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ORANGE COUNTY ATTORNEYS ASSOCIATION

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

ORANGE COUNTY ATTORNEYS ASSOCIATION Charging Party, v. COUNTY OF ORANGE, Respondent.	PERB Case No. LA-CE-814-M **CHARGING PARTY'S CLOSING BRIEF** Hearing Dates: October 28-31, 2013

STATEMENT OF FACTS

The Charging Party, Orange County Attorneys Association (OCAA or the Association) is the exclusive bargaining representative of a bargaining unit established by the employer, the County of Orange (the County) known as the Attorney Unit and in that capacity OCAA and the County have bargained a series of memorandum of understandings going back to the 1970's. The bargaining unit is comprised of Attorneys I-IV, and Senior Attorneys, known colloquially as "Turbos", employed in four different departments in the County—the Office of the District Attorney, the Public Defender's Office, the Office of the County Counsel, and Child Support Services. (Tr. Vol. I, at 27/1-28/1.)[1]

The most recent memorandum of understanding was negotiated over 2006-2007 and initially had a term of 2007 through 2009 (the MOU) (Exhibit LL). The parties negotiated an extension to that agreement until June 16, 2011. As part of agreeing to the extension of the MOU, in 2009, OCAA agreed to numerous concessions in order to assist the County with financial difficulties: 1) an across-the-board 3.5% salary increase which the MOU provided was due to be paid June 19, 2009 was postponed for a year ntil June 18, 2010; 2) mandatory work furloughs were agreed to for the attorneys in the Office of the District Attorney resulting in a 5% pay cut for those attorneys (Tr. Vol. I, 25/9-26/4; Ex. A). These agreements resulted in a savings of $3 million for the County (Tr. Vol. I, 26/22-28; Ex. A, p. 3). Thereafter the County requested that OCAA again agree to additional cost savings measures and after further negotiations OCAA agreed to one mandatory unpaid furlough day or unpaid holiday for each attorney and that attorneys could also voluntarily agree to additional furlough days. In addition, if the amount of savings generated by the mandatory and voluntary furlough days did not generate a savings of $835,575 then additional mandatory furlough days would be implemented (Tr. Vol. I, 28/8-19; Ex. B). The parties also agreed that despite a requirement in the MOU, for 2011, the County would not pay the membership fees for the attorneys to participate in the Orange County Bar Association generating an additional savings of

1 References to the transcript of the hearing proceedings will be abbreviated as "Tr." for transcript, "Vol." for the volume and then page and line references as 27/1 indicating page 27, at line 1.

$85,575 for the County (Tr. Vol. I, 29/2-10; Ex. B). This second agreement to provide the County with additional cost savings was entered into on October 20, 2010, after approximately a month of discussions between representatives of OCAA (Larry Yellin, President of OCAA, Scott Van Camp, CFO or Treasurer of OCAA, and Karen Davis, the Consulting Manager for OCAA) and representatives of the County—Carl Crown, Director of Human Resources and Shelley Carlucci, Assistant HR Director (Ex. B; Tr. Vol. I, 29/19-30/18).

The agreed upon extension meant that the MOU between the parties was now set to expire in June of 2011, and in April 2011, Bob Leys, another representative of County HR, contacted Ms. Davis via e-mail to request that the parties begin meeting to negotiate a successor agreement (Tr. Vol. I, 31/ 20-32/9; Ex. C). The parties met for the first time on May 13, 2011, to commence negotiations for a successor MOU (Tr. Vol. I, 33/1-5; Ex. C). At the first meeting on May 13 the County presented a proposal which called for a two year agreement with no salary increases, developing a "performance incentive system", and the elimination of the pick-up of employee contributions towards retirement (Tr. 33/21-34/9, 34/15-; Ex. D). During this first meeting OCAA expressed a willingness to continue with the County not paying the Orange County Bar Association dues if the County agreed that any savings from such an agreement would be realized by the attorneys and the County indicated that it was agreeable with the concept (Tr. Vol. I, 34/26-35/6, 35/15-21). The parties met again on June 3, 2011, and OCAA presented a written proposal calling for a three year contract with salary increases (Tr. 38/4-43/15; Ex. E). During this session when OCAA expressed an interest in discussing further what the County had in mind in its proposal for a performance incentive system, the County requested that OCAA come up with suggestions for how to structure a performance incentive system (Tr. Vol. I, 43/3-15, Vol. II, 64/4-14).

OCAA also understood that it was important to the County that it cease making the employees' contributions towards pensions. Since 2002 the County had been making the full amount of the employees contributions (known as pick-ups 1 & 2) towards their base retirement in exchange for OCAA foregoing a 3.5% salary increase (Ex. LL, p. 87). In addition since 2005, the attorneys had agreed in the prior MOUs that the attorneys would pay two different employer contributions to fund an enhanced retirement formula of 2.7% at 55 (Id., at pp. 86-87).

At a negotiating session on June 10, 2011, in response to OCAA requesting information from the County, Mitch Tevlin--from the CEO budget section-- attended the negotiating session and went over the cost of the pick-ups and other elements of the retirement contributions and presented estimated amounts of the pick-ups going forward along with the impact of the elimination of the pick-ups on the amount attorneys would be required to contribute towards their pension (Tr. Vol. I, 45/8-46/21, 55/14-22; Ex. F). In response to the County's proposal that it wanted to cease making the pick-ups, Mr. Yellin stated that perhaps it was time for the County to begin making all the employer contributions if the County was no longer willing to continue making the pick-up payments, while nonetheless the attorneys were going to be expected to continue making the *employer's* contributions to fund the 2.7 % @ 55 retirement formula that had been put in place in 2005 (Tr. Vol. I, 45/18-26, Vol. II, 76/11-78/13).

Thereafter, the parties met again on June 17, 2011, and at this session the County presented some draft contract language on various issues and information regarding which members of the bargaining unit were receiving bi-lingual pay. This latter information was in response to a request from OCAA given that the County was proposing to change how the bilingual pay was calculated (Tr. Vol. I, 55/23-56/28; Ex. G). After OCAA reviewed the information regarding bi-lingual pay that the County provided on June 17, OCAA agreed to the change that the County was seeking—that the extra pay for being certified as bi-lingual would only be paid for hours the attorneys were actually working and using their bi-lingual skills (Tr. Vol. I, 57/1-26).

At the next bargaining session, July 8, 2011, OCAA presented a "distinguished level" proposal that was responsive to the County's request that OCAA come up with a performance incentive system (Vol. II, 64/20-69/24; Ex. H). In addition to crafting a performance incentive system to reward attorneys whose performance was outstanding, OCAA proposed that the entry level positions have their salary reduced to create a cost neutral way to partially fund the new distinguished level it was proposing. The distinguished level step(s) were to satisfy the County's expressed desire to establish a performance incentive since it would provide the potential of earning additional pay steps for those attorneys who met certain criteria including being an exceptional performer (Tr. Vol. I, 59/1-60/6; Ex. H). It would also assist attorneys who had not received pay

increases due to being topped out who potentially were going to be hit with a pay reduction due to the pension contribution changes the County was proposing (Tr. Vol. II, 65/15-66/6). OCAA indicated that if the County would agree to an increase in the optional benefit program of $800 (which the parties were in agreement on using the Orange County Bar dues to offset), and there were also salary increases agreed to over the next 3 years, then the attorneys would agree to a phase-in over three years of the County's ceasing to make the pick-up contributions towards the retirement benefits (Tr. Vol. I, 60/7-61/18). It was OCAA's understanding based on information provided by the County that if the County ceased making the pick-up payments it would result in a savings to the County of approximately $4 million each year, while conversely attorneys would experience a reduction in their take home pay of about 7 ½% (Tr. Vol. I, 61/21-62/2). On July 8, the County also presented a written response to OCAA's prior proposal which stated that the County was only interested in a two year contract but was willing to look at a reopener regarding a salary increase in the second year of the contract and that the County was rejecting Mr. Yellin's suggestion that the employer make all the employer contributions towards retirement and the employees would begin making all the employee contributions (Tr. Vol. I, 62/16-64/25; Ex. I).

The parties met again on July 22, 2011 and the County presented a "Counter Proposal" in response to OCAA's proposal of July 8 which specifically provided that if OCAA would agree to accept a new retirement formula of 1.62 @ 65 for all new hires with current employees being able to elect to participate in that formula, then the County would agree to the "employee's pick-up of their full retirement contribution (in addition to the reverse pick-up for the '2.7 @ 55') would be phased in over the two year term of the contract." (Ex. J; Tr. Vol. I, 65/18-66/6). In addition, the County withdrew its proposal for a performance incentive system with Mr. Crown, the County's spokesperson, explaining that the County "hadn't come up with anything specific. They weren't exactly sure what the Board, you know, where the Board wanted to go with this. So they withdrew the proposal." (Tr. Vol. I, 66/7-18). In response OCAA agreed with the County's proposal regarding new employees going into a lesser pension benefit formula of 1.62% at 65 but expressed concern over the County's withdrawal of the performance incentive system given that OCAA had spent a great deal of time and effort crafting the distinguished level proposal in response to the

County's request that OCAA be creative and come up with a performance incentive system for the Attorney Unit (Tr. Vol. I, 66/24-67/5).

On August 12, 2011 the parties met again and Mr. Crown expressed that he was very pleased with the progress the parties had made over the course of negotiations to that date and OCAA presented a counterproposal (Ex. K) which specifically provided that if the County would agree to implement the distinguished level performance incentive system which OCAA had further modified to make less expensive and to not become effective until the second year of the contract while the lowering of the entry level salaries by three steps would be immediate, as well as the County agreeing to reopeners for salary increases, then OCAA would agree to the County's proposal for a phase-in--but over three years--of the attorneys paying the pick-ups (Tr. Vol. I, 68/8-22, Vol. II, 72/1-73/14; Ex. K). OCAA also presented its analysis of the cost savings generated by its proposal that would more than offset the cost of the distinguished level performance incentive system (Ex. K, p. 2). Mr. Crown expressed during this meeting that the County was very open to the idea of reopeners in a contract for salary and also that the parties had come a long way and that it was "very apparent [OCAA] had taken a lot of time and we had listened to what the County wanted and took it very seriously.... And they were really very, very pleased about the, you know, the acceptance of phasing in the retirement." (Tr. Vol. I, 71/25-72/5.) In addition, the parties discussed the issue of the Orange County Bar dues and applying the saving to the optional benefit program and Mr. Crown's response was not to agree to the proposal but to state "I don't think there will be a problem with that." (Tr. Vol. I, 72/8-14.)

Approximately a month later Mr. Crown called Ms. Davis on the telephone and stated that the County was "going to have to put the negotiations on hold" although he indicated the County was very pleased with OCAA's "responsiveness" during the negotiations to date (Tr. Vol. I, 72/15-27). In response to Ms. Davis expressing that she did not understand why the negotiations were being put on hold since OCAA was "ready to negotiate right now" Mr. Crown indicated he could not explain the reason for putting the negotiations on hold, that he needed to check with the Board of Supervisors and he would let OCAA know when the County wished to continue negotiations (Tr. Vol. I, 72/24-73/8). Ms. Davis confirmed this conversation in an e-mail to Mr. Crown on

September 7, 2011, stating "I am sending this e-mail to confirm my understanding that OCAA negotiations have been placed on hold by the County until you notify me of our next negotiation meeting (Ex. L). To which Mr. Crown responded within minutes "That is correct." (Id.)

Ms. Davis met with Mr. Crown on another issue and inquired of the status of negotiations between OCAA and the County and Mr. Crown reiterated that the negotiations were on hold. Ms. Davis stated that she was reiterating that OCAA was "willing and ready and desirous of negotiating" to which Mr. Crown responded he knew that (Tr. Vol. I, 75/25-76/8). This face-to-face conversation took place 3-4 weeks after the initial conversation in early September, 2011 (Id.). Because the Orange County Bar dues would be paid in December of 2011 or January of 2012, Ms. Davis communicated to Mr. Crown that since the County had put the negotiations with OCAA on hold, that OCAA was requesting that the dues not be paid since then that money would be unavailable to partially fund the distinguished level concept or otherwise used as an offset (Ex. M). Mr. Crown's response was to state "Thanks Karen" (Id.). Ms. Davis and Mr. Crown did not discuss the issue of the Orange County Bar dues beyond this e-mail exchange but Ms. Davis followed up with the administrative personnel in the various departments to make certain that the direction had been passed along to not pay the dues and it was confirmed by the various departments that the dues payments had been placed on hold (Tr. Vol. I, 75/10-76/16).

The negotiations between OCAA and the County did not begin again until Bruce Barsook contacted Ms. Davis in the latter part of March, 2012, and introduced himself as the new spokesperson for the County or the new chief negotiator (Tr. Vol. I, 76/17-77/5; Ex. N). Ms. Davis inquired about why there had been an eight month halt in the negotiations and why the spokesperson for the County was changing (Tr. Vol. I, 77/8-78/25). Mr. Barsook indicated that there had been a change in philosophy in the County and expressed unhappiness when Ms. Davis explained she was scheduled for a two week vacation and it would be necessary to find out what the schedules and availability were for the members of the OCAA bargaining team prior to scheduling a meeting (Id.). Ms. Davis contacted Mr. Barsook via e-mail and a date of April 27, 2012, was established as the next negotiation meeting. Ms. Davis explained that this date was the soonest that would work because another member of OCAA's bargaining team, Karren Kenney, also had a two

week vacation scheduled (which was a different two week period than Ms. Davis' vacation) (Tr. Vol. I, 79/3-80/8; Ex. N). Mr. Barsook had been requesting that the parties meet in the evenings or weekends to negotiate and Ms. Davis explained this was not possible given the schedules of the bargaining team members who had both child care issues and extremely pressing work obligations (Tr. Vol. I, 80/9-27; Ex. N). the parties had traditionally met on Fridays at noon because of the trial schedule for the attorneys (Tr. Vol. II, 74/27-75/16).

When the parties met on April 27, 2012, the County presented a document titled "COUNTY'S INITIAL PROPOSAL OCAA NEGOTIATIONS" (Ex. O). Neither Mr. Crown nor Mr. Leys, the County's representatives in the negotiations that had previously occurred were in attendance and instead the County was represented by Mr. Barsook and Terri Bruner, from County Human Resources, who had not participated in any of the prior negotiations between the parties (Tr. Vol. I, 81/9-82/7). Mr. Barsook acknowledged during his testimony that he could not recall whether he reviewed the prior proposals exchanged between the parties other than OCAA's August 2011 Proposal (Tr. Vol. III, 91/19-93/20; Ex. K). OCAA expressed shock at receiving a document titled "INITIAL PROPOSAL" which contained ten new items that had not been previously discussed in the prior negotiations that had been on hold since August of 2011 (Tr. Vol. I, 83/10-18). When the negotiations had been put on hold by the County, OCAA had just made a proposal and instead of receiving a response to that OCAA proposal Mr. Barsook indicated the County had "reviewed its position and has a proposal, a revised proposal for OCAA." (Tr. Vol. I, 83/20-84/10). Mr. Barsook was questioned by Mr. Yellin and Mr. Van Camp, another member of OCAA's bargaining team, as to whether the parties were "starting over" in the negotiations and Mr. Barsook did not answer that question directly and instead stated he wanted to discuss the County's document titled "INITIAL PROPOSAL" (Tr. Vol. I, 84/5-10, 97/22-98/4, Vol. II, 79/1-23).

The "INITIAL PROPSAL" included more than a page of narrative description of the County's view of its budget concerns, then seven proposals regarding various items, and then an additional six items that were labeled "Clean-up Issues" (Exhibit O, pp. 1-3). The final page of the document was titled as a multi-year comparison of total budgeted compensation by bargaining unit with projected budgets through the fiscal year of 2016-2017 (Ex. O, p. 4). Because the information

was not of the type that had been presented during prior negotiations, Ms. Davis asked many questions about the multi-year comparison because--despite its title indicating it was "by bargaining unit"-- in fact it was based entirely on the overall number of employees in the County and was averaged and as a result had nothing to do with the Attorney Unit. Ms. Davis also raised concerns because budgets for future years are merely plan documents that do not deal with expenses or real costs and that this was a problem beyond the information not being broken down to show the classifications represented by OCAA (Tr. Vol. I, 84/24-85/28, 86/7-89/19). Ms. Davis requested the County provide actual costs (as opposed to budget information for members of the Attorney Unit (Tr. Vol. IV, 8/24-11/20, Vol. III, 101/7-12). In response Mr. Barsook indicated it was not possible to provide such information (Tr. Vol. III, 101/10-12). However, Frank Kim, CFO for the County, acknowledged the County could and did provide such actual cost information on a bargaining unit basis (Tr. Vol. III, 157/4-158/7).

In addition, OCAA was "shocked" because there were twelve new items appearing in the County's proposal which had not been even mentioned in the prior negotiations (Tr. Vol. I, 86/1-6; 97/22-98/4, Vol. II, 79/24-80/2). For example, the "INITIAL PROPOSAL" stated that the County was seeking to make changes to the merit increase within range language in the MOU by increasing the length of time a newly hired attorney would have to work before receiving an increase to one year from the current MOU's six months, as well as to decrease the amount of steps an attorney would be eligible to move on the salary schedule based upon their evaluation from a range of one to four steps to a lesser range of one or two steps of movement within the salary range (Tr. Vol. I, 90/1-18; Ex. O, pp. 1-2).

When OCAA inquired what the basis was for these new proposals, Mr. Barsook indicated that the County needed to save money by decreasing costs, but never stated that the County had sustained or identified any new budget concerns (Tr. Vol. I, 90/27-4, Vol. II, 80/7-81/11). In fact the County's revenues had increased since the parties had been at the negotiating table in 2011 (Tr. Vol. I, 91/4-20). Alarmingly, the "INITIAL PROPOSAL" for instance stated that it was possible that there would be a "salary reduction" which was not something that had been even mentioned by the County during the 2011 negotiations (Tr. Vol. I, 93/16-19). Mr. Barsook also stated that the

County's new "INITIAL PROPOSAL" was that all the attorneys would pay the full employee contribution, both pick-ups 1 and 2, immediately upon the contract becoming effective and continued to insist that was the County's position despite OCAA pointing out that the parties had previously been discussing that there would be a phase-in of the of the obligation to pay pick-ups 1 and 2 (Tr. Vol. I, 93/24-94/3; Ex. O, p. 2). In addition, the County was still demanding that all new employees would go into the 1.62% at 65 pension formula and for the first time that the COLA for retirees would be decreased to 2% (Tr. Vol. I, 94/4-18; Ex. O, p. 2). Moreover, the County was now proposing that attorneys would have any Annual Leave taken within the three pay periods prior to retirement count against the amount of Annual Leave hours which would be eligible for cash out (Tr. Vol. I, 94/19-95/9).

The County also included proposals in its "INITIAL PROPOSAL" which were not monetary but which had also not been discussed or raised by the County as proposals during the 2011 negotiations such as elimination of seniority as a factor in lay-offs (Tr. Vol. I, 95/10-28; Ex. O, p. 2). By the end of this session OCAA was demanding a response to its proposal from August of 2011 (Ex. K), which was where the parties had left off in the negotiations before the County placing a hold on the negotiations (Tr. Vol. I, 98/13-23, Vol. II, 85/19-86/6).

The parties met again on June 15, 2012, and the County presented a proposal which basically summarily rejected each of OCAA's proposals from August of 2011 stating as to the issue of retirement contributions, that the County's response was "as proposed by County, April 27, 2012" (Ex. P, p. 1). With the sole exception of the proposal for salary reopeners, which the County indicated was "under review" every other proposal was rejected except the County indicated it was willing to accept OCAA's proposals to lower the entry level salaries by three steps and to eliminate the payment of the Orange County Bar dues, however, any cost savings realized by these OCAA proposals would be "allocated to the County-proposed reduction in costs" (Tr. Vol. I, 100/5-27, Vol. II, 86/10-87/3; Ex. P). Thus, the County reneged on several agreements in principal that had been reached between the parties in 2011 and took steps backward away from agreement between the parties, while also taking proposals that OCAA had made to generate cost savings in order to fund increases in salary steps and the OBP and refused to apply the savings generated to the

attorneys wages and instead regressively now began demanding that any savings be pocketed by the County in addition to the 4-5 million in savings that would result if OCAA agreed to the retirement contribution changes being sought by the County (Id.).

OCAA had requested information during the prior bargaining session regarding the recommended insurance plan changes given that the prior County proposal actually stated the information was attached when in fact the information had not been provided on April 27, 2012 (Tr. Vol. I, 99/20-100/4; Ex. O, p. 2, Ex. P, pp. 2-5). On June 15, the County presented what it claimed in its "INITIAL PROPOSAL" was the previously attached—Mercer Recommendations (Tr. Vol. III, 20/28-21/13, 22/5-26/25.)

On June 29, 2012, the parties met again and the County provided information responsive to requests made by OCAA including providing the total budgeted compensation requested by OCAA for just the attorney unit, rather than an average for all employees of the County as had been provided on April 27, 2012. However, the information still represented only future (and past) projected budgets rather than actual costs. OCAA was adamant it wanted actual cost information not just budget projections. This information was not provided (Tr. Vol. I, 107/7-20, Vol. II, 87/21-88/26; Ex. Q, p. 3). The parties met again on July 6, 2012 and the County presented additional information regarding the costing/savings generated by its proposals and more specifics regarding the changes in the health plans that were being suggested (Ex. R).

OCAA continued to work on refining its proposal regarding the distinguished class steps and retooled it in response to Mr. Barsook's suggestion that OCAA should be "creative" in crafting a proposal to address both parties' concerns (Tr. Vol. I, 107/24-108/23; Vol. III, 112/4-9; Ex. S). OCAA presented a proposal to the County on July 20, 2012 which in addition to retooling the distinguished level proposal by eliminating another step at the top of the salary ranges so that it was now only a proposal for adding a potential for two steps or a possible 5.5% salary increase (Tr. Vol. II, 95/2-11) also sought to have the savings from the Orange County Bar dues applied toward OBP and proposed giving up paid holidays, and for salary reopeners which were tied to growth factors in the revenues of the County (Tr. Vol. I, 108/24-110/19, Vol. II, 94/4-99/10; Ex. S). OCAA explicitly stated that if the revenue sources—Property Tax and Prop 172 funds declined they would

"accommodate that" and in response to questions from Mr. Barsook, OCAA explicitly stated that if there were a reduction in revenues it would accept a lowering of salary (Tr. Vol. I, 110/20-26). OCAA also stated that it wanted to hear feedback from the County regarding which items were worth pursuing (Tr. Vol. III, 112/16-113/17). However, the County did not make any proposal in response to OCAA's request for feedback regarding the concepts it was suggesting nor did it provide financial information to dispute OCAA's savings estimates (Tr. Vol. III, 115/26-116/20). During the next bargaining session on August 17, 2012, OCAA presented further proposals with more details about how this concept would be implemented and also indicated that it was willing to look at total compensation and factor increased costs for retirement benefits or other items as part of funding any increase in salary based on increased revenues (Tr. Vol. I, 111/1-112/1, Vol. II, 100/6-101/9; Ex. U). Mr. Barsook contended he verbally suggested a formula at the prior meeting but admitted the County never made a proposal (Tr. Vol. III, 118/3-11). Mr. Barsook also testified that he was concerned that the inclusion of Prop. 172 funding in the formula would create problems (Tr. Vol. III, 43/14-44/8). However, he acknowledged he had no idea what % of the District Attorney's Office funding was derived from Prop. 172 and he made no inquiries of the District Attorney's Office representative to ascertain what the historical levels of Prop. 172 funding was for the District Attorney's Office (Tr. Vol. III, 98/14-24, 118/28-119/13).

Mr. Yellin was explicit in stating that OCAA was willing to both accept that salaries would decrease based on the funding sources and also that OCAA was willing to take total compensation into account in determining the amount of increase in salary that would be generated by any increase in funding (Tr. Vol. II, 100/3-101/9, Vol. III, 49/3-28, 119/14-120/1). During this meeting Mr. Barsook inquired if OCAA's proposal was "the best" the attorneys could do and OCAA's response was that it had presented a number of options which they felt the County needed to review and Mr. Yellin explicitly stated that it was not and Mr. Yellin explicitly requested that Mr., Barsook tell him how the proposal needed to be modified to meet the County's needs and that OCAA was willing to be creative and modify its proposal (Tr. Vol. II. 102/20-103/14, Vol. III, 119/22-120/1).

At the next bargaining session on August 24, 2012, after initially being present Mr. Barsook left the negotiating session for 45 minutes and then returned to present the "COUNTY's LAST,

BEST & FINAL OFFER" (Tr. Vol. I, 112/3-27; Ex. V). The "LAST, BEST & FINAL" (LBFO) stated that with regard to several of the items that further information was attached (Ex. V, p. 1-2). However, there was no attached information regarding the County's proposal to "Clarify language in MOU to conform to current practices" or "Educational and Professional Reimbursement" and only the proposals regarding Family Leave language—initially dated July 20, 2012 with an interlineated 8/24/12 were attached (Tr. Vol. I, 113/1-4, 114/26-115/11, Vol. II, 107/6-26).

In addition, despite the fact the County was proposing extremely significant changes to the arbitration procedure for disciplinary appeals, how merit increases would be handled, and with respect to the lay-off procedure, no MOU language was provided on August 24, nor in fact was ever provided to OCAA (Tr. Vol. I, 113/23-114/25, Vol. II, 109/7-111/1). The "LAST, BEST & FINAL OFFER" also stated that if OCAA and its membership accepted the proposed terms then there would be a "2.5% lump sum bonus payable to unit members on the payroll as of the adoption of this MOU[]" and also explicitly provided that if it was "not accepted by September 4 2012, the County will assume it has been rejected, and that as a result, an impasse in negotiations has been reached. If the proposal is accepted, and we certainly hope that it is, OCAA will have until September 25, 2012 to ratify the MOU. If the offer is not ratified by that date, the County will assume the offer has been rejected, and that as a result, an impasse in negotiations has been reached." (Ex. V, p. 2.)

The LBFO also provided with respect to Health Insurance that the "Mercer Recommendations" would be implemented "effective January 1, 2013, or such later date as the County determines; Clarify language in MOU to conform to current practices (see attached)." However, nothing was attached regarding any clarification in MOU language regarding health insurance and any alleged current practices. (Tr. Vol. I, 113/14-22.)

OCAA responded by informing the County that it was not possible to have a vote of their membership by September 4, 2012, particularly since the County had not provided any contract language for review with respect to the advisory arbitration, premium pay, worker's compensation supplemental pay and layoffs (Vol. II, 113/1-11; Ex. W). Mr. Yellin communicated these and other concerns to Mr. Barsook on August 31, 2012 in a letter which requested from the County the language that would be inserted into or eliminated from the MOU and a reasonable amount of time

to evaluate the offer (Id., p. 3). The County's response was to refuse to provide the proposed contract language but to extend the deadline for acceptance to September 12, 2012 (Vol. II, 114/23-115/4; Ex. X). On September 13, 2012, the County declared impasse in the negotiations (Ex. Z). OCAA did have a vote of its membership regarding the "LAST, BEST & FINAL OFFER" and only one attorney voted to accept the offer but many members expressed unhappiness at not being able to review the proposed MOU language—something that had always occurred in prior negotiations (Tr. Vol. I, 115/17-116/12).

Thereafter the parties participated in both mediation and factfinding. Following the factfinding report, there were conversations and an exchange of e-mails beween Ms. Davis and Mr. Barsook regarding what the County was proposing as its new "Deal Points" (Ex. AA, pp. 2-3). Mr. Barsook stated in his e-mail of January 24, 2013, which was to confirm the conversation between he and Ms. Davis that "based on [his] conversation with the Board of Supervisors earlier this week it my understanding that the Board would agree to adopt the recommendations contained in the draft report (assuming it included the issues referenced in our last, best & final offer which were not addressed during the fact finding hearing), if and only if, the OCAA agreed to such recommendations and notified the County of its agreement no later than Monday, January 28, 2013, Otherwise my sense is that the County will file a dissent to the draft report and then submit a request to the Board to impose the changes to wages, hours and other working conditions set forth in the County's Last, Best & Final offer (which will necessarily mean no 2.5% salary increase[2] since no agreement has been reached)." (Ex. AA, p. 2.)

Per the request of Ms. Davis made on January 24, 2013 for "Deal Points" for OCAA to submit to its membership (Tr. Vol. I, 117/14-21), Mr. Barsook provided OCAA with slightly altered terms of an offer in part reflecting the new law which had become effective January 1, 2013, the Public Employees' Pension Reform Act (PEPRA) (Ex. 9).[3] The new offer provided that new hires

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2 It is unclear why Mr. Barsook would have referred in his e-mail to a "2.5% salary increase" which would become unavailable if the membership did not accept the Deal Points. At no time had the County proposed that OCAA's members would receive a 2.5% salary increase. Rather at the time of the first LBFO, the proposal was for a 2.5% lump sum bonus which was non-base building (Ex. V, p. 2) and after the fact finding report the "Deal Points" called for 1.25% salary increase and a 1.25% "one-time, lump sum, off schedule bonus (Ex. 9, p. 1).

3 It is anticipated that the County will contend that somehow Ms. Davis' credibility was negatively impacted by the fact that a document entitled "KEY POINTS OF PROPOSAL" was inadvertently submitted by OCAA as the County's

would be covered by the pension formula required by PEPRA and would pay 50% of the normal cost rate and also provided that as to classic members or continuing employees there would be a phase in of the employees picking up the contributions—pick-up 1 and 2, with pick-up 1 becoming the obligation of the attorneys on February 1, 2013 and pick-up 2 becoming effective July 1, 2013 (Ex. 9, p.1). This proposal also provided with respect to health insurance that any changes would be implemented "when such recommendations or modifications are implemented for a majority of County employees" and that the "'clean-up language' provided to Association on 8/24/12" would also be implemented (Ex. 9, p. 2). In addition, the Deal Points provided that "Effective the first payroll period following effective date of Agreement, the County will increase salaries as follows:-- 1.25% base building; --1.25% one-time, lump sum, off schedule bonus (Ex. 9, p. 1).

Finally, the Deal Points provided that the "Association agrees to withdraw its unfair practice charge with prejudice (Ex. AA, p. 6, Ex. 9, p. 3). OCAA objected to the County's inclusion in the Deal Points of a requirement that OCAA dismiss its unfair labor practice charge with prejudice (Exs. BB & DD). OCAA also informed the County that it regarded the "Deal Points" it had been provided as a new proposal from the County since it contained some items from the August 24, 2012 Last, Best & Final offer, some items from the factfinder's recommendations, and some new items which had not been previously offered by the County nor had they been recommended by the factfinder (the issue of changes to health insurance was not dealt with in the factfinding process or report and the "Deal Points" provides contrary to the Last, Best & Final (Ex. V, p. 1) that the Mercer Recommendations will not be implemented until a majority of the County's employees are covered by the recommendations). (Ex. BB, p. 2.) Mr. Barsook responded that the "Deal Points" were not meant to be considered as a proposal from the County, The Deal Points were developed at [Ms. Davis'] request and meant as a good faith attempt to resolve the negotiating impasse between the parties." (Ex. CC, p. 1.) Thus, the County was making changes to its LBFO, only in part based on the factfinder's report as well as changes that were not part of the factfinder's recommendations

"DEAL POINTS". Any such contention should be rejected for several reasons. First, OCAA explained the error through the testimony of Mr. Yellin (Tr. Vol. IV, 7/2-8/17) and more importantly at no time did Ms. Davis in her testimony refer to the document that Mr. Barsook had provided as anything other than "the Deal Points" and she did not attempt to claim that the document was titled "Key Points of Proposal" or that there was any significance to the title of the document which she had changed at the direction of Mr. Yellin.

for other reasons as well.

The membership of OCAA again voted to reject this proposal and the County did not in fact submit a dissent to the factfinder's report (Tr. Vol. I, 118/18-119/3; Ex.GG, pp. 7-16). The membership of OCAA voted to present a counterproposal which included all the terms of the "Deal Points" offered by the County with two additional items which had been previously discussed with the County during the negotiations between the parties—distinguished level steps for the top three classifications and a bonus for all attorneys that is tied to an increase in County revenue in both property taxes and Proposition 172 funding up to a cap of 3.75%—with express acknowledgement that if these funding sources decreased that the attorneys would agree to accept furloughs or unpaid days up to a cap of 5% (Ex. EE, pp. 2-3).

The March 1 response from the County was to simply reject the proposal made by OCAA and to inform OCAA that the Board would be voting to "unilaterally implement the County's Last, Best & Final offer." (Ex. FF.) Also on March 1, 2013, the County sent to OCAA via e-mail the Agenda Staff Report which included for the first time the actual language on a number of issues (changes to the lay-off language eliminating seniority as a factor, changes to the arbitration process eliminating binding arbitration for disciplinary matters, changes to workers' compensation supplemental pay, and to the manner in which premium pay would be calculated). On March 5, 2013 the Board of Supervisors voted to unilaterally implement terms and conditions of employment for the attorney unit which were not consistent with the "Deal Points" that were the most recent proposal from the County after the fact finding process.

ARGUMENT

I. INTRODUCTION

During the 2011 through 2013 negotiations between the parties to reach a successor agreement, the County's conduct over the course of the negotiations represented both per se bad faith bargaining and a pattern of conduct during the negotiations amounting to surface bargaining demonstrating that the County was not engaging in good faith bargaining and was not really

interested in reaching an agreement with OCAA. The per se bad faith bargaining conduct of the County consisted of its insistence that the employees in the Attorney Unit pay a portion of the *employer's* statutorily required contribution towards the employees' retirement benefits and its simultaneous insistence after the passage of the Public Employees' Pension Reform Act of 2013 (PEPRA) that the County would no longer continue to make the "pick-ups" or payments of the employees' contributions. In addition, the County's unilateral imposition was not consistent with the terms of its final offer to OCAA following the fact finding process.

The County's bad faith bargaining under the totality of circumstances test employed by PERB is also evident from this same conduct as well as multiple indicators demonstrating that the County wished to frustrate or avoid truly engaging in the bargaining process. As will be discussed in greater detail in Section III of this brief, after the 8 month hiatus in bargaining that resulted from the County's refusal to meet with OCAA, the County in essence started over in the bargaining process with a new chief negotiator who acted as though none of the prior bargaining sessions had even occurred and promptly backed away from proposals the County had made in the prior round of negotiations while simultaneously adding more than a dozen new items to the County's new "INITIAL PROPOSAL" (some of which were noneconomic and extremely onerous to OCAA) all of which clearly amounts to conduct which predictably moved the parties away from an agreement instead of towards consensus.

Even after this inauspicious beginning of the second round of negotiations, during the slightly more than four months the new chief negotiator represented the County not a single concession was made, all attempts made by OCAA to suggest potential ways to reach an agreement were met with a complete lack of interest, and the County refused to provide information requested by OCAA. At the last bargaining session between the parties OCAA explicitly stated it was willing to make further modifications in its proposal to attempt to meet the needs of the County and to try and reach an agreement, but the County instead declared impasse when OCAA did not accept its LBFO. Tellingly, the County's final offer to OCAA was the same as its "INITIAL PROPOSAL" on April 27, 2012, with the exception of offering a 2.5% non-base building bonus which was only available if the attorneys agreed to accept the County's offer, which the County was well aware

contained onerous provisions eliminating binding arbitration and seniority in lay-offs (despite the County's failure to provide the MOU language to implement these proposals).

When OCAA's membership overwhelmingly rejected this offer (with only a single "yes" vote) the County again did not modify its position during the mediation or fact finding process, other than to at the very end of the process—when in keeping with the fact finder report--the County did offer to make 1.25% of the previously non-base building bonus, a base building increase, and to eliminate the most onerous proposals regarding arbitration and eliminating seniority. This was again rejected by the membership with only a single "yes" vote. However, since as previously observed, the County's subsequent unilateral imposition differed in some respects from this final offer the County's conduct constituted yet another way in which the County engaged in bad faith bargaining.

II. THE COUNTY's PER SE VIOLATIONS OF THE OBLIGATION TO BARGAIN IN GOOD FAITH WITH OCAA

A. The County's Insistence to Impasse and the Subsequent Imposition of a Change in the Employees' Contributions Towards Their Retirement Violated PEPRA and Constituted Per Se Bad Faith Bargaining

PERB has recognized that the insistence to impasse and later imposition of terms that amount to a waiver of statutory rights is unlawful conduct by an employer under MMBA. *City of Pinole* (2012) PERB Decision No. 2288-M, at pp. 11-12 (the City's pension proposal requiring that bargaining unit members contribute in excess of the statutory maximum without their consent is an unlawful waiver of a statutory right). This matter, like *Pinole*, concerns an employer unilaterally, and not through an MOU approved by OCAA's membership, increasing the employees' contributions towards their retirement in a manner that violates several statutes. Specifically here the County revoked the "pick-ups" and required that members of the Attorney Unit pay (1) the entire employee normal contribution (as a result of the elimination of the pick-ups); (2) an additional employee contribution equal to 0.54 percent of compensation earnable to fund past service liability; and (3) a portion of the *employer's* contribution, notwithstanding express

requirements under PEPRA and the County Employees Retirement Law of 1937 (CERL) that the County may only do so pursuant to an approved MOU. The County's proposals upon which it insisted to impasse and which it then later unilaterally imposed have unlawfully deprived existing employees[4] in the Attorney Unit (that is, employees that are not "new members" subject to Government Code Section 7522.30), of a right to which they are entitled—continued "pick-up" payments and the right to not be compelled to make contributions to fund their retirement benefits beyond employee normal contributions.

Members of the bargaining unit receive benefits upon retirement pursuant to CERL which are provided through the Orange County Employees' Retirement System (OCERS). These retirement benefits are funded by employee and employer contributions that are made to OCERS during the course of the attorney's employment, as well as investment and other earnings. Since approximately, 1980, the MOUs entered into by the parties have provided in relevant part that employees in the Attorney Unit would be eligible to receive one of two retirement benefit formulas depending on their date of hire: those hired prior to September 20, 1979 received a retirement benefit calculated pursuant to Government Code Section 31676.12 (one-fiftieth retirement formula), and those hired after that date received a retirement benefit calculated pursuant to Government Code Section 31676.1 (one-sixtieth retirement formula) (collectively, these formulas are referred to here as the "basic retirement benefit"); their corresponding employee contributions were calculated pursuant to Government Code Section 31621. (Ex. LL, pp. 86-87).

OCAA and the County agreed in 2000 that, effective June 28, 2002, in lieu of a 3.5% pay increase, the County would instead pay or "pick-up" all employee contributions required to fund the basic retirement benefit; successor MOUs up through the MOU which expired on June 16, 2011 agreed to continue these "pick-ups." (Ex. LL, p. 87.)[5]

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4 The issues before the AJ with respect to PEPRA and CERL in this matter are the contributions that the County is requiring to be made by employees in the Attorney unit who are continuing or existing employees and not any individuals who are new hires or employees hired after January 1, 2013.

5 The most recent MOU provided:

> The County will continue to pay, on behalf of the employees, employee retirement contributions at the rates that were applicable prior to June 24, 2005. Specifically, the employee retirement contributions that will continue to be paid by the County

OCAA and the County agreed beginning with the 2004 – 2007 MOU, that employees in the Attorney Unit retiring on or after July 1, 2005 would receive an enhanced retirement benefit calculated pursuant to the formula contained in Government Code Section 31676.19 ("2.7% at 55" benefit formula), which required higher contributions than the basic retirement benefit formulas (Tr. Vol. I, 44/6-22; Ex. LL, p. 86-87). Since June 24, 2005, the employees in the Attorney Unit have paid an additional contribution to OCERS to fund the cost of the 2.7% at 55 retirement benefit formula; this additional contribution has resulted in the employees in the Attorney Unit paying the equivalent of the *employer's* contribution to OCERS to fund the additional cost of the 2.7% at 55 retirement formula. [6]

There is no dispute that the County insisted to impasse on the attorneys agreeing to begin making the pick-ups and also to continue to pay the above-described two portions of the employer's contributions and that on March 5, 2013, the Board approved Resolution No. 13-015, which

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> will be (i) an amount equal to the normal employee contributions that would have been calculated under either Government Code Sections 31621.5 (for employees hired on or before September 20, 1979), or Section 31621 (for employees hired on or after September 21, 1979), and (ii) any employee contributions needed for full reserve funding of cost-of-living increases to retirees. The County will make such payment under Government Code Section 31581.1, up to one-half of the employee's total retirement contribution to a maximum of five (5) percent of compensation, and Government Code Section 31581.2, for the remainder of such contributions paid by the County. . .

6 The most recent MOU also provided:

> F. Employee retirement contributions pursuant to the 2.7% at 55" benefit formula. . .
>
> 3. Effective with the pay period that commences on June 24, 2005, general members in this bargaining unit will make an additional employee contribution to the retirement system, in an amount equal to 0.54% of compensation earnable. This contribution will be in addition to the normal employee contribution calculated under Section 31621.8 of the Government Code, and will be in addition to the employee contribution required to help provide full reserve funding of cost-of-living increases to retirees for all active members of the retirement system as recommended by the actuary. The additional employee contribution made under this paragraph shall be in accordance with, and for the purposes stated, in Section 31678.3(d) of the Government Code. This additional contribution shall continue beyond the expiration date of this MOU, for the purpose of amortizing, over a 30 year period, the cost of the retirement benefit improvement resulting from the adoption of the "2.7% at 55" benefit formula in Section 31676.19 of the Government Code.

(Ex. LL, p. 86.)

imposed terms and conditions of employment on employees in the Attorney bargaining unit consistent with these proposals. Hence, among the terms and conditions of employment imposed upon members of the Attorney Unit was the following:

> Concurrent with Board adoption of this Resolution, the unilaterally implemented changes in terms and conditions of employment for those employees in the unit represented by the Orange County Attorneys Association are: . . .
>
> - Retirement (Employee Contribution) – for employees in the 2.7% @ 55 plan, unit members will pay the full member contributions, and the County will not pick-up member contributions as permitted by Government Code Section 31581.1 and 31581.2 (pick-ups 1 & 2), effective the first pay period following Board adoption of this Resolution . . .

(Ex. GG, p. 5.) The imposed terms and conditions of employment under Resolution No. 13-015 also include the requirement that employees in the Attorney Unit continue to pay the entire additional cost, *including the employer's contribution*, to fund the 2.7% at 55 retirement benefit formula (Ex. HH, p. 95-96).[7] As a result, employees in the Attorney Unit are currently required to make a portion of the employer's contribution to fund their retirement benefits and have seen an effective reduction in salary as a result of the County eliminating its payment of the pick-up. This elimination of the pick-up and continued payment of a portion of the employer contribution has not been agreed to by OCAA.

The County violated MMBA by insisting to impasse and beyond that the attorneys agree to County proposals which violated two provisions of the Government Code and then again when it unilaterally implemented terms and conditions of employment removing the "pick-up" by the employer of employee contributions, and also requiring employees in the Attorney Unit to pay an additional contribution equal to 0.54 percent of compensation earnable representing past service liability, as well as the employer's contribution to fund the additional cost of the 2.7% at 55 benefit

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7 Specifically, under the imposed terms and conditions, increased contributions "as a result of implementation of the '2.7% at 55' retirement benefit, will be paid by the individual employees and not by the County. Therefore, the difference between (i) the employees' normal contribution rate calculated pursuant to Government Code Section 31621.8, and (ii) the employees' previous normal contribution rate . . . shall be paid by the employee and shall not be paid by the County . . ." (Ex. HH, p. 5).

formula: (A) Government Code Section 31631, part of the recently-enacted PEPRA, which requires for any represented employees that any increased payments be approved in an MOU, and (B) Government Code Section 31678.3, which provides that an employer may only require that represented employees make an additional contribution to their retirement accounts for purposes of funding the 2.7 % at 55 enhanced benefit if those increases are collectively bargained and memorialized in an MOU.

i. By insisting to impasse on ending the employer pick-up of member contributions the County unilaterally imposed payment requirements in violation of Section 31631(a)

While Section 31631(a) of the Government Code permits county boards to require members to pay all or part of the member contributions towards their retirement benefits, it prohibits them from doing so without entering into an MOU with the members' collective bargaining representative, which is precisely what the County did here. Section 31631(a) provides, in relevant part:

> ***Notwithstanding any other law***, a board of supervisors . . . may, by resolution, ordinance, contract, or contract amendment under this chapter, without a change in benefits, ***require that members pay all or part of the contributions of a member or employer, or both***, for any retirement benefits provided under this chapter. All of those payments are hereby designated as employee contributions. For members who are represented in a bargaining unit, the payment requirement ***shall be approved in a memorandum of understanding*** executed by the board of supervisors or the governing body of a district and the employee collective bargaining representative.

Cal. Gov. Code § 31631(a) (*emphasis added*). This provision uses clear and mandatory language ("shall be approved . . ."), and there is no reasonable interpretation of this language which would allow an employer to require that employees pay "all or part of the contributions of a member" without an MOU. Moreover, this provision clearly states that it applies "[n]otwithstanding any other law."

There is no dispute that the County consistently throughout the negotiations insisted that

OCAA agree to proposals regarding retirement contributions which were the later basis for its resolution imposing terms which "require that members pay all or part of the contributions of a member" for CERL retirement benefits. The impact of this unilaterally imposed change is that Attorney Unit members are now required to pay for all of the member contributions towards the basic retirement benefit formulas, whereas in the past the County would "pick-up" the entire cost of employee payment towards the basic retirement benefit formulas. These payment requirements resulting from the elimination of the pick-up were not "approved in a memorandum of understanding" between the County and OCAA, as is required by Section 31631(a). By its plain language, Section 31631(a) prohibits exactly the course of action taken by the County—requiring that employees in the Attorney Unit pay "all or part of the contributions of a member" without the required MOU.[8] Thus, the County violated MMBA when it insisted to impasse and then by unilaterally imposing a term which violated Section 31631(a) and that OCAA waive a statutory right.

ii. By requiring that members of the Attorney Unit pay the *employer* contribution towards the 2.7% at 55 retirement benefit, Respondents imposed payment requirements that were not approved in an MOU in violation of Section 31631(a)

In addition to its MOU requirement governing the payment of member contributions, Section 31631(a) also provides that, in order to require "that members pay all or part of the

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8 The County may attempt to argue that Section 31631(a) – as did Mr. Barsook (Tr. Vol. III, 77/4-18) – should be read to apply only to requirements that employees pay, in addition to their own member contributions, a portion of the *employer* contribution to the retirement system or to share the cost of an additional retirement benefit." This argument has no basis in the actual language of the statute, which provides that it governs the requirement that members pay "all or part of the contributions ***of a member*** or employer, ***or both***." Gov. Code § 31631(a) (*emphasis added*). Further, the section directly states that it is not about sharing the cost of additional benefits by stating that it is about requiring increased employee contributions "without a change in benefits." If this code section were truly only about members agreeing to pay a portion of employer contributions to secure additional benefits, one would expect it to say so. It not only doesn't say that, but it expressly states that it governs increased payments "without a change in benefits." This argument also fails to justify the County's actions because, as we discuss below, the County *has* imposed a payment requirement that includes payment of a portion of the *employer* contribution and a payment of 0.54% beyond the employee's normal contribution.

contributions ***of a[n] . . . employer***," "the payment requirement shall be approved in a memorandum of understanding . . ." Gov. Code § 31631(a) (*emphasis added*). With respect to the employer contribution, too, Respondents have violated the clear and mandatory language of this provision.

The County insisted through impasse and then adopted a resolution imposing terms and conditions of employment which included the requirement that members of the Attorney Unit pay the entire cost of the additional contribution towards the 2.7% at 55 retirement benefit, *including the employer contribution* towards this benefit. (Ex. V, p. 1, Ex. D, p. 5 (the increase in contributions occurring "as a result of implementation of the '2.7% at 55' retirement benefit, will be paid by the individual employees and not by the County. . .".)) In so doing, the County insisted to impasse and has "require[d] that members pay all or part of the contributions of a[n] . . . employer" for this CERL retirement benefit. This payment requirement was not "approved in a memorandum of understanding" in violation of Section 31631(a).[9] Because the payment requirement under which members of the Attorney Unit are required to pay a portion of the employer contribution was not set forth in a MOU, the unilateral imposition of this payment requirement violated of the plain language of Section 31631(a).

iii. Section 31631(b) cannot be interpreted to allow unilateral imposition of increased contributions without an MOU and therefore insistence to impasse on such proposals is per se bad faith bargaining

The County may contend that Section 31631(b) somehow excuses its actions. However, this subsection cannot reasonably be interpreted to allow unilateral imposition of increased contributions without an MOU. Subsection (b) provides:

> (b) Nothing in this section shall modify a board of supervisors' or the governing body of a district's authority under law as it existed on December 31, 2012,

9 The County may contend that, because there was an existing obligation to make this payment, its imposition of terms and conditions of employment including this requirement was proper under Section 31631(a). On the contrary, Section 31631(a) does not concern only the imposition of new payment obligations. It expressly provides that, while an employer may "require that members pay all or part of the contributions of a member or employer, or both," any such "payment requirement" shall be set forth in an MOU. There can be no dispute that the County is requiring that members of the Attorney Unit pay this portion of the employer contribution and that such payment requirement has been unilaterally imposed rather than set forth in an MOU.

including any restrictions on that authority, to change the amount of member contributions.

Gov. Code § 31631(b). The County may argue that it had the authority to unilaterally impose increases before PEPRA was enacted, pursuant to Government Code Section 31581.2, so Section 31631(a) should not be interpreted to limit this authority. However, subsection (b) cannot be interpreted to allow unilateral imposition without an MOU because such interpretation would deprive subsection (a) of its meaning; because, unlike subsection (a), subsection (b) uses the narrower term "member contributions"; and because Section 31581.2 does not provide a basis under subsection (b) for the unilateral action challenged here.

Subsection (a)'s requirement of an approved MOU must be given effect, and subsection (b) cannot be interpreted in a way that deprives subsection (a) of all meaning. The rules of statutory interpretation require courts to apply a statute without further construction if it is not ambiguous or uncertain. *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007–1008, 239 Cal.Rptr. 656, 741 P.2d 154; *People v. Overstreet* (1986) 42 Cal.3d 891, 895, 231 Cal.Rptr. 213, 726 P.2d 1288; *Morse v. Municipal Court* (1974) 13 Cal.3d 149, 156, 118 Cal.Rptr. 14, 529 P.2d 46. In doing so, courts must give effect to every word and clause, whenever possible, and not deprive them of meaning. *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 18, 270 Cal.Rptr. 796, 793 P.2d 2; *Weber v. County of Santa Barbara* (1940) 15 Cal.2d 82, 86, 98 P.2d 492. Here, subsection (a) requires that any contribution increase for represented employees be approved in an MOU: "For members who are represented in a bargaining unit, the payment requirement shall be approved in a memorandum of understanding executed by the board of supervisors . . . and the employee collective bargaining representative." Gov. Code § 31631(a). This requirement is straightforward and it needs no further construction to be applied. *See Woodhead*, 43 Cal.3d at 1007-08. However—even if the AJ finds it necessary to look beyond the unambiguous requirement set forth in subsection (a)—subsection (b) cannot be interpreted to allow unilateral imposition of increases absent an approved MOU because this would render meaningless the subsection (a) clause requiring an MOU. The ALJ is required by the rules of statutory construction to give effect to this statutory language and not to leave it "useless or deprived of meaning." *See Rank*, 51 Cal.3d at 18. The ALJ

should avoid any construction of Section 31631(b) that would deprive Section 31631(a) of such meaning.[10]

Instead, the correct reading of Section 31631(b) is that it maintains the ability to change the "member contribution" rate—an actuarially set value not subject to collective bargaining—as opposed to the "employee contribution" allocation that must be collectively bargained under Section 31631(a).[11] The County may well seek to obscure this plain reading of the statute by conflating these two distinct terms. Section 31631(a) does not deal with the setting of "member contributions" and, instead, provides that county boards may not require that members pay "all or part of the contributions of a member or employer, or both" in the absence of an approved MOU. Section 31631(a) designates the term "***employee contributions***" to describe the member and employer contributions that are allocated for payment by the employee.[12] It is this allocation that "shall be approved in a [MOU]." In contrast, Section 31631(b) preserves the governing body's authority as it existed prior to PEPRA to set "***member contributions***." The "member contribution" is a rate that is set based on actuarial evaluations, and that is not subject to collective bargaining. *See generally* Gov. Code §§ 31453, 31453.5, 31454, 31581. Had the Legislature intended to allow counties unilaterally to change the overall "employee contribution," it would have been consistent in its use of this terminology. It wasn't. And it would run afoul of settled principles of statutory construction to ignore the fact that it used distinct terms: "employee contribution" in (a) and "member contribution" in (b). Accordingly, Section 31631(b) should be interpreted as simply

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10 Additionally, to the extent that the specific requirement that there be an approved MOU is inconsistent with the general language in subsection (b), the specific language of (a) should control. *See* Code Civ. Proc. § 1859 ("[W]hen a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.").

11 Significantly, Section 31631(b) expressly states that its preservation of a governing body's authority as it existed prior to PEPRA "include[s] any restrictions on that authority . . ." Gov. Code § 31631(b). In this subsection, the Legislature was at least as concerned with preserving *limits* on a governing body's ability to act unilaterally as it was with preserving that ability itself.

12 PEPRA uses "employee contribution" elsewhere in a manner consistent with this reading. *See* Gov. Code § 7522.04(b) ("employee contributions" are "the contributions to a public retirement system *required to be paid by a member of the system*"); *see also* § 7522.30(a) ("The standard shall be that . . . employers not pay any of the required employee contribution."); § 7522.04(e); § 20516.5(a); § 20683.2(a).

recognizing that the "member contribution" continues to be subject to change based upon actuarial studies and not subject to collective bargaining, not as eviscerating the plain language of Section 31631(a).

The County will likely claim that Section 31631(b)'s preservation of the their authority "under the law as it existed on December 31, 2012 is a reference to Section 31581.2, which preexisted PEPRA and authorizes employer payment of member contributions. However, Section 31581.2 does not justify the insistence to impasse and the subsequent unilateral action taken here, which was directly contrary to the more recent and more specific Government Code Section 31631(a), a provision that, moreover, expressly provides that it applies "[n]otwithstanding any other law." *See* Gov. Code § 31631(a). Reading Section 31631(a) to mean what it says (that an MOU is necessary in order to require a member to pay the full member contribution) would not render Section 31581.2 dead letter. All that Section 31581.2 provides is that an employer may agree to pay a portion of the member contribution, and that such agreements are subject to an employer's bargaining obligations under the MMBA (that a resolution providing for payment of a pick-up "may" be amended "subject to the provisions of Section 3504 and 3505"). *See* Gov. Code § 31581.2(a). Under Section 31631(a) this remains true—an employer may agree to pay a portion of the member contribution and the negotiation and amendment/repeal of such an agreement remains subject to the MMBA—but now under PEPRA, in order to change the allocation of an employee's obligation to pay all or part of the member or employer contribution, there must be a mutual agreement.

In addition, assuming, *arguendo*, that Section 31581.2 provides authority to the County preexisting PEPRA to cease making the pick-up, Section 31581.2 cannot and does not justify the County's conduct requiring that employees pay a portion of the *employer's* contribution to fund the members' retirement benefits which is part of what the County has done here pursuant to the imposed terms. Section 31581.2 only deals with employer agreements to pay a portion of a member's contributions and provides the Respondents with no authority to compel employees to make a portion of the employer's contributions. There is no authority under CERL or under PEPRA which permits an employer to compel employees in the absence of an MOU to pay a

portion of the employer's contributions to fund the employees' retirement benefits.

Finally, Section 31581.2 does not permit the removal of the entire pick-up because, under the express terms of the parties' agreements regarding the pick-ups, the pick-up was primarily paid under a different provision, Government Code Section 31581.1 (which lacks any language about revoking the pick-up), with only "the remainder" of any pick-up payment falling under Section 31581.2 (Ex. LL, p. 87.)

iv. The broader scheme of PEPRA supports a reading that prohibits removal of the "pick-up" and required payment of employer contributions through impasse procedures

Any interpretation of Section 31631(a) and (b) that would allow the insistence to impasse and the subsequent unilateral imposition of contribution increases absent an approved MOU is also inconsistent within the broader scheme of PEPRA as a whole. When interpreting a statutory provision, a court is required to "harmonize the various parts of a statutory enactment ... by considering the particular clause or section in the context of the statutory framework as a whole." *Fenn v. Sherriff* (2003) 109 Cal. App. 4th 1466, 1474, 1 Cal. Rptr. 3d 185, 192, *quoting People v. Murphy* (2001) 25 Cal.4th 136, 142, 105 Cal.Rptr.2d 387, 19 P.3d 1129. A review of PEPRA more broadly makes it even more clear that impasse may not be used to compel these increased payments.

In addition to Section 31631(a)—which provides that government employers may require represented employees to pay increased benefits, but that any such increase "shall be approved in a memorandum of understanding . . ."—PEPRA also added Government Code Section 31631.5. Section 31631.5 contains a similar provision allowing a government employer to require that employees pay increased contributions, but, unlike Section 31631, this provision does not require an MOU and instead explicitly allows unilateral imposition of increases through impasse procedures. However, also unlike Section 31631 which went into effect immediately, Section 31631.5 does not become operative until January 1, 2018. In relevant part, Section 31631.5 provides:

> (a)(1) Notwithstanding any other provision of this chapter, a board of supervisors or the governing body of a district may require that members pay 50 percent of the normal cost of benefits. . .

(2) Before implementing any change pursuant to this subdivision for any represented employees, the public employer shall complete the good faith bargaining process as required by law, including any impasse procedures requiring mediation and factfinding. This subdivision shall become operative on January 1, 2018. . .

(b) Nothing in this section shall modify a board of supervisors' or the governing body of a district's authority under law as it existed on December 31, 2012, including any restrictions on that authority, to change the amount of member contributions.

Gov. Code § 31631.5. Section 31631.5 is relevant to the current dispute because its impasse language makes it even clearer that Section 31631 (the section that clearly describes the actions taken by the County) does not allow for the use of impasse procedures. If impasse is permitted under both Section 31631 and Section 31631.5, as the County may assert, why does only Section 31631.5 expressly say so?[13]

Section 31631.5 is also notable in that, by way of its later effective date, it works with Section 31631 to eventually "phase-in" additional changes for existing employees. As part of this "phase in," Sections 31631 and 31631.5 allow employers to do different things. Section 31631(a) essentially states that, notwithstanding that pension contributions may be designated as "member contributions" or "employer contributions," the parties may agree to *allocate* the requirement of paying "all or part" of these contributions to the employee. Whatever allocation the parties negotiate is designated as the "employee contributions."[14] This concept is distinct from the setting of the underlying member contribution rate, and Section 31631(a) does nothing to change how the "member" or "employer" contribution is calculated—a conclusion explicitly reinforced by Section 31631(b). Instead, Section 31631(a) deals solely with allocating to the employees the obligation to pay "all or part" of those "member" and/or "employer" contributions. Any such allocation to the

13 Further, Section 31631.5 contains the same "authority under the law as it existed" subsection as Section 31631(b); if this subsection were meant to allow unilateral imposition through impasse procedures, why the need for a separate Section 31631.5 expressly authorizing these procedures in 2018? And why repeat this "authority under the law as it existed" subsection in Section 31631.5?

14 "Notwithstanding any other law, a board of supervisors . . . may . . . without a change in benefits, require that members pay all or part of the contributions of a member or employer, or both, for any retirement benefits provided under this chapter. All of those payments are hereby designated as employee contributions." Gov. Code § 31631(a).

employee (the "employee contribution" must be reached by mutual agreement and set forth in an approved MOU. In contrast, Section 31631.5 does deal with the setting of member contribution rates. It provides that a government employer may require that the member contribution rate for all members be 50 percent of the normal cost of benefits (as is required for new members under Government Code Section 7522.30).[15] Although this is a separate issue from employer pick-up of the member contribution and the requirement that employees pay a portion of the employer contribution, Section 31631.5 is relevant to this dispute because of its express authorization of the resort to impasse procedures as of 2018 is instructive. That language contrasts with the language in Section 31631, which requires the allocation of "employee contributions" to "be approved in a memorandum of understanding executed by the board of supervisors . . . and the employee collective bargaining representative." This distinction is particularly noteworthy because, not only are they part of the same statute, but they are sequential sections with a not inconsiderable amount of parallel language. Reading these statutes together, the only reasonable conclusion is that impasse procedures are not permitted to accomplish the changes described in Section 31631(a).

v. Interpreting Section 31631(a) as prohibiting the removal of pick-ups and prohibiting the requiring of employees to pay a portion of the employer's contribution without an MOU does not violate the Constitution

The County may attempt to argue that interpreting Section 31631 to mean what it says on its face (that an MOU is required to compel members to pay the entire member contribution and/or a portion of the employer's contribution) would violate the state constitution. However, although the Constitution grants governing bodies of counties the power to set employee compensation, *see* Cal. Const. Art. XI, § 1, Art. XI, § 11, it does not follow that the Legislature cannot impose uniform requirements on how pension contributions are structured.

As an initial matter, what is at issue here is a discrete procedural restriction (requiring the

15 Note that together with Section 31631 this means that, in 2018, in addition to being able to compel a member contribution rate of 50 percent of the normal cost rate through impasse under Section 31631.5, government employers will remain able to negotiate allocation to employees of contributions above the member contribution rate (including full payment of both the member and employer contribution) under Section 31631, though not through the use of impasse procedures.

existence of an MOU—or the agreement of the employer and the union--and thereby limiting the use of impasse procedures) with respect to a single discrete element of an employee's overall compensation (the amount contributed towards the pension system). This limited procedural limitation does nothing to interfere with the Board of Supervisor's ability to set overall compensation levels inasmuch as the County remains free to make use of the impasse procedures to reduce employees' salaries or the cost to the county of other fringe benefits to offset the cost of its share of any pension contributions.

Courts have repeatedly acknowledged the ability of the Legislature to place limits on the constitutionally designated powers of local government bodies. *E.g.* *Professional Fire Fighters v. City of Los Angeles* (1963) 60 Cal.2d 276, 32 Cal.Rptr. 830 (upholding Public Safety Officers' Procedural Bill of Rights Act, which provides procedural protections to public safety officers, as applied to charter cities, notwithstanding home rule because it sought to accomplish an objective of statewide concern); *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 205 Cal.Rptr. 794 (charter city was required to comply with requirements of the MMBA in contracting with employees). Only in upon cases involving complete delegation of a government employer's authority to set wages have courts found constitutional problems. *See County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 132 Cal.Rptr.2d 713; *County of Sonoma v. Superior Court* (Ct. App. 1st Dist. 2009) 173 Cal.App.4th 322.[16] Indeed, in *County of Riverside*, the Court even acknowledged that its holding disapproving of the delegation of county authority was a limited one:

> We agree that the Legislature may regulate as to matters of statewide concern even if the regulation impinges 'to a limited extent' . . . on powers the Constitution specifically reserves to counties (§ 1) or charter cities (§ 5). However, *regulating* labor relations is one thing; *depriving* the county entirely of its authority to set

16 Note that the delegation of such power to another body is expressly prohibited by the constitution. Cal. Const., Art. XI, § 11 ("The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation . . . money . . ."); *see also* *County of Riverside*, 30 Cal.4th at 291-95 (finding delegation to binding arbitration panel in violation of Article XI Section 11). The delegation of authority is not an issue here.

employee salaries is quite another.

30 Cal.4th at 287-88 (*emphasis in original*); see generally id. at 289 ("[T]he process by which the salaries are fixed is obviously a matter of statewide concern . . ."). Accordingly, finding that Section 31631(a) limits the procedures that may be used by Respondents poses no constitutional problems.

vi. The County has violated Government Code Section 31678.3, which provides that an employer may only require that represented employees make an additional contribution to their retirement accounts under that section if those increases are collectively bargained and memorialized in an MOU

The County's insistence to impasse on proposals regarding the attorneys' making a portion of the em*ployer's* contributions and the later subsequent unilateral imposition of those proposals as part of the terms and conditions of employment in the absence of a collectively bargained MOU also constituted a violation of Government Code Section 31678.3(d). This section provides, in relevant part:

> A resolution adopted pursuant to subdivision (b) [authorizing application of the 2.7% at 55 benefit formula] may require members to pay a portion of the contributions attributable to past service liability, that would have been required if the benefits specified in the resolution, as adopted by the board of supervisors or the governing body of the district, had been in effect during the period of time designated in the resolution. Any payments required of represented employees shall first be approved in a memorandum of understanding made under the Meyers-Milias-Brown Act and executed by the board of supervisors or the governing body of the district and the employee representatives. The contributions paid by a member pursuant to this subdivision shall become part of the accumulated contributions of the member.

Gov. Code § 31678.3(d). By its plain terms, Section 31678.3 permits a county board of supervisors to require that represented employees make an additional contribution to their retirement accounts for the purpose of funding the past service liability of employees under the 2.7% at 55 retirement formula *only if* those increases are collectively bargained and then memorialized in an MOU executed by the board of supervisors and the collective bargaining representative.

Here, in violation of this requirement, the County insisted that OCAA agree that its members would continue making those contributions and the Board passed Resolution No. 13-015, unilaterally imposing terms and conditions of employment, including a term requiring that employees in the Attorney Unit make an additional contribution equal to 0.54 % of compensation earnable and pay the employer's contribution to fund the cost of the 2.7% at 55 benefit formula (Ex. GG, p. 5; Ex. HH, p. 95). Indeed the County went so far as to modify the prior MOU language to state incorrectly that the parties intended that the implementation of the 2.7% at 55 formula "will continue to be borne entirely by the general member employees . . . ." (Id.) There is no basis for the County making such a unilateral change to the terms and conditions and it is an egregiously inaccurate statement.

The County was on notice, once PEPRA became effective on January 1, 2013, that it was OCAA's position that PEPRA prohibited changes to the retirement contribution pick-up. Mr. Barsook and Ms. Davis discussed this issue and he reiterated in an e-mail to Ms. Davis that it was the County's position that PEPRA had not changed the law with regard to this issue and provided her with a Circular Letter from Cal PERS which Mr. Barsook contended addressed this point (Tr. Vol. III, 66/14-67/4; Ex. AA, p. 1, pp. 7-15). OCAA was indicating it was no longer willing to agree to any MOU which required that the employees pay the employer's contributions or that required the employees to begin paying the pick-ups as both these proposed contract provisions were at a minimum nonmandatory subjects of bargaining, and can also be viewed as impermissible or unlawful waivers of statutory rights. Because there were no bargaining sessions or meetings between the parties after the December 10, 2012 fact finding hearing, OCAA also informed the County of this position at the Board meeting at which the Board was voting to impose the terms and conditions (Tr. Vol. II, 119/15-121/2, 125/15-126/6 , Vol. III, 76/23-77/18).

Furthermore, the proposal that the attorneys pay a portion of the *employer's* contributions, including the portion attributable to past service liability violated Section 31678.3, which provides that a requirement that employees pay these two components of the *employer's* contributions can only take effect if the exclusive bargaining representative agrees in an MOU that the employees will undertake to make the employer's contributions. Once OCAA informed the County that it was

unwilling to enter into an agreement then the County was prohibited by the provisions of PEPRA and CERL from compelling the employees through a unilateral imposition to make these payments. Thus, the County's proposals which it insisted upon throughout the bargaining and were the basis of the unilateral imposition became akin to illegal waivers of statutory rights once it was made clear to the County that OCAA was unwilling to agree to waive the rights in the two statutes and enter into an MOU containing the challenged terms. The two statutes both require that the union agree to the proposals regarding the retirement contributions and agree to have the provisions become part of an MOU. While such proposals may have been permissive subjects of bargaining during the negotiations, because of the requirement in both statutes for an MOU, once it became clear there was not going to be an MOU, the particular terms the County was proposing--by virtue of the language of the statutes-- became illegal or improper waivers of statutory rights since the statutes specifically gave to OCAA the right to agree or not to include the particular terms in an MOU. While here, OCAA did inform the County it was objecting, under such circumstances there is no requirement that the union inform the employer or that it object to the bargaining over the topic. (*City of San Jose* (2013) PERB Decision No. 837-M, pp. 43-44.)

B. The Terms Ultimately Imposed by the County Were Not Reasonably Contemplated Within the County's Final Offer to OCAA and the Parties Were not at Impasse in August of 2012

The County provided OCAA with a LBFO on August 24, 2012 (Ex. V) at a point in the negotiations when OCAA was clearly stating that it was interested in attempting to reach a compromise with the County and explicitly while even Mr. Barsook acknowledges OCAA was explicitly stating that it was ready, willing and capable of further compromises in its positions (Tr. Vol. III, 119/22-120/1). OCAA again signaled its willingness to make further compromises after its members rejected the County's final proposal and once again the County refused to respond and simply barreled ahead with its unilateral imposition of terms and conditions (Exs. EE & FF). Leaving aside the very real issue of whether the parties were truly at impasse at the point in their negotiations at which the County declared impasse because of OCAA's rejection of the LBFO and

subsequently when the County imposed, the County engaged in per se bad faith bargaining because the terms and conditions ultimately imposed by the County on March 5, 2013, were inconsistent with the final proposal made by the County to OCAA in January of 2013.

The County ultimately imposed terms and conditions, which in addition to including unlawful terms, also did not accurately reflect the last offer made by the County to OCAA. On January 25, 2013, Mr. Barsook sent to Ms. Davis a document entitled "Deal Points" which he contended during the hearing was "informally" an attempt to reach an agreement and which represented the recommendations of the fact finder and those items from the previously made LBFO which the parties had not discussed during the fact finding process (Tr. Vol. III, 120/2-18). However, contrary to the testimony of Mr. Barsook, OCAA regarded the "Deal Points" as an offer and at the behest of the County had its membership vote on whether or not to accept the "Deal Points". OCAA expressed to the County that it regarded the Deal Points provided by the County as a proposal from the County and objected to the County's inclusion in the proposal a demand that OCAA dismiss the unfair labor practice it had previously filed (Exs. BB & DD). Indeed, OCAA responded to the Deal Points with a counterproposal of its own which had already been approved by its membership (Ex. EE). Furthermore, the County itself referred to the "Deal Points" as "an *offer* by the County to agree to the Fact Finding Chair's draft recommendations if it resulted in an agreement...." (Ex. GG, p. 4 (emphasis added.)

The terms and conditions unilaterally imposed by the vote of the Board on March 5, included the issue of "Health Insurance—the cost saving changes recommended by the Count's health care consultant (i.e. Mercer) will be implemented at such date as the County determines." (Ex. GG, p. 3.) The actual terms and conditions imposed provided with respect to the change in health insurance premium payments that the County's contribution would remain at 95% of the cost of the premium for employee only coverage with the caveat that such a payment by the County was "Subject to the provisions of subsection G below...." (Ex. HH, p. 83.) However, the final proposal from the County was that the Mercer recommendations would only be implemented with respect to OCAA "when such recommendations or modifications are implemented for a majority of County employees...Implement 'clean-up' language provided to the Association on 8/24/12." (Ex. 10, p.

2.)[17] These issues were not part of the fact finders recommendations and represented a different term or proposal on this issue than the County's position in its 8/24/12 LBFO (Exs. V, GG, pp. 7-8).

Hence, the County's final proposal to OCAA included that OCAA's members would only be subjected to the changes which were part of the Mercer Recommendations when a majority of County employees were also subjected to the changes, yet this is not what the Board voted to unilaterally implement. Furthermore, the terms of the unilateral implementation with respect to this issue of health insurance changes are not even contemplated within the LBFO as at that point the County's position was to "Implement Mercer Recommendations effective January 13, 2013, or such later date as the County determines;" but there are serious objectionable aspects to this term of the LBFO (Ex. V, p. 1). First, the County had obviously moved to a more favorable position on this issue by "clarifying" that the implementation of the changes would occur when the majority of other employees were also covered by the changes and the term of the LBFO is so vague as to be meaningless. By stating that the County was going to implement the changes at a time it unilaterally determined in the LBFO this amounted to a failure to really bargain or even provide a comprehensible proposal that was concrete enough for OCAA to consider. A statement that the County would simply determine when it would implement the changes in essence represents a failure to bargain regarding the issue, a mandatory subject, as it amounts to a proposal that the County would just retain all the discretion and was unwilling to agree with OCAA to a specific time when the changes would be implemented and was demanding that OCAA agree to give the County total discretion.

III. THE COUNTY'S OVERALL BAD FAITH BARGAINING

A. Dilatory Tactics

An examination of the County's conduct over the course of the negotiations establishes that the County did not desire to reach an agreement with OCAA and engaged in conduct which was specifically designed to frustrate the bargaining process. The existence of multiple factors establish that the County had no interest in engaging in bargaining with OCAA. First, there was the delay of

17 As is discussed in _____, in fact there was no language provided on August 24, 2012.

eight months that was solely due to the County's unilaterally placing the negotiations "on hold" in August of 2012. No explanation was ever offered for the County's repeatedly stating that it was not ready to meet with OCAA. The failure to meet and confer or dilatory tactics has even in some circumstances been held to be a per se failure to bargain in good faith. *Gonzales Union High School District* (1985) PERB Decision No. 480 (union's refusal to meet at all over the summer months constitutes a per se violation of the obligation to bargain in good faith).

The County may attempt to argue that its conduct was excused because OCAA did not somehow "demand" to return to the table and/or because the parties were in a round of bargaining that involved concessions which arguably meant that the significant delay in the bargaining was actually to the advantage of OCAA. Any such contentions should be rejected for several reasons. First, it is unclear what the County believes OCAA should have done in response to the County's announcement that the negotiations were "on hold". Beyond making it clear that OCAA was prepared to go forward with negotiations and confirming that it was the County which had placed the negotiations on hold (Ex. L), OCAA could not force the County to come back to the table in the face of its statements that the County was unwilling to meet with OCAA at that time.

Furthermore, whatever supposed advantage there was to OCAA's membership because they were not paying the demanded retirement contributions during the bargaining hiatus, the passage of time actually appears to have had the effect of circumscribing the County's willingness to reach any kind of compromise. Indeed, the position taken by the County at the first meeting once negotiations resumed was that a tiered implementation of the retirement contributions was no longer viable because "that the time had elapsed so much that the value, economic value of the tiered implementation or phased-in implementation had already come and gone. In other words, that even making the retirement effective immediately was going to be more advantageous to the employees and less advantageous to the County, proposing it right now." (Tr. Vo. III, 17/1-7, see also--17/16-18/1.) If the County had not delayed there may theoretically have been more flexibility in the position of the County with respect to the issue of the retirement contributions. Once the parties returned to the table, rather than the County indicating a willingness to compromise and phase in the employees' paying the contributions, the County from the outset of the second round of negotiations

was adamant that the employees must immediately begin paying both the pick-ups and there would be no phasing in of this obligation (Exs.O, p. 2, V, p. 1). [18]

When questioned regarding why the County's position had changed, the response was that the County had not had the benefit of the employees' paying the pick-ups, but this had occurred not because OCAA was unwilling to discuss the issue and potentially compromise on this obviously significant issue, but rather as a result of the County's sef-imposed hiatus. By virtue of its decision, unilaterally taken, to delay the bargaining, the County created a scenario, if one accepts its statements at the table at face value, wherein the very possibility of compromising and achieving an agreement became monumentally more difficult because the County's unilaterally chosen course of action—the 8 month delay in negotiations--provided it with an "excuse" to renege on prior concessions and to maintain a take-it-or-leave-it stance.

For instance, by August of 2011, the parties were moving toward an agreement which called for a phase in over at least two years (Ex. J) and possibly three years of the employees paying the pick-ups (Ex. K). By unilaterally electing to cease bargaining, the County's position thereafter became one of no compromise on this issue which it justified by pointing to its own delay. While the County may be able to point to fiscal concerns as justifying its position at the bargaining table, this ignores that the fiscal concerns it claims justifies its position were self-created, through improper conduct on its part. It is the antithesis of working towards an agreement to take unilateral action which makes an agreement much less likely and through that conduct also thereby deprive the exclusive bargaining representative of its ability to offer compromises and represent the interests of employees in the process. It quite frankly also ignores the very real impact that the pick-ups had on members of the bargaining unit (Tr. Vol. II, 126/10-18). The value to employees who must deal with a very significant decrease in take home pay is in the ability to adjust to the decrease when it is phased in and occurs over time rather than being an all at once decrease of near 10%. The County's actions deprived OCAA and its membership of having some ability to impact this very real major

18 While the County did subsequently offer to delay the payment of one of the pick-ups for five months, this offer was not made until more than six months after the County made an LBFO which included that the attorneys would immediately begin making both pick-ups and its insistence through impasse on this proposal thereby frustrating the bargaining process.

hit in take home pay the County was proposing the employees must accept.

B. Movement Backwards Away From an Agreement

There can also be no doubt that the County backtracked on its proposals and behaved in April of 2012 as though the prior negotiations had not even occurred. When the parties returned to the table after the Count's placing negotiations on hold, the first proposal was not a response to OCAA's outstanding proposal from August of 2011 (Ex. K), which was the last proposal made by a party, but rather to place before OCAA an "INITIAL" proposal as though all that had gone before was wiped clean and had not occurred. The "INITIAL" proposal backtracked on prior concessions the parties had made in their respective positions (eliminated phase-in of contributions, eliminated use of Bar dues to increase OBP) and added at least 10 entirely new items to the County's demands. While there were no ground rules in place that prevented a party from making new proposals, it is an indicator of surface bargaining when one party introduces new proposals which are clearly designed to move the parties away from agreement rather than towards consensus. *Chino Valley USD* (1999) PERB Decision No. 1326.

C. Other Indicators of Surface Bargaining

A comparison between the "INITIAL" proposal and the LBFO reveals that the two proposals are identical with the exception of adding the non-base building 2.5% bonus which would only be available if OCAA entered into an agreement (Exs. O, V). Indeed, the County did not make a single proposal to OCAA between these two proposals its "INITIAL" proposal and the LFBO other than in response to OCAA's demand that it receive a response to the August 2011 proposal OCAA had made immediately before the hiatus. And the County's response to the outstanding proposal consisted of a "No" or "as proposed by County , April 27, 2012" or "see April 27 2012 County proposal" (Ex. P, p. 1). Over the bargaining sessions in 2012, the County made its "INITIAL PROPOSAL" (which stated it included and attached the Mercer Recommendations on health insurance plan changes which were in fact not attached and were only subsequently provided to OCAA on June 15, 2012-- Ex. O, p. 2, Ex. P, pp. 2-5) and thereafter the County did not make a single intervening proposal—not one.

Thus, it is basically beyond dispute that the County unilaterally delayed bargaining for eight

months, returned to the table in April of 2012, with a new negotiator who had not even familiarized himself with the prior proposals exchanged between the parties, and on April 27, 2012, presented a new proposal that amounted to regressive bargaining in many important respects, and that the County thereafter refused and failed to entertain any proposals from OCAA and while making no proposals itself, steadfastly held its position of maintaining *exactly* the same position it had put forward in its April 27, 2012 erroneously labeled "INITIAL PROPOSAL". Clearly, over the next several months the County did not negotiate with OCAA. It merely went through the motions of attending bargaining sessions with no intent of negotiating, and then proceeded to declare the parties were at impasse when OCAA did not accept the County's "INITIAL PROPOSAL"—although it was now titled LBFO.

Not surprisingly, given its lack of movement at the bargaining table, the County also refused to make counterproposals or to even respond to significant proposals that OCAA was making. The County had solicited OCAA's coming up with a performance incentive system (Ex. D) and OCAA did so in such a way that the distinguished level steps it was proposing not only provided the performance incentive system the County stated it was seeking but also sought to be as cost neutral as possible given the County's position that it did not want to increase salaries. Despite the fact that the County had solicited a performance incentive system, the County's consistent response to OCAA's proposals regarding the distinguished level step after the second round of bargaining was to reject it and offer no feedback or suggested changes (Tr. Vol. I, 94/9-101/9, 102/20-105/24). The same is true with respect to the issue of a salary reopener that was tied to the economic conditions of the County. While in August of 2011, the County indicated it was interested in a salary reopener and thought one would be no problem, come the second round of negotiations in April through August of 2012, the County refused to actually entertain the idea. OCAA explicitly stated that it was willing to both have the attorneys salaries tied to any possible decrease in revenues such that it was explicitly proposed that decreases would result in mandatory furloughs generating cost savings for the County and it was also stated at the bargaining table that OCAA was willing to take total compensation into consideration (Tr. Vol. I, 110/3-26). Despite the changes made to its proposal over time to respond to concerns raised by the County, the County simply refused to seriously

entertain the proposal or to make its own counterproposal regarding a salary reopener that was tied to both increases and decreases in the revenue stream and to the issue of total compensation.

It is difficult to imagine a more clear case of bad faith bargaining and there are numerous indicators under the totality of circumstances test that the County was not bargaining in good faith. Furthermore, OCAA was offering more concessions and clearly stating that it was willing to make changes to its proposals in an attempt accommodate the County's concerns and to reach an agreement when the County simply announced the parties were at impasse if OCAA would not accept the terms of the "INITIAL PROPOSAL". Such a take-it-or-leave-it approach to bargaining is consistent with an impermissible rush to impasse given that the County was refusing to explore the possibility of the compromises that OCAA was offering and has recently been set forth as a separate indicator of bad faith in support of a surface bargaining unfair labor practice charge. *City of San Jose* (2013) PERB Decision No. 2341-M, at pp. 20-21.

Furthermore, the County failed to provide what was critical information regarding the actual cost of salary and benefits for attorneys. Such a failure to provide information can be viewed as another indicator under the totality of circumstances test.

Indeed, OCAA even made a final effort to reach compromise by agreeing to all the terms offered by the County after the factfinding with the additional elements of a salary reopener and the distinguished level steps and the County refused to respond and simply moved forward with its unilateral imposition (Exs. EE, GG). Leaving aside the issue of whether the parties were truly at an impasse given the concessions that OCAA was making, the County clearly absolutely refused after August 2011, to make any counterproposals on this issue or to attempt to reconcile the parties differences in regards to the concept of either a salary reopener or the distinguished level steps, despite the fact that both these proposals had been solicited by the County, and at one time had been met with statements of interest.

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CONCLUSION

OCAA has established that the County unlawfully insisted to impasse on three elements of its proposals regarding employees paying retirement contributions and that such conduct constituted per se bad faith. In addition, under the totality of circumstances test, OCAA has established the existence of bad faith bargaining due to the failure to provide requested cost information, impermissible delay, regressive bargaining, failure to respond to OCAA proposals, and lack of movement from its 'INITIAL PROPOSAL" to its LBFO. Given this evidence the County should be held to have engaged in bad faith bargaining. Therefore, its March 5, 2013 unilateral imposition was unlawful. An order should issue to this effect and the imposition must be "undone," the parties ordered to return to the table and the members of the bargaining unit should be ordered to be made whole for any loss of salary and benefit resulting from the unlawful imposition.

Respectfully submitted,

Dated: February 19, 2014

REICH, ADELL & CVITAN
A Professional Law Corporation

By: Marianne Reinhold
MARIANNE REINHOLD
Attorneys for Charging Party
ORANGE COUNTY ATTORNEYS ASSOCIATION

PROOF OF SERVICE
(Code Civ. Proc. § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party of the within action; my business address is 2670 North Main Street, Suite 300, Santa Ana, CA 92705.

On **February 19, 2014**, I served the document described as **CHARGING PARTY'S CLOSING BRIEF (UPC No. LA-CE-814-M)** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Directed to:

Eric J. Cu
Administrative Law Judge
Public Employment Relations Board
Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2804
PERB main phone: (818) 551-2822
Facsimile: (818) 551-2820
E-file: PERBe-file.LARO@perb.ca.gov

Copy sent to:

Adrianna E. Guzman
Liebert Cassidy Whitmore
6033 West Century Boulevard, 5th Floor
Los Angeles, CA 90045
Telephone: (310) 981-2000
Facsimile: (310) 337-0837
aguzman@lcwlegal.com

☑ **BY MAIL:** I deposited such envelope in the mail at Santa Ana, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

☐ **BY OVERNIGHT COURIER:** I sent such document(s) on the above date, by overnight delivery with postage thereon fully prepaid at Santa Ana, California.

☐ **BY FAX:** I sent such document by use of facsimile machine telephone number (714) 834-0762. The facsimile cover sheet and confirmation are attached hereto indicating the recipient's facsimile number and time of transmission pursuant to California Rules of Court Rule 2008(e). The facsimile machine I used complied with California Rules of Court Rule 2003(3) and no error was reported by the machine.

☐ **BY PERSONAL SERVICE:** I placed the above document in a sealed envelope. I caused said envelope to be delivered by hand to the above addressee.

☑ **BY EMAIL:** I caused to be sent such document by use of email to the email addressee above. Such document was scanned and emailed to such recipient.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **February 19, 2014**, at Santa Ana, California.

Rita A. Pollard

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