to make these unit employees whole for any loss of wages or benefits they have suffered due to the County's unlawful unilateral action, along with interest at the rate of 7% per annum until the time their salaries are restored to their former rates. (*Mount San Antonio Community College District* (1988) PERB Decision No. 691 (*Mt. San Antonio*); *The Regents of the University of California* (1997) PERB Decision No. 1188-H; *Ventura County Community College District* (2003) PERB Decision No. 1547.)

The Board has held that delay in processing a case or issuing a decision is not grounds for mitigation or modification of a remedial order, as employees should be compensated for the lost time of money owed to them. (*Mt. San Antonio Community College District* (1983) PERB Decision No. 297; *Pittsburg Unified School District* (1984) PERB Decision No. 318a; *Corning Union High School District* (1984) PERB Decision No. 399a; *Modesto City and High School*

Districts (1987) PERB Decision No. 566a; *Chula Vista Elementary School District* (2011) PERB Decision No. 2221; *County of Riverside* (2013) PERB Decision No. 2336-M.) But PERB did order a stay of interest in one complex case, noting the difference between a private and public employer's ability to absorb the cost of a large interest award. (*Mt. San Antonio, supra*, PERB Decision No. 691.)

Given the passage of time, a negotiated solution between the parties may be the best solution for determining damages. They are therefore ordered to bargain over the issue for 60 days before this case is submitted for compliance. The rescission of the FY 2009-10 furloughs and make-whole portions of the remedial order shall be stayed for the same 60-day period to provide the parties with an opportunity to meet and confer in good faith over a mutually acceptable remedy. If the parties are unable to reach agreement within 60 days, and they have not mutually agreed to extend time to continue these negotiations, the stay shall be lifted and the remaining portions of the order shall take effect. The parties shall then notify the PERB General Counsel or designee, so compliance procedures can be initiated.

It is also appropriate that the County be ordered to post a notice incorporating the terms of the order at all locations where notices to public employees are customarily posted for Professional and Service bargaining unit employees represented by Local 521. Posting such a notice, signed by an authorized agent of the County, will provide employees with notice that the County has acted unlawfully, is required to cease and desist from such activity, and will comply with the order. It effectuates the purposes of MMBA to inform employees about the resolution of this controversy and the County's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.)

The December 11, 2009 furlough memo found to be an unlawful bypass was also distributed by e-mail to all County employees. In addition to the physical posting

requirement, it is therefore appropriate to post the notice by electronic message, intranet, internet site, and/or any other electronic means used by the County to distribute the December 11 memo to its represented employees, or used by the County to regularly communicate with such employees. Any disputes involving the locations or scope of the posting, which additional form(s) of electronic means shall be used, or any other issues relating to remedy are reserved to compliance proceedings. (*City of Sacramento* (2013) PERB Decision No. 2351-M; *County of Sacramento* (2014) PERB Decision No. 2393-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the County of Madera (County) violated the Meyers-Milias-Brown Act (MMBA), sections 3503, 3505, 3506, and 3509, subdivision (b), and Public Employment Relations Board (PERB) Regulation 32603, subdivisions (a), (b), and (c), when it unilaterally implemented furloughs in FY 2009-10 for Professional and Service bargaining unit employees without satisfying its statutory bargaining obligation to their exclusive representative Service Employees International Union Local 521 (Local 521) on December 8, 2009; and bypassed, undermined, and derogated the authority of Local 521 as exclusive representative when it distributed the December 11, 2009 furlough memo to all County employees, including those in Local 521-represented bargaining units. By this conduct, the County failed to negotiate in good faith with Local 521 in violation of MMBA section 3505; denied the right of Local 521 to represent bargaining unit members in violation of MMBA section 3505; and interfered with the rights of unit employees to be represented by Local 521 in violation of MMBA sections 3506 and 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a), (b), and (c).

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with Local 521 before implementing furloughs for Professional and Service bargaining unit employees.

2. Bypassing, undermining, and derogating the authority of Local 521 as exclusive representative by distributing correspondence to all County employees.

3. Denying Local 521 its right to represent bargaining unit employees in their employment relations with the County.

4. Interfering with the rights of unit employees to be represented by Local 521.

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

1. Rescind the December 8, 2009 County Board of Supervisors resolution implementing furloughs in FY 2009-10 beginning January 2010 for Local 521 Professional and Service bargaining unit employees.

2. Restore terms and conditions of employment for Professional and Service unit employees prior to the December 8, 2009 resolution, and make all affected employees whole for any loss of wages or benefits due to the County's unilateral implementation of furloughs beginning January 2010, including interest at 7% per annum.

These affirmative, make whole remedies shall be stayed for 60 days to provide the parties with an opportunity to meet and confer in good faith over a mutually acceptable remedy. If the parties reach a mutually acceptable alternative to Sections B.1 and B.2 of this remedial order during this time or any mutually agreed upon extension of time, the County

may strike these provisions from the attached Notice. If the parties are unable to reach agreement within 60 days or any extension of time, this order shall take effect. The parties shall then notify the Public Employment Relations Board (PERB or Board) General Counsel or designee so compliance procedures can be initiated.

3. Rescind the County's December 11, 2009 furlough memo and direct all County communications on furloughs and mandatory bargaining subjects to Local 521-designated representatives.

4. Within ten (10) workdays of the service of a final decision in this matter, post copies of the Notice attached hereto as an Appendix at all County work locations where notices to public employees are customarily posted for Local 521-represented Professional and Science bargaining units. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. In addition to the physical posting requirement, the Notice shall be posted by electronic message, intranet, internet site, and/or any other electronic means used by the County to distribute the December 11, 2009 furlough memo to represented employees, or customarily used by the County to regularly communicate with such employees.

5. Written notification of the actions taken to comply with this Order shall be made to the PERB General Counsel or designee. The County shall provide reports, in writing, as directed by the General Counsel or designee. All reports regarding compliance with this Order shall be concurrently served on Local 521.

It is further ORDERED that all other allegations in Case No. SA-CE-650-M 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 or received by electronic mail before the close of business, 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, 32091 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).)

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CE-650-M, *Service Employees International Union (Local 521) v. County of Madera (County)*, in which all parties had the right to participate, it has been found that the County violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by unilaterally implementing furloughs in FY 2009-10 for Professional and Service bargaining unit employees without satisfying its duty to meet and confer in good faith with Local 521; and bypassing, undermining, and derogating the authority of Local 521 as exclusive representative when it distributed the December 11, 2009 furlough memo to all County employees, including those in Local 521-represented units. All other claims are dismissed.

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

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer in good faith with Local 521 before to implementing furloughs for Professional and Service bargaining unit employees.

2. Bypassing, undermining, and derogating the authority of Local 521 as exclusive representative by distributing correspondence to all County employees.

3. Denying Local 521 its right to represent bargaining unit employees in their employment relations with the County.

4. Interfering with the right of unit employees to be represented by Local 521.

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

1. Rescind the December 8, 2009 County of Madera Board of Supervisors resolution implementing furloughs in FY 2009-10 beginning January 2010 for Local 521 Professional and Service bargaining unit employees.

2. Restore terms and conditions of employment for Professional and Service unit employees prior to the December 8, 2009 resolution, and make all affected employees whole for any loss of wages or benefits due to the County's unilateral implementation of furloughs beginning January 2010, including interest at 7% per annum.

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

3. Rescind the County's December 11, 2009 furlough memo and direct all County communications on furloughs and mandatory bargaining subjects to Local 521-designated representatives.

Dated: _____ COUNTY OF MADERA

By: _____
Authorized Agent