

1 Adrianna E. Guzman, Bar No. 188812
aguzman@lcwlegal.com
2 LIEBERT CASSIDY WHITMORE
A Professional Law Corporation
3 6033 West Century Boulevard, 5th Floor
Los Angeles, California 90045
4 Telephone: 310.981.2000
Facsimile: 310.337.0837

5 Attorneys for Respondent
6 COUNTY OF ORANGE

7
8 THE STATE OF CALIFORNIA

9 PUBLIC EMPLOYMENT RELATIONS BOARD

10 ORANGE COUNTY ATTORNEYS
11 ASSOCIATION,

PERB Case No.: LA-CE-814-M

12 Charging Party,

**RESPONDENT COUNTY OF ORANGE'S
CLOSING BRIEF**

13 v.

14 COUNTY OF ORANGE,

15 Respondent.
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

1

2 **I. INTRODUCTION** 1

3 **II. PROCEDURAL HISTORY**..... 2

4 **III. WITNESSES**..... 4

5 **A. OCAA’s Witnesses** 4

6 **1. Karen Davis** 4

7 **2. Larry Yellin**..... 4

8 **B. County’s Witnesses**..... 5

9 **1. Bruce Barsook**..... 5

10 **2. Frank Kim** 5

11 **IV. APPLICABLE LAWS GOVERNING RETIREMENT** 6

12 **A. County Employees Retirement Law of 1937**..... 6

13 **B. Public Employees’ Pension Reform Act of 2013** 7

14 **V. FACTS ESTABLISHED AT THE HEARING** 7

15 **A. OCAA Bargaining Unit** 7

16 **B. County’s Budgeting System and Revenue Sources** 8

17 **C. County Adopts Enhanced Retirement Benefit**..... 9

18 **D. 2007-2009 MOU** 10

19 **E. 2007-2009 MOU Extended to Address County’s**
Financial Situation 11

20 **F. County’s 2011-2012 Budget**..... 11

21 **G. 2011 Negotiations** 12

22 **1. County Contacts OCAA to Commence Negotiations**..... 12

23 **2. May 13, 2011 Meeting**..... 13

24 **3. June 3, 2011 Meeting**..... 14

25 **4. June 10, 2011 Meeting**..... 14

26 **5. June 17, 2011 Meeting**..... 15

27 **6. July 8, 2011 Meeting**..... 15

28 **7. July 22, 2011 Meeting**..... 16

1	8.	August 12, 2011 Meeting.....	16
2	9.	Negotiations Placed On Hold.....	17
3	10.	OCAA Asks County to Hold Off Paying the Orange County Bar Dues.....	17
4	H.	County’s Financial Concerns for Fiscal Year 2012-2013.....	18
5	I.	2012 Negotiations	18
6	1.	January 2012	18
7	2.	February 2012	19
8	3.	March 2012	19
9	4.	April 27, 2012 Negotiation Meeting.....	19
10	5.	OCAA Unable to Meet Until June 15, 2012.....	22
11	6.	June 15, 2012 Negotiation Meeting	23
12	7.	June 29, 2012 Meeting	24
13	8.	July 6, 2012.....	25
14	9.	July 13, 2012 Meeting Canceled.....	25
15	10.	July 20, 2012.....	26
16	11.	County’s July 27, 2012 Proposal	27
17	12.	OCAA’s August 17, 2012 Proposal.....	28
18	13.	The County’s Last, Best, and Final Offer	29
19	J.	OCAA Engages in Direct Dealing	31
20	K.	County Declares Impasse And the Parties Participate in Fact Finding	32
21	L.	County Expresses Willingness to Accept Fact Finder’s Draft Report if OCAA Also Accept.....	32
22	M.	OCAA Rejects the Deal Points	34
23	N.	County Imposes its Last, Best, and Final Offer	36
24	O.	County’s Fiscal Year 2013-2014 Budget.....	36
25	P.	County Adopts Mercer Recommendations	37
26	VI.	ARGUMENT	37
27			
28			

1	A.	OCAA’s Allegation that the County Unilaterally Suspended Bargaining Must Be Dismissed Because It is Time-Barred 38
2		
3	1.	OCAA’s Allegation that the County Unilaterally Suspended Negotiations in August 2011 is Barred by the Statute of Limitations..... 38
4		
5	2.	OCAA Knew No Later than April 27, 2012 that the County’s Proposal Was Different from its Last Proposal in 2011.....:..... 40
6		
7	B.	OCAA Failed to Prove by a Preponderance of the Evidence that the County Violated Government Code section 3505 41
8		
9	1.	There is No Evidence the County Engaged in Any Conduct That Would Constitute a “Per Se” Violation of the Duty to Meet and Confer 41
10		
11	2.	OCAA Failed to Prove by a Preponderance of the Evidence That the County’s Conduct Constitutes Bad Faith Bargaining Under the “Totality of Circumstances” Test 42
12		
13	3.	OCAA Failed to Prove by a Preponderance of the Evidence that the County Failed to Respond to OCAA’s Proposals Submitted in Response to the County’s April 27, 2012 Proposal 44
14		
15	4.	The Evidence Proved that the County Acted in Good Faith With the Intent of Reaching Agreement 44
16		
17	C.	OCAA Failed to Prove By a Preponderance of the Evidence That the County Improperly or Prematurely Declared Impasse 46
18		
19	D.	OCAA Failed to Prove by a Preponderance of the Evidence That the County’s Imposition Was Inconsistent with its Last Best and Final Offer 47
20		
21	E.	OCAA Failed to Prove that the County Violated the PEPR 48
22	VII.	CONCLUSION..... 51
23		
24		
25		
26		
27		
28		

1 **I. INTRODUCTION**

2 This case involves negotiations between Respondent County of Orange and Charging
3 Party Orange County Attorneys Association (OCAA) in 2011 and 2012 for a successor
4 memorandum of understanding (MOU). OCAA accuses the County of bad faith bargaining,
5 improperly declaring impasse, and imposing terms inconsistent with prior offers and in violation
6 of the Public Employees' Pension Reform Act of 2013. It claims that through such actions, the
7 County violated Government section 3505 of the Meyers-Milias-Brown Act (MMBA), and PERB
8 Regulation 32603(c).

9 OCAA, however, failed to prove its case by a preponderance of the evidence. First, the
10 allegation regarding the unilateral suspension of bargaining is time-barred as OCAA knew well
11 before May 16, 2012, that the County had unilaterally placed negotiations on hold. Similarly,
12 OCAA's allegation that the County engaged in regressive bargaining is also time barred. Any
13 allegation that the County's April 27, 2012 proposal omitted all progress purportedly made in
14 prior negotiations had to have been filed no later than October 27, 2012 to comply with the six
15 months limitations period.

16 Second, OCAA failed to prove by a preponderance of the evidence that the County's
17 proposals were regressive or that it reneged on any prior agreements. Instead the evidence
18 established that the County never agreed to phase in OCAA's payment of the employee portion of
19 the retirement contribution. While the County may have initially offered that in 2011, that
20 proposal was contingent on OCAA accepting the new retirement formula. OCAA never accepted
21 the new retirement formula during the 2011 negotiations. Further, it made its acceptance of that
22 proposal contingent on other terms.

23 Third, OCAA failed to prove by a preponderance of the evidence that the parties were not
24 at a genuine impasse. Although OCAA may have claimed that it had room for additional
25 movement, the fact remains that, having received the County's last, best and final offer, OCAA
26 never provided a counter-proposal that indicated agreement may be possible. In fact, not until
27 the parties completed all applicable impasse resolutions and, only *after* the County expressed a
28 willingness to accept the fact finder's draft report *if* OCAA accepted it, did OCAA ever present

1 the County with another proposal. That proposal, however, did not reflect a change in position
2 that would indicate agreement may be possible.

3 Instead, OCAA continued to seek the addition of “distinguished level” steps to the salary
4 schedule, continued to demand a phase-in of the employee portion of the retirement contribution,
5 and continued to be opposed to advisory arbitration and the elimination of seniority as a factor for
6 purposes of layoff. As a result, the County properly declared impasse in September 2012, and the
7 impasse continued throughout mediation and the completion of fact finding.

8 Fourth, OCAA failed to prove by a preponderance of the evidence that the County
9 imposed terms inconsistent with its prior offers. The record proves that the County’s “deal
10 points” were not, as OCAA claimed, a second last, best and final offer, but a good faith attempt to
11 reach a settlement based on the fact finder’s recommendations. The record further established
12 that all of the terms imposed were reasonably comprehended within the County’s proposals
13 discussed at the bargaining table.

14 Finally, OCAA failed to prove by a preponderance of the evidence that the County’s
15 imposition violated the Public Employees’ Pension Reform Act of 2013 (PEPRA). Instead, the
16 record established that OCAA’s claim is based on its misinterpretation of that statute’s
17 provisions.

18 Therefore, because OCAA failed to prove its claims by a preponderance of the evidence,
19 the unfair practice charge and the complaint which issued must be dismissed in their entirety and
20 with prejudice.

21 **II. PROCEDURAL HISTORY**

22 OCAA filed its UPC against the County on November 16, 2013. The County submitted
23 its position statement and response on December 17, 2012. On April 8, 2013, PERB issued a
24 complaint and alleged that the County:

- 25 • unilaterally suspended bargaining for a period of approximately six months;
- 26 • engaged in regressive bargaining by twice indicating a willingness to move away
27 from its initial positions with respect to unit member salaries and retirement
28 contributions, then providing subsequent proposals omitting all progress made

1 during negotiations;

- 2 • failed to respond to OCAA's proposals submitted in response to the County's
3 April 27, 2012 proposal.

4 The complaint alleged that such actions violated Government Code sections 3050 and
5 3506.5(c), and PERB Regulation 32603 (c). (See Complaint in PERB file.) The County filed its
6 answer on May 3, 2013. The County denied the allegations, affirmatively alleged additional
7 facts, and asserted various affirmative defenses, including waiver.

8 On April 29, 2013, OCAA filed an amended charge. It alleged that the County's
9 imposition was unlawful because (1) there was no bona fide impasse, (2) it was inconsistent with
10 prior offers; and (3) the imposition violated portions of the PEPRA. OCAA did not, however, file
11 a motion to amend the complaint, as required by PERB Regulation 32647(a). (See PERB file.)
12 The parties participated in an informal settlement conference on May 2, 2013, but were unable to
13 resolve the dispute, and the matter was set for hearing. (See PERB file).

14 On October 25, 2013, Marianne Reinhold, OCAA's counsel emailed Administrative Law
15 Judge (ALJ) Eric Cu and inquired about OCAA's purported motion to amend the complaint.
16 Adrianna E. Guzman, the County's counsel, emailed the County's objections to ALJ Cu that same
17 day. (See PERB file.)

18 A formal hearing was held on October 28, 29, 30 and 31, 2013. At the outset of the
19 hearing, ALJ Cu heard from the parties regarding OCAA's motion to amend the complaint, and
20 thereafter granted OCAA's request include the following allegations:

- 21 • The County imposed terms upon OCAA on or about March 5th, 2013;
22 • Through such actions the County violated the MMBA because the parties were not
23 at impasse, the terms imposed were inconsistent with prior offers, and the
24 imposition violated the Public Employees' Pension Reform Act (PEPRA).
25 (Hearing Transcript,¹ Vol. I, p.7:21-14:22.)

26 As authorized by ALJ Cu, the County chose to file its answer to the amended complaint
27 after the close of the hearing. (HT Vol. I, p.14:23-15:5.) On November 7, 2013, the County filed

28 ¹ All future references to the Hearing Transcript shall be identified as "HR" followed by the
applicable transcript volume, identified as "Vol."

1 its answer to the amended complaint. (See PERB file.)

2 **III. WITNESSES**

3 **A. OCAA'S WITNESSES**

4 **1. Karen Davis**

5 Ms. Davis has been employed by OCAA as its consulting manager since 2008. (HT Vol. I,
6 p. 21:27-22:4.) Her duties include serving as OCAA's liaison to the County, assisting with
7 negotiations, running the OCAA office, representing attorneys through disciplinary and grievance
8 procedures, attending investigatory hearings, and contracting for supplemental benefits to unit
9 members by OCAA. (HT Vol. I, p.22:5-13.) Ms. Davis served as an OCAA spokesperson during
10 recent bargaining. (HT Vol. I, p.22:14-16.)

11 Prior to being employed by OCAA, Ms. Davis worked for the County for 28 years, and, at
12 various times, worked in the Sheriff's Office, the County Administrative Office², and the District
13 Attorney's Office. (HT Vol. I, p.22:17-23:10.) Her employment with the County ended in either
14 2002 or 2003. (HT Vol. I, p.124:13-17.) She has a Bachelor's degree in criminology and
15 sociology. (HT Vol. I, p.125:14-20.)

16 Ms. Davis also serves as the Executive Director of the Orange County Management
17 Association, and has previously worked with the Riverside Attorneys Association, the San
18 Bernardino Attorneys Association, and the Kern County Managers and Attorneys. (HT Vol. I,
19 p.23:21-28.)

20 Prior to the 2011 OCAA negotiations, Ms. Davis had participated in less than ten
21 negotiations as either chief spokesperson or in a shared chief spokesperson capacity. For Orange
22 County, in particular, she has negotiated a total of three MOUs. (HT Vol. II, p.9:15-10:11.)

23 **2. Larry Yellin**

24 Mr. Yellin has worked for the County since 1994, and currently holds the position of
25 senior deputy district attorney. (HT Vol. II, p. 54:3-11.) For the last 11 years, he has worked in
26 the District Attorney's Homicide unit. Initially, he was assigned to respond to homicides that
27 occurred within specific agencies, but for the last seven years, his primary focus has been on cold

28 _____
² That office is now called the County Executive Office. (HT Vol. I, p.23:16-20.)

1 case homicides (cases that have remained unsolved and unworked for approximately three years).
2 (HT Vol. II, p.54:12-27.)

3 As a senior deputy district attorney, he regularly takes cases to trial. For the last 11 years,
4 he has averaged four to six trials each year, with most trials lasting two to three weeks. (HT Vol.
5 II, p.55:8-21.) These trials all involve preparation both before and after the criminal charges are
6 filed. (HT Vol. II, p.55:22-57:6.)

7 Mr. Yellin has been OCAA's President for about seven years. In that capacity, aside from
8 serving as OCAA's lead negotiator during contract negotiations, his responsibilities include
9 delegating tasks to OCAA's executive board members, being a cosigner on all of OCAA's
10 financial issues, and making hiring decisions. (HT Vol. II, p. 57:28-58:5; p.59:27-60:12.)

11 Mr. Yellin has limited experience and familiarity with both the MMBA and labor
12 relations. He has never handled any cases involving either unfair labor practice charges or the
13 County Employees Retirement Law of 1937 (CERL or '37 Act, Gov. Code § 31450 et seq). (HT
14 Vol. II, p.128:3-129:5.) He also has no responsibility for the preparation of the District
15 Attorney's budget. (HT Vol. II, p.129:18-21.)

16 **B. COUNTY'S WITNESSES**

17 **1. Bruce Barsook**

18 Mr. Barsook has represented public agencies in contract negotiations since 1981. (HT Vol.
19 III, p.7:21-27.) Over those 32 years, Mr. Barsook has participated in hundreds of negotiations,
20 and has, in the majority of them, served as the agency's chief negotiator. (HT Vol. III, p.7:28-
21 8:5.) In late January 2012, the County contracted with Mr. Barsook to perform labor negotiations
22 and labor relations-related services with its various employee organizations, including OCAA.
23 (HT Vol. III, p.3-16.)

24 **2. Frank Kim**

25 Mr. Kim is the County's Chief Financial Officer (CFO). (HT Vol. III, p.135:14-17.) He
26 received his permanent appointment to that position in August 2013, but previously had served as
27 Interim CFO for one year. (HT Vol. III, p.135:18-24.) Mr. Kim has worked for the County since
28 November 1995. He started as an accountant, then moved on to financial analyst, then budget

1 analyst, and served as budget manager for 10 years before his appointment as Interim CFO. (HT
2 Vol. III, p.136:9-18.) He has an Accounting degree, as well as a Master's degree in Public
3 Administration. (HT Vol. III, p.136:19-22.)

4 As the County's CFO, Mr. Kim is responsible for the County's budget, public finance as
5 related to debt issues, risk management, liability and the County's purchasing department. (HT
6 Vol. III, p.136:23-28.) In particular to the budget, he and his staff set the budget instructions and
7 policies, set assumptions related to salaries and employee benefits (SEB) using a centralizing
8 salary forecasting system, coordinate the budget process, pull various data from the County
9 departments, consolidate the data and present it to the BOS for adoption. (HT Vol. III, p.137:1-
10 14; p.137:26-138:2.)

11 Mr. Kim is an unrepresented employee, and part of the executive management group.
12 That group has been paying 100% of the employee retirement contribution since July 2013. (HT
13 Vol. III, p.146:25-147:7; HT Vol. IV, p.18:15-20; p.19:10-21.)

14 **IV. APPLICABLE LAWS GOVERNING RETIREMENT**

15 **A. COUNTY EMPLOYEES RETIREMENT LAW OF 1937**

16 The County Employees Retirement Law of 1937 ("CERL" or "'37 Act") requires that
17 pension benefits be funded from two sources: (1) contributions made by the County; and (2)
18 contributions made by employees who are members of the retirement system. The County
19 contribution rate is calculated as a certain percentage of the total compensation of all members.
20 The contribution rate to be paid by each member is calculated as a certain percentage of the
21 compensation of that member. The member contribution rate will vary depending on the age of
22 the member when he or she became a member of the Orange County Retirement System
23 (OCERS). (Gov. Code, §§ 31453, 31453.5, 31454, 31463, 31581.)

24 The CERL requires that the full amount of the member's contribution rate be
25 automatically deducted from each employee paycheck. (Gov. Code, §§ 31625 and 31625.1.) But
26 it also allows the County, if it *chooses*, to pay all or a portion of the contribution required of
27 employees, but not for employees who first enter the OCERS as a member on or after January 1,
28 2013. (Gov. Code, §§7522.30, 31581.1, 31581.2.)

1 **B. PUBLIC EMPLOYEES' PENSION REFORM ACT OF 2013**

2 The Public Employees' Pension Reform Act of 2013 (PEPRA), which became effective
3 on January 1, 2013, made sweeping changes to California public retirement systems, including
4 county retirement systems operating under the CERL, such as OCERS. Under the PEPRA,
5 changes to retirement systems impact public employees in somewhat different ways depending on
6 whether the employee is considered a "new member" of a public retirement system. A "new
7 member" is generally defined as an employee who first enters the retirement system on or after
8 January 1, 2013, with some exceptions. (Gov. Code §7522.04(f).) All other employees are often
9 referred to as "classic" members.

10 PEPRA is intended to curtail enormous costs to public employers in sustaining
11 substantially under-funded pension systems. To this end, the PEPRA includes: a prohibition on
12 retirement benefit formula enhancements and institutes lower formulas for new members; a
13 reduction in items of compensation that may be pensionable; a requirement that new members
14 pay a member contribution rate that is one-half of the normal cost of the retirement benefit; a
15 prohibition on employers picking-up any part of new member contributions; and avenues for
16 employees to share any portion of the employer's contributions to the retirement system. (Gov.
17 Code §§7522.02, 7522.20-7522.30, 7522.34, 20516 and 31631.)

18 The statutory aim of the PEPRA is to reduce, *not increase*, employer costs.

19 **V. FACTS ESTABLISHED AT THE HEARING**

20 **A. OCAA BARGAINING UNIT**

21 OCAA represents employees in five classifications: Attorney I, II, III, IV and Senior
22 Attorney. (HT Vol. I, p.27:1-9.) Unit members in these classifications work in the District
23 Attorney's Office, the Public Defender's Office, Child Support Services, and County Counsel.
24 There are approximately 500 unit members, and the majority of them work as deputy district
25 attorneys. (HT Vol. I, p.27:10-28:2; HT Vol. II, p.69:25-70:15.)

26 Unit members are not considered "at-will" employees, and, except for unit members in
27 probationary status, can only be terminated for "just cause." (HT Vol. II, p. 139:14-140:1.)
28

1 **B. COUNTY'S BUDGETING SYSTEM AND REVENUE SOURCES**

2 BRASS is the budgeting system the County uses to create and utilize its budget. Through
3 this system, the County can forecast and calculate salaries for the budget document. At the end of
4 each December, the County has six months of actual salary data. The County extracts those six
5 months of salary data for all employees from its payroll and puts it into its budgeting system. The
6 County then looks at the information by employee and by bargaining group to see the employee's
7 current rate, and step within range. (HT Vol. III, p.138:1-19.)

8 The budgeting system assumes that an employee will have a standard evaluation and will
9 receive a two-step increase, if the employee has not already reached the top step on the salary
10 range. Those salary assumptions, as well as assumptions on employee benefits, like pension and
11 health plans, are used to establish the budget. (HT Vol. III, p.138:20-139:12.)

12 Since budgets are forecasts, there will be differences because those assumptions may not
13 actualize. But the County typically does not see large variances between what was budgeted and
14 what actually occurs. In general, the budgeted amount and actual amount on salaries will
15 generally be very close because there are not many unusual pay events. (HT Vol. III, p.139:13-
16 140:6; p.155:25-156:14.) There will also typically be slight overages in budgeted costs versus
17 actual costs because the County errs on the side of having a larger budget. (HT Vol. 156:15-
18 157:3.)

19 The County's budget is approximately \$5.4 billion, of which \$650 million are general
20 purpose revenues. Although general purpose revenues make up a very small component of the
21 overall County budget (11-12%), 90% of those general purpose revenues come almost entirely
22 from property taxes. (HT Vol. III, p.147:25-148:8.) The County receives most of the 16 different
23 property tax allocations in two disbursements: one in January, which is the first secured property
24 tax allocation, and the other in late April, which is the second secured property tax allocation.
25 Secured property taxes is the bulk of the value of assessed values in the County. The unsecured
26 property taxes are related to boats and RVs, and they come in throughout the year. (HT Vol. III,
27 p.149:25-150:6.)

28 The County relies upon its reserves to cover that period between property tax allocations.

1 When reserves are low, however, the County issues a “tax and revenue anticipation note”
2 (TRAN), which is a short-term debt, or it borrows from other funds. But if the County borrows
3 from other funds, it has to repay those funds with interest. This has always been a challenge for
4 the County because of its low reserve. (HT Vol. III, p.150:7-27.)

5 The rest of the County’s budget, the remaining 88%, comes from reimbursement the
6 County receives from the State or the federal government for providing and/or administering such
7 services as Food Stamps and CalWorks. (HT Vol. III, p.148:20-149:3.)

8 Although general purpose funds comprise only a small portion of the County’s budget,
9 they are critical to the County because the County does not have other revenue sources to fund
10 those services the County is required to provide. The County has to have a sheriff, an assessor, an
11 auditor-controller, and a board of supervisors. It is also required to provide general relief and
12 certain social services. (HT Vol. III, p.148:9-149:3.)

13 General purpose funds are also used to fund classifications represented by OCAA. The
14 Public Defender’s office is approximately 95% general revenue funded. The County Counsel’s
15 office also receives significant general purpose revenue. The District Attorney’s office receives
16 the bulk of its funding from general purpose revenue, but also receives funding from a public
17 safety sales tax (Prop. 72); the District Attorney’s office receives 20% of the total Prop. 72 funds.
18 Child Support Services, however, are 100% funded by a State offset. (HT Vol. III, p.149:4-21;
19 p.151:22-153:19.)

20 **C. COUNTY ADOPTS ENHANCED RETIREMENT BENEFIT**

21 In 2004-2005, the County adopted an enhanced retirement benefit which provided
22 employees with the enhanced retirement formula of 2.7% at age 55 – a significant enhancement
23 from the 1.67% at age 57.5 that existed previously. In exchange, employees agreed to pay the
24 entire cost of that enhanced benefit, including the County’s portion. (HT Vol. I, p.44:14-22;
25 p.135:16-136:3; **Exhibit LL**, pp. 86-88.) Neither Ms. Davis nor Mr. Yellin were involved in the
26 negotiations that resulted in the increased benefit of 2.7% at age 55. (HT Vol. I, p.136:11-16; HT
27 Vol. II, p.60:19-28.)
28

1 **D. 2007-2009 MOU**

2 The parties 2007-2009 MOU provided unit members with an Optional Benefit Plan
3 contribution of \$1500 for the benefit year. As provided by the MOU, however, that amount
4 increased to \$2,000 on January 1, 2008. (See p.45 of **Exhibit LL**.)

5 The MOU also included language which expressly provided that the enhanced retirement
6 formula shall not result in any increased cost to the County, that any difference shall be paid by
7 employees, and that this provision shall last in perpetuity beyond the expiration of the MOU:

8 3. Effective the pay period that commences on June 24, 2005, general
9 members in this bargaining unit will make an additional employee
10 contribution to the retirement system, in an amount equal to 0.54% of
11 compensation earnable. This contribution will be in addition to the normal
12 employee contribution calculated under Section 31621.8 of the
13 Government Code, and will be in addition to the employee contribution
14 required to help provide full reserve funding of cost-of-living increases to
15 retirees for all active members of the retirement system...The additional
16 employee contribution made under this paragraph shall be in accordance
17 with, and for the purposes stated, in Section 31678.3(d) of the Government
18 Code. ***This additional contribution shall continue beyond the expiration
19 date of this MOU, for the purposes of amortizing, over a 30 year period,
20 the cost of the retirement benefit improvement resulting from the
21 adoption of the "2.7 at 55" benefit formula in Section 31676.19 of the
22 Government Code.***

23 4. It is the intent of the parties that the ***implementation of the 2.7% at 55***
24 ***retirement benefit formula shall be without additional cost to the County.***
25 ...the County and OCAA will annually review its costs including costs
26 impacted by changes in the investment earnings and evaluate whether any
27 adjustments to employee contributions are necessary.

28 **(Exhibit LL, pp.86-87, emphasis added.)**

 Thus, the parties contractually agreed that employees would pay the difference between
the County's employer contribution for the previous retirement formula and the County's now
higher contribution rate for the enhanced retirement formula, as well as paying the "past service
liability," and that such payment shall continue beyond the expiration of the MOU. (**Exhibit LL**,
pp.86-87.) The parties also agreed that the value of this employee contribution (the "Reverse
Pick-up) would be reevaluated and adjusted by the County on an annual basis to ensure that the
County is not incurring any increased cost for the enhanced retirement formula. (**Exhibit LL**,
pp.86-87.)

1 **E. 2007-2009 MOU EXTENDED TO ADDRESS COUNTY’S FINANCIAL**
2 **SITUATION**

3 In 2009, the County approached OCAA for concessions because of the County’s financial
4 situation.³ OCAA agreed to defer to 2010 the 3.5% general salary increase that was set to go into
5 effect in June 2009. (HT Vol. I, p.25:1-18; see p. 4 of **Exhibit A.**) In addition, because the
6 County received less Prop. 172 sales tax funds than anticipated, unit members in the District
7 Attorney’s office took a one-day-a-week furlough, which resulted in a 5% pay cut for each pay
8 period. (HT Vol. I, p. 25:19-27.) That furlough lasted no more than eight months. (HT Vol. I, p.
9 125:21-127:14.) These temporary cost-saving measures were expected to result in gross savings
10 of approximately \$3 million. (HT Vol. I, p.26:22-28; see **Exhibit A.**)

11 Due to continued financial difficulties, however, the County approached OCAA in 2010
12 and asked it to consider reducing the impact of the upcoming salary increase. The parties agreed
13 that each unit member would take an additional 24 hours of furlough, which would save the
14 County approximately \$800,000. (HT Vol. I, p.28:3-22; see **Exhibit B.**) OCAA also gave up
15 payment of the Orange County Bar dues for a one-year period; that concession saved the County
16 approximately \$86,000. The County, however, does not require membership in the Orange
17 County Bar Association. (HT Vol. I, p.29:2-12; p.129:11-14; **Exhibit B.**)

18 **F. COUNTY’S 2011-2012 BUDGET**

19 For fiscal year 2011-2012, the County’s countywide budget for salaries and employment
20 benefits (SEB) was \$1.7 billion, but the actual costs were just slightly less. (HT Vol. III, p.140:7-
21 141:4; p.155:18-24.) Fiscal year 2011-2012 was one of the most challenging years for the County
22 as it was coming off of the Great Recession, which started in 2008, and continued for several
23 years. At the end of the recessionary period, the State passed SB 89, which took some of the
24 County’s general fund revenues (vehicle license fees) and redirected those funds for State general
25 fund purposes. That State action resulted in the County suffering an economic loss of
26 approximately \$73-76 million, which amounted to slightly more than 10% of the County’s

27 _____
28 ³ PERB has previously recognized that in “fiscal year 2009-2010, the County’s poor fiscal health
required severe budget cutting measures” and several departments had experienced layoffs.
(*County of Orange* (2013) PERB Dec. No. 2350-M.)

1 general purpose revenue. (HT Vol. III, p.141:5-24; p.158:25-159:7.)

2 The County responded to that economic loss by taking steps to balance its revenue
3 shortfall. It deferred capital projects and IT projects, and initiated a hiring freeze. It used some
4 reserves, and reallocated some flexible revenues, but did not use them. And while there were
5 some small furloughs the County tried not to significantly impact labor. (HT Vol. III, p.141:25-
6 142:18; p.159:27-161:23; p.162:5-163:24.)

7 **G. 2011 NEGOTIATIONS**

8 **1. County Contacts OCAA to Commence Negotiations**

9 In March 2011, Bob Leys, Assistant Director for Human Resources, emailed Ms. Davis to
10 commence negotiations for a successor MOU. (HT Vol. I, p.30:24-31:1; p.31:20-32:2; p.32:20-
11 22; **Exhibit C**.) Although the County wanted negotiations to start in April 2011, OCAA was not
12 available until after May 9, 2011. OCAA subsequently confirmed the first negotiation meeting
13 for May 13, 2011. (HT Vol. I, p.32:23-33:5; p.33:19-20; **Exhibit C**.)

14 OCAA's negotiation team consisted of Ms. Davis, Mr. Yellin, Scott Van Camp, from the
15 Public Defender's office; Ebrahim Baytieh, from the District Attorney's office, and Karen
16 Kenney, from the Public Defender's office. (HT Vol. I, p.33:6-18; p.79:12-19; HT Vol. II,
17 p.58:1-17.) Mr. Yellin was OCAA's lead negotiator.⁴ (HT Vol. II, p.58:1-5; p.60:2-5.) The
18 County's negotiation team consisted of Carl Crown, Human Resources Director, Shelly Carlucci,
19 Assistant Human Resources Director,⁵ Lisa Bohan-Johnson, a representative from the District
20 Attorney's office, and Diana Hantsche, a representative from the Public Defender's office. (HT
21 Vol. I, p. 29:28-30:4; p.36:26-28; p. 81:7-18; HT Vol. III, p.11:7-9.)

22 There were no written ground rules for the negotiations, and no rules that precluded a
23 party from introducing new matters in negotiations, or specifying how proposals were to be
24 formatted. There was also no written ground rule or verbal agreement that established a deadline
25 for submitting new items for negotiation. (HT Vol. I, p.153:26-155:4; HT Vol. II, p.9:7-10.)

26 ⁴ Ms. Davis, however, believed that she, Mr. Yellin, and OCAA's legal counsel, shared
27 responsibility as OCAA's lead spokesperson. (HT Vol. II, p.8:20-9:6.)

28 ⁵ Although Ms. Davis initially identified Ms. Carlucci as present during the 2011 negotiations,
she later testified that it was Mr. Leys, not Ms. Carlucci, who was present for the negotiations.
(HT Vol. I, p.36:24-37:7; p.81:7-18.)

1 **2. May 13, 2011 Meeting**

2 At this first meeting of the 2011 negotiations, the County presented OCAA with its initial
3 proposal. That proposal identified 19 items for discussion, along with an additional item for the
4 creation of a new attorney classification. In addition to proposing “clean-up” language, the
5 County’s proposal included the following:

- 6 • Contract term of two years (June 17, 2011 through June 13, 2013);
- 7 • No general salary increases;
- 8 • Employees to pay full employee pension contribution upon adoption of the MOU,
9 in addition to the reverse pick-up for the enhanced benefit of 2.7%@55;
- 10 • Establishment of new retirement tier (1.62%@65) for new employees with defined
11 contribution employer match (current employees ability to participate – pending);
- 12 • Reopen Health Plans in April 2012 to discuss changes in 2013;
- 13 • Eliminate bilingual pay (a premium pay);
- 14 • Eliminate binding arbitration and replace with non-binding, advisory arbitration
15 for all issues; and
- 16 • Reduction in Attorney I Salary Schedule at each step of the L-1 salary range.

17 (HT Vol. I, p.34:24-35:12; see **Exhibit D.**)

18 Mr. Crown advised OCAA that the County’s Board of Supervisors (BOS) primary interest
19 was to have attorneys increase their retirement contribution. (HT Vol. I, p.33:19-34:23; HT Vol.
20 II, p.64:2-7; see **Exhibit D.**) Mr. Crown also advised OCAA that the County was not looking at
21 increasing salaries, and that salary increases were not on the table. (HT Vol. I, p.132:13-16;
22 p.135:12-15.) OCAA understood that the County wanted unit members to pay both pickup one
23 and pickup two of the employee portion of the retirement formula. (HT Vol. I, p.43:23-44:8;
24 p.131:19-28.) Mr. Yellin advised the County that OCAA would be willing to take on the
25 employee pension contributions *provided* the County could reduce the fiscal impact on unit
26 members. (HT Vol. II, p.63:10-18.) The parties also discussed bilingual pay and performance
27 incentives. (HT Vol. I, p.35:22-27; p.36:3-22; p.37:1-38:3; HT Vol. II, p.64:10-18.)

28

1 **3. June 3, 2011 Meeting**

2 The parties next met on June 3, 2011, and OCAA presented its initial proposal. (HT Vol.
3 I, p.38:4-16; **Exhibit E**.) OCAA's proposal called for a three-year contract with a 3.5% salary
4 increase in the first year, and increases in each of the two remaining years tied to external factors.
5 OCAA also proposed reinstating annual leave cash-outs,⁶ establishing a health reimbursement
6 account instead of a retiree medical program, increasing the optional benefit plan (OBP)
7 contribution, and establishing a cafeteria plan. (HT Vol. I, p.38:17-43:2; **Exhibit E**; see also pp.
8 44-46 of **Exhibit LL**.) OCAA also expressed an interest in learning more about the County's
9 proposed performance incentive system. (HT Vol. I, p.43:3-15; **Exhibit E**.) OCAA asked for
10 information concerning the cost of the retirement pickups proposed in the County's initial May
11 13, 2011 proposal. (HT Vol. I, p.44:24-45:10.)

12 Mr. Crown advised OCAA that the County was not interested in long-term contracts and
13 concerned about rising healthcare costs. (HT Vol. I, p.134:19-135:11.)

14 **4. June 10, 2011 Meeting**

15 The County responded to OCAA's information request on the retirement pickups by
16 having Mitch Tevlin make a presentation during the June 10, 2011 meeting. Mr. Tevlin provided
17 a methodology chart that identified the current costs for Tier 1⁷ and Tier 2 employees, as well as
18 the proposed costs. OCAA, however, was primarily interested in Tier 2 formulas because most of
19 its members fall within that tier. (HT Vol. I, p.45:11-47:16; p.55:1-22; HT Vol. II, p.76:21-77:16;
20 **Exhibit F**.)

21 As reflected in the methodology chart, the County's proposal was to cease paying Base
22 Pickup 1 (3.64%) and Base Pickup 2 (3.74%), but continue paying the other employer portions,
23 except that unit members would continue to pay for the enhanced retirement benefit. (HT Vol. I,
24 p.47:17-49:6; p.53:21-54:6; HT Vol. II, p.77:17-78:13; p.157:7-160:1; **Exhibit F**.)

25 OCAAA responded by advising the County that if it wanted OCAA to pay all of the
26

27 ⁶ The cash-out of annual leave balances had been placed on hold, except for emergencies, due to
the County's cash flow issues.

28 ⁷ Tier 1 employees are those hired before 1976/1977. (HT Vol. I, p.46:22-47:5; HT Vol. II,
p.77:5-16.)

1 employee contributions, then the County could pay all of the employer contributions, and OCAA
2 would accept that. (HT Vol. II, p.76:7-20; p.78:8-17.)

3 **5. June 17, 2011 Meeting**

4 The parties next met on June 17, 2011. The County presented OCAA with excerpts from
5 a draft MOU that included various changes to bring certain terms into compliance with new
6 regulations. The County also provided information concerning unit members' usage of bilingual
7 pay. (HT Vol. I, p.55:23-57:6; **Exhibit G.**) OCAA agreed to have bilingual pay specific to work
8 hours, and to eliminate the transfer policy. (HT Vol. I, p.57:7-58:10.)

9 **6. July 8, 2011 Meeting**

10 The County responded to OCAA's June, 3, 2011 proposal. The County advised that it did
11 not agree with OCAA's proposals for (1) contract term, (2) reinstatement of annual leave cash-
12 out, (3) increasing the OBP contribution; (4) salary increases; or (5) OCAA's verbal proposal to
13 have each party pay its own share of retirement cost including the employer's share for the
14 enhanced retirement formula. But the County advised that it was willing to (1) consider OCAA's
15 proposal for a Health Reimbursement Account pending resolution of pension contributions, (2)
16 further evaluate OCAA's proposal for a cafeteria plan; and (3) look at a salary reopener in year
17 two of the contract. (HT Vol. I, p.62:3-8; p.62:16-64:25; **Exhibit I.**)

18 During this meeting, OCAA presented the County with a new proposal. This proposal
19 sought the creation of a "distinguished level" on the salary scale for tenured, experienced
20 attorneys. OCAA saw this as an incentive for attorneys who excelled in their work but who were
21 at top step. It would not, however, be available to employees classified as Attorney I, II, or III.
22 OCAA noted that not every attorney in the eligible classifications would receive it, but of the
23 approximate 350 attorneys who would be eligible, it anticipated that more than 50% would
24 receive the distinguished level pay. OCAA believed that providing additional salary steps for the
25 highest paid attorneys could be offset by significantly reducing the entry level salaries of
26 employees in the Attorney I classification, the lowest paid attorneys in the County. (HT Vol. I,
27 p.58:28-60:6; p.141:4-15; HT Vol. II, p.64:20-65:24; p.68:8-23; p.72:20-73:14; **Exhibit H.**)

28 OCAA's proposal for the creation of a distinguished level classification, however, did not

1 consider the retirement implications of those additional salary steps. Instead, it focused solely on
2 the salary aspects. (HT Vol. II, p. 140:17-141:3.) But OCAA knew that the distinguished level
3 would be base building and, thus, would count toward determining final salary for purposes of
4 retirement. (HT Vol. I, p.142:10-28; HT Vol. II, p.145:4-147:8.) Thus, this proposal was not
5 cost-neutral and would still be an expense to the County. (HT Vol. I, p.143:1-14.)

6 OCAA also proposed (1) increasing the OBP contribution from \$2,000 to \$2,800 and (2)
7 increasing salaries by 8% over the term of the contract (2% in year one and 3% in both year two
8 and year three). (HT Vol. I, p.60:7-15; p.144:1-9.) As proposed by OCAA, “[w]ith *acceptance*
9 of the above salary and OBP modifications, *OCAA will agree to discuss* the County’s proposed
10 employee pick-up of additional retirement contributions, phased over the three year period of the
11 new contract.” (Exhibit H, emphasis added.)

12 **7. July 22, 2011 Meeting**

13 During this meeting, the County submitted a proposal advising that “if the parties could
14 agree upon a new retirement formula for new employees,” then the County would agree to “the
15 employee’s pick up of their full retirement contribution . . . [being] phased in over the two year
16 term of the contract.” The County also withdrew its proposal for a performance incentive system.
17 (HT Vol. I, p.65:9-66:8; HT Vol. II, p.71:12-22; Exhibit J.)

18 **8. August 12, 2011 Meeting**

19 During the August 12, 2011 negotiation session, OCAA presented the County with its
20 counter-proposal to the County’s July 22, 2011 proposal. OCAA’s proposal, however, was
21 contingent on the County providing salary increases to unit members, salary reopeners for each
22 year of the contract, and agreeing to a three-year phase-in of employee pickup of retirement
23 contributions, rather than the two years proposed by the County. OCAA’s proposal also included
24 what it perceived to be ways the County could achieve cost savings that would cover the
25 increases to unit member salaries and the OBP. (HT Vol. I, p.67: 10-13; p.68:1-7; p.69:2-71:22;
26 HT Vol. II, p.71:25-72:20; Exhibit K.)

27 OCAA, however, did not address the County’s proposal for a new retirement formula.
28 (Exhibit K.) The County advised that they would get back to OCAA. (HT Vol. II, p.73:15-22.)

1 **9. Negotiations Placed On Hold**

2 On September 7, 2011, Mr. Crown called Ms. Davis and advised her that the parties “were
3 going to have to put the negotiations on hold” and that he would “let [her] know when we want to
4 continue negotiations.” Ms. Davis advised him that OCAA was still ready to negotiate. Even
5 though OCAA did not know the details as to why the negotiations were on hold, it suspected that
6 they were being impacted by the Human Resources audit. (HT Vol. I, p.72:15-73:11; HT Vol. II,
7 p.47:15-48:3; **Exhibit L.**)

8 Ms. Davis then emailed Mr. Crown to document that it was the County, not OCAA, that
9 put negotiations on hold. She sent that email because she felt it was important to document who
10 halted negotiations. (HT Vol. I, p.73: 11-22; p.146:27-147:1; HT Vol. II, p.41:20-42:8; p.47:26-
11 48:3; **Exhibit L.**) In her email, however, Ms. Davis did not express any objection to having
12 negotiations put on hold, did not demand that the County return to the bargaining table, and did
13 not ask to schedule additional dates for negotiation. (HT Vol. I, p.147:15-24; **Exhibit L.**)

14 About one month later, while discussing another matter with Mr. Crown, Ms. Davis asked
15 Mr. Crown what was happening with the OCAA negotiations. Ms. Davis reminded Mr. Crown
16 that OCAA was “willing and ready and desirous of negotiating.” (HT Vol. I, p.73:23-74:8.)
17 Again, however, Ms. Davis did not demand a return to the table, and the County never refused to
18 return to the table. (HT Vol. I, p.147:15-24; HT Vol. II, p.49:11-18.) And although Mr. Yellin
19 knew that the County had placed negotiations on hold, he too sent no letters to Mr. Crown
20 demanding a return to the bargaining table. (HT Vol. II, p.129:26-130:7.)

21 **10. OCAA Asks County to Hold Off Paying the Orange County Bar Dues**

22 On December 20, 2011, Ms. Davis emailed Mr. Crown and asked that the County ‘hold
23 off on paying the 2012 Orange County Bar Association dues.’ She noted that “[t]his may be an
24 issue we wish to discuss during negotiations and since the County is holding off on OCAA
25 negotiation meetings, we wish to hold off on paying this contracted dues amount.” Mr. Crown
26 responded and thanked Ms. Davis. (HT Vol. I, p.74:9-75:7; **Exhibit M.**)

27 Ms. Davis did not have any further conversations with Mr. Crown on this issue. She did,
28 however, speak with administrative staff in each of the affected departments and each confirmed

1 that payment of the Orange County Bar dues was on hold. (HT Vol. I, p. 75:8-76:16.)

2 Ms. Davis did not raise any objection to the continued hold on negotiations, did not
3 demand a return to the table, and did not ask that the County schedule additional meetings. (HT
4 Vol. I, p.147:15-24; p. 148:15-23; **Exhibit M.**) Instead, Ms. Davis viewed the lack of bargaining
5 as the parties merely “tak[ing] a break” in negotiations. (HT Vol. I, p.83:10-12.) Mr. Yellin also
6 sent no letters to Mr. Crown demanding that the County return to the bargaining table. (HT Vol.
7 II, p.130:4-7.)

8 **H. COUNTY’S FINANCIAL CONCERNS FOR FISCAL YEAR 2012-2013**

9 The County’s financial concerns of fiscal year 2011-2012 continued into fiscal year 2012-
10 2013 because the State challenged the County’s allocation of the vehicle license fee (VLF)
11 adjustment amount. VLF was part of the County’s general purpose revenues. (HT Vol. III,
12 p.150:28-151:13.) The State filed litigation against the County regarding the VLF, and that put
13 12% of the County’s general fund revenues in doubt and in jeopardy. (HT Vol. III, p.142:19-
14 143:3.) At this same time, the County’s reserve position was quite weak. It had \$245 million in
15 reserves, but when compared to the size of the County, that was actually very low, and it put the
16 County’s rating at risk. Given its size, the County should have at least two months worth of
17 operating revenue in reserve, but the County’s reserves were well below that minimum. The
18 County’s concern was that if it did not manage this shortfall with primary expense reductions, and
19 there was an adverse decision on the VLF litigation that required the County to repay funds to the
20 State, the County would have a large funding gap.⁸ (HT Vol. III, p.143:4-145:28.)

21 **I. 2012 NEGOTIATIONS**

22 **1. January 2012**

23 In late January 2012, the County contracted with Mr. Barsook to perform labor
24 negotiations and labor relations-related services with its various employee organizations,

25
26 ⁸ In June 2013, the Superior Court issued a tentative ruling in favor of the State. That ruling
27 prohibited the County from allocating \$76 million of VLF funds into its revenues, and ordered the
28 County to repay \$150 million to the State. While the parties are trying to work out a settlement to
allow repayment over a five-year period, the County’s reserves in October 2013 were \$219
million and the County’s credit rating was at risk because its reserve position continues to
deteriorate. The County has still lost and continues to lose approximately \$73 million annually.
(HT Vol. III, p.146:1-24; p.162:14-167:5.)

1 including OCAA. (HT Vol. III, p.7:3-16.) To familiarize himself with the history of the OCAA
2 negotiations, he spoke with various County officials and reviewed the materials presented to the
3 BOS during 2011. (HT Vol. III, p.8:6-16.)

4 In reviewing the files, Mr. Barsook did not find any communications from OCAA
5 requesting that the County return to the bargaining table. (HT Vol. II, p.130:4-7; HT Vol. III,
6 p.8:21-24.) He also found no communications showing that the County ever refused to return to
7 the bargaining table. (HT Vol. III, p.8:25-27.)

8 **2. February 2012**

9 In February, Mr. Kim's office finished its SEB forecast, so departments could use that
10 information to build their budgets. That same month, Mr. Kim's office ran the multi-year
11 comparison chart on OCAA. (HT Vol. III, p.170:10-171:4; **Exhibit Q.**)

12 **3. March 2012**

13 On or about March 23, 2012, Mr. Barsook emailed Ms. Davis, and advised her that he
14 wanted to schedule negotiation meetings with OCAA. This was a follow-up email to an earlier
15 phone call Mr. Barsook had initiated with Ms. Davis. Because Ms. Davis was scheduled to be on
16 vacation, Mr. Barsook asked for dates starting in April 2012. Ms. Davis advised that she would
17 "get back" to him. She also advised that, due to childcare issues, the team was not available to
18 meet in the evenings or on weekends. (See HT Vol. I, p.76:17-77:5; p.77:14-78:8; p.80: 9-27;
19 p.149:6-150:25; **Exhibit 1.**)

20 On March 28, 2012, Ms. Davis advised Mr. Barsook that her team could meet on April 27,
21 2012—30 days later. (HT Vol. I, p.79:3-15; p.150:26-151:21; **Exhibit 2.**) Ms. Davis confirmed
22 that date in an April 16, 2012 email to Mr. Barsook. (HT Vol. I, p.80:6-8; **Exhibit N.**)

23 **4. April 27, 2012 Negotiation Meeting**

24 On April 27, 2012, the County and OCAA returned to the bargaining table. The County's
25 negotiation team now consisted of Mr. Barsook, as the County's Chief spokesperson, and Terri
26 Bruner, Assistant Director for Human Resources, as well as Ms. Hantsche and Ms. Bohan-
27 Johnson, both of whom had been part of the County's negotiation team in 2011.⁹ (HT Vol. I,

28 ⁹ Also in attendance at that meeting were Stacy Herberg, an associate in Mr. Barsook's office,
and Paula Kitchen, who served as note-taker. (HT Vol. III, p.11:5-12.)

1 p.81:2-82:4; p.82:14-18.) OCAA's negotiation team remained the same as in 2011, and Mr.
2 Yellin was the lead negotiator (despite Ms. Davis' belief that she shared in that role). (HT Vol. I,
3 p.79:12-19; HT Vol. II, p.9:11-14; p.78:18-25.)

4 Mr. Barsook introduced himself and then discussed the County's proposal and its
5 underlying principles which focused on total compensation¹⁰ and living within the County's
6 means. He noted that a significant amount of time had passed since the parties had last met, and
7 that the County had an obligation to look at its current financial circumstances. He noted that
8 although revenues had been relatively flat, expenditures in terms of employee compensation had
9 increased substantially and were at a level the County believed was unsustainable. He also noted
10 that while the size of the unit had diminished, the costs of retirement and insurance had increased
11 significantly. (HT Vol. I, p.85:6-14; p.93:6-19; p.156:10-157:9; HT Vol. II, p.34:13-21; p.80:7-
12 22; HT Vol. III, p.11:18-13:6.)

13 Mr. Barsook went through the entire proposal with OCAA. (HT Vol. II, p.78:26-79:9;
14 Vol. III, p.13:13-17.) The County's April 27, 2012 proposal included the following:

- 15 • No salary increase ("the average total compensation ... remains the same
16 unless/until new on-going general fund revenues are available to fund such
17 increases.")
- 18 • Employees to pay full employee pension contribution (i.e. eliminate partial County
19 pick-up of member contribution);
- 20 • Establishment of new retirement tier (1.62%@65) for new employees with three
21 year final average salary computation and a 2% COLA maximum;
- 22 • Implement health plan costs containment changes recommended by Mercer (the
23 District's Health Plan Consultants);
- 24 • Premium pay – paid on hours worked rather than on hours in paid status (e.g., sick
25 leave, vacation, etc.), and on dollar amount rather than on percentage of pay;
- 26 • Use advisory arbitration rather than binding arbitration for discipline appeal;

27
28 ¹⁰ "Total compensation" refers to the amount of money the County actually expends to employ
each of the employees within a group. "Annual cost" is the cost of an item over 12-months, on an
annualized basis. (HT Vol. III, p.29:21-30:9.)

1 require mediation prior to arbitration for all discharge cases;

- 2 • Change probationary and first merit increases for new attorneys from six months
3 to one year;
- 4 • Merit increases to be set at one or two steps in the range, as opposed to one to four
5 steps within range;
- 6 • Eliminate workers' compensation supplemental pay;
- 7 • Annual Leave payout; and
- 8 • Eliminate seniority as point for purposes of layoff;

9 (HT Vol. I, 82:14-83:23; p.84:11-17; p. 90:2-25; p.91:21-93:5; p.94:4-95:20; p.96:11-18;
10 p.97:1-17; p.152:10-20; HT Vol. II, 11:5-27; p.15:17-23; p.16:8-20; **Exhibit O.**)

11 Some of these proposals were not discussed in the 2011 negotiations. (HT Vol. III,
12 p.110:27-111:24; **Exhibit O.**) OCAA asked about its August 2011 proposal and demanded that
13 the County provide a response. This was the first time in the eight months after OCAA presented
14 its August 13, 2011 proposal to the County that it asked the County to respond to its proposal.
15 Mr. Barsook assured OCAA the County would provide a specific response at the next meeting,
16 but also noted that the April 27, 2012 proposal was responsive to OCAA's last proposal. (HT
17 Vol. I, p.98:5-23; p.155:21-156:4; HT Vol. II, p.149:13-16; HT Vol. III, p.13:13-27.)

18 He advised that although OCAA wanted to phase in the retirement contributions, given
19 how much time had elapsed, the economic value of that phase in had come and gone. The
20 County's last proposal in 2011 had called for the phase in to start in July 2011, and the remainder
21 in July 2012. He also stated that OCAA's proposal to add three additional steps to the end of the
22 salary schedule and two new steps at the beginning of the salary schedule that would be less
23 would still cost a substantial amount of money. He reminded them that the County was looking
24 to save costs, not add to them. (HT Vol. III, p.16:24-17:18:4.) He noted that the County's merit
25 pay proposal was designed to slow down the rate of growth as employees moved across the salary
26 schedule. (HT Vol. III, p.109:15-110:1.)

27 In support of its proposal, the County also provided OCAA with a five-year compensation
28 projection chart for all bargaining units Countywide. The County included the chart so OCAA

1 would have a flavor of what the County was focusing on, and because the County's proposals to
2 OCAA were similar to what was being presented to the other units. (HT Vol. I, p.84:18-26; HT
3 Vol. III, p.15:16-16:9; **Exhibit O**.) The chart showed that while salary costs have been modest
4 since fiscal year 2007-2008, retirement costs had increased 12.5%, and insurance costs had
5 increased 26.5%. As a result, the average total compensation for County employees had
6 increased by 17.3%. (HT Vol. III, p.14:19-15:25; **Exhibit O**.) The County provided the
7 budgeted information, as opposed to actual expenses, because (1) the numbers were very close to
8 actual expenses and (2) the County does not track SEB by bargaining unit. (HT Vol. III, p. 157:4-
9 25.)

10 One of OCAA's team members stated that it felt like the County was dictating to them
11 and that OCAA was looking to find common ground. (HT Vol. III, p.14:3-12.) Mr. Barsook
12 advised that the County was also interested in finding common ground, but the County also had
13 particular principles it wanted to achieve, such as living within its means and addressing total
14 compensation. He invited OCAA to be creative, and advised that the County had an open mind
15 on how to achieve that. (HT Vol. III, p. 14:13-18; p.112:4-9.)

16 OCAA was upset that the proposal was identified as an "initial proposal," and felt that the
17 County's focus was strident. (HT Vol. II, p.79:9-23; p.93:25-94:9; HT Vol. IV, p. 27:15-27.)
18 The meeting ended with OCAA agreeing to follow-up with the County regarding OCAA's
19 availability for further negotiation meetings; OCAA limited its availability to particular Fridays
20 during the lunch hour. (HT Vol. I, p. 98:26-28; p.99:7-12; HT Vol. II, p.4:26-5:1; HT Vol. III,
21 p.18:15-24; **Exhibit 3**.)

22 5. OCAA Unable to Meet Until June 15, 2012

23 On April 30, 2012, Ms. Davis emailed Mr. Barsook and advised that OCAA was not
24 available to meet with the County until June 15, 2012—more than six weeks later. (HT Vol. II,
25 p.5:7-6:14; HT Vol. III, p.18:25-19:7; **Exhibit 3**.) Mr. Barsook contacted Ms. Davis that same
26 day and expressed his strong disappointment with OCAA's purported unavailability to meet
27 sooner than June 15, 2012. He noted that the County already had to wait over a month to get the
28 first negotiation meeting with OCAA scheduled, and now OCAA was saying it could not meet for

1 another six weeks. (HT Vol. II, p.6:16-7:13; HT Vol. III, p.19:11-20:22; **Exhibit 4.**)

2 In a May 3, 2012 email to Ms. Davis, Mr. Barsook memorialized their April 30, 2012
3 conversation, and identified 11 dates and times that the County was available to meet and confer
4 prior to June 15, 2012. Mr. Barsook confirmed the meeting on June 15, 2012, and requested that
5 Ms. Davis provide other dates that OCAA could meet. (HT Vol. II, p.6:16-7:13; HT Vol. III,
6 p.19:11-20:22; **Exhibit 4.**)

7 Ms. Davis responded on May 7, 2012. She advised that OCAA looked forward to
8 meeting with the County on “June 16th,” [sic] and that she had asked the rest of the OCAA
9 negotiation team to check their calendars so additional dates could be scheduled at that “June
10 16th” [sic] meeting. Ms. Davis then asked that the County appreciate that “after waiting 8
11 months for the County to, again begin negotiations—their calendars were not blocked out for this
12 purpose.” (HT Vol. II, p.7:14-8:5; **Exhibit 5.**)

13 **6. June 15, 2012 Negotiation Meeting**

14 On June 15, 2012, the parties again met for negotiations and the County presented OCAA
15 with a document titled “County’s Response to OCAA Counter Proposal (8-12-11).” (HT Vol. I,
16 p. 99:113-19; HT Vol. II, p.85:17-86:9; HT Vol. III, p.21:14-22:4; **Exhibit P.**) That proposal
17 responded to each of the terms contained in OCAA’s August 12, 2011 proposal, as follows:

- 18 • Retirement contribution – as proposed by the County in its April 27, 2012
19 proposal;
- 20 • Addition of three lower salary steps at beginning of schedule – current contract;
21 but County willing to consider lowered salary range as a component of the County
22 proposed reduction in costs during the term of the MOU (see April 27, 2012
23 County proposal);
- 24 • Addition of three new salary steps at top of schedule – reject;
- 25 • Salary reopeners – under review; and
- 26 • Elimination of paid bar dues – eliminate paid bar dues (value to be allocated to the
27 County-proposed reduction in costs (See April 27, 2012 County proposal).)

28 (HT Vol. I, p.100:5-27; HT Vol. II, p.86:1-87:3; HT Vol. III, p.21:14-22:4; **Exhibit P.**)

1 Mr. Barsook went through the response and explained the reason for the County's position
2 on each of the items reflected. OCAA did not have any comments. (HT Vol. III, p.27:11-21.)
3 The County also provided OCAA with information on the County's health plan proposal
4 referenced in its April 27, 2012 proposal, and brought in Barbara Voelkel, of Human Resources,
5 to go over it. (HT Vol. I, p.99:20-100:4; pp.2-5; p.100:28-101:2; HT Vol. II, p.16:2-7; p.87:4-17;
6 p.130:21-131:2; HT Vol. III, p.20:23-21:13; p.22:5-14; p.103:21-104:12; **Exhibit P.**)

7 During the 2011 negotiations, the County proposed to ask Mercer, the County's health
8 care consultant, to provide recommendations for cost containment for the County's health plan,
9 and had proposed a reopener in 2012 to discuss those recommendations. By 2012, the County
10 had received the Mercer recommendations. At the June 15, 2012 meeting, the County provided
11 OCAA with the specifics from the Mercer recommendations, including specifics on plan design,
12 employee contribution, County contribution, wellness program, retiree medical, and the Patient
13 Protection and Affordable Care Act. (HT Vol. I, p.102:1-19; HT Vol. III, p.20:26-26:25;
14 p.105:13-106:6; **Exhibit P.**)

15 Ms. Voelkel responded to OCAA's questions, and it appeared that OCAA understood the
16 need to be prudent in terms of health insurance. OCAA requested more information regarding
17 how the County had computed the proposed savings reflected in the County's April 27, 2012
18 proposal. (HT Vol. III, p.26:26-27:10; p.27:22-28.)

19 **7. June 29, 2012 Meeting**

20 At this meeting, the County provided OCAA with a five-year compensation projection
21 chart specific to OCAA. It also provided OCAA with the information it requested concerning
22 statistics on a number of items, including the workers' compensation supplemental pay benefit.
23 The workers' compensation supplemental pay benefit provides an industrially-injured employee
24 with 80% of his or her regular pay for a year while they are on workers' compensation leave.
25 (HT Vol. I, p.106:17-27; p.107:1-17; HT Vol. II, 87:18-90:8; p.90:17-91:12; p.147:20-148:13;
26 p.149:17-150:1; HT Vol. III, p.28:1-13; p.30:10-15; p.99:18-27; p.103:11-20; **Exhibit Q.**)

27 The five-year compensation chart showed the budgeting cost for the prior five years, but
28 also provided projected costs through fiscal year 2016-2017. It showed the increasing costs for

1 each of the various items that comprise total compensation, and showed that although the size of
2 the unit had diminished, costs had increased significantly. It also showed that even without salary
3 increases, due to projected increases in retirement and insurance, the County's costs were
4 increasing. (HT Vol. III, p.31:10- 33:15; **Exhibit Q.**)

5 The parties discussed the information provided, and OCAA understood that the County
6 was hoping to achieve \$3,461,500 in savings from its retirement proposal. (HT Vol. II, p.148:17-
7 149:7; HT Vol. III, p.28:14-27.) OCAA did not present a proposal at this meeting, but told the
8 County it was working on one. (HT Vol. III, p.28:14-18; p.33:24-2.)

9 **8. July 6, 2012**

10 The parties next met on July 6, 2012. (HT Vol. III, p.34:3-5.) OCAA did not present a
11 proposal on the economic issues, but identified those issues in the County's proposal that would
12 probably be acceptable: bereavement, reemployment of employees on disability retirement, extra
13 help, and non-discrimination. The parties also discussed the provision on "paid call firefighters,"
14 even though the unit does not consist of any County-employed firefighters, and the County does
15 not employ firefighters. There also appeared to be agreement on the County's proposal on leave
16 provisions. (HT Vol. III, p.34:6-35:8; p.36:18-37:2.) Mr. Barsook advised OCAA that once it
17 agreed to the proposals, he would draft the contract language and provide it to them at a later
18 meeting. (HT Vol. III, p.35:9-14.)

19 **9. July 13, 2012 Meeting Canceled**

20 Prior to the July 13, 2012 meeting, Ms. Davis contacted Mr. Barsook and advised that the
21 meeting needed to be rescheduled. They agreed to meet on July 20, 2012. (HT Vol. II, p.94:4-8;
22 HT Vol. III, p.37:5-14.)

23 Mr. Barsook reminded Ms. Davis that the County was very focused on the total
24 compensation approach.¹¹ Mr. Barsook asked whether it might be appropriate to resolve OCAA
25 negotiations along similar lines to the OCMA negotiations. Ms. Davis advised that she felt it
26 would be difficult, and that the attorneys would be resistant, but she would try and push them into

27 ¹¹ Ms. Davis was familiar with the "total compensation approach" because the other organization
28 she represents, Orange County Management Association (OCMA), had just reached a tentative
agreement with the County using that approach. (HT Vol. III, p.37:17-23.) OCMA membership,
however, did not ratify that tentative agreement. (HT Vol. III, p. 58:1-7.)

1 coming up with an approach similar to OCMA. (HT Vol. III, 37:5-38:2.) Mr. Barsook explained
2 that he was willing to look at a variety of ways to resolve the issue, but the County was focused
3 on total compensation, and that the parties needed to find a way to keep County costs in line. (HT
4 Vol. III, p.38:5-18.)

5 **10. July 20, 2012**

6 The parties next met on July 20, 2012. Mr. Barsook provided OCAA with the contract
7 language proposals on those items that OCAA had previously indicated would probably be
8 acceptable. (HT Vol. III, p.35:24-36:9; p.84:17-85:1; p.86:8-10; p.89:4-11; **Exhibit 8**.) Mr.
9 Yellin said he would review and get back to the County. (HT Vol. III, p.36:10-14.)

10 OCAA presented the County with a "Menu of Discussion Points." That document
11 contained the following terms:

- 12 • Reduction in entry level attorneys pay, but provide additional "distinguished level"
13 pay opportunities to certain tenured attorneys;
- 14 • Attorneys have option of giving up three holidays per year;
- 15 • Provide an "amnesty" for one-time pay-out of annual leave at 75% versus 100%
- 16 • Provide a one-time 3.5% signing bonus to off-set increased contribution to
17 retirement;
- 18 • Increase the Optional Benefit Program (OBP) by eliminating the payment of dues
19 to Orange County Bar Association and instead have the amount added to the OBP;
20 and
- 21 • Provide year two salary reopeners, with increases tied to growth factors.

22 (HT Vol. I, p.107:21-108:9; HT Vol. II, p.18:17-19:6; p.94:9-14; p.94:22-95:14; HT Vol.
23 III, p.38:19-39:1; **Exhibit S**.)

24 OCAA, however, was not stating it would accept all these terms, these were just items it
25 was open to discussing. (HT Vol. III, p. 127:11-128:9.) OCAA's proposal, however, was not
26 fully responsive to the issues raised in the County's April 27, 2012 proposal. It did not respond
27 to the County's desire to have a total compensation approach, or the other non-economic issues in
28 the County's proposal. Mr. Barsook pointed out that adding two more steps at the bottom of the

1 salary range for entry level attorneys would not provide as much savings as OCAA thought. He
2 also advised that OCAA's proposal to add a distinguished level was more problematic, and that
3 even using OCAA's figures, it would still cost the County millions. Mr. Barsook addressed each
4 of the items on OCAA's proposals, including its proposal for a 3.5% signing bonus and
5 increasing the OPB. (HT Vol. I, p.108:10-110:2; HT Vol. II, p.96:13-99:10; p.150:12-27; HT
6 Vol. III, p.39:2-42:17; p.112:16-25; p.113:5-13; p.113:18-26; p.114:2-115:7; p.115:26-116:3;
7 **Exhibit K, Exhibit S.**)

8 The parties also discussed OCAA's proposal to have increases tied to growth factors in
9 property tax revenues and Prop. 172 sales tax funds. OCAA had proposed that if revenue went
10 up, OCAA could take advantage of that increase, but if revenue went down, OCAA would
11 "accommodate that" or "participate in that." (HT Vol. I, p.110:3-19; HT Vol. II, p. 19:2-15; HT
12 Vol. III, p.42:18-44:20; p.113:5-17; **Exhibit S.**) There is nothing, however, in OCAA's proposal
13 that contains any language that clearly and unambiguously authorized a salary reduction if
14 revenues went down. (HT Vol. II, p.19:20-20:14; **Exhibit S.**)

15 **11. County's July 27, 2012 Proposal**

16 On July 27, 2012, the parties held another negotiation session. During that meeting, the
17 County verbally responded to OCAA's July 20 2012 menu proposal. The County advised that it
18 was:

- 19 • Willing to agree to a transition period for employees to pay full retirement
20 contributions (pick-up 1 on adoption and pick-up 2 on January 1, 2013), **but only**
21 **for an agreement;**
- 22 • Willing to consider use of a compensation formula beginning with 2013/2014
23 fiscal year, but subject to the following conditions:
- 24 ○ Use (general fund) property tax as the determinant for revenue sources;
 - 25 ○ Change from prior year's property tax revenue used to determine total
26 employee compensation, not just wages;
 - 27 ○ Property tax revenue to be used first to pay for retirement costs, then
28 insurance, and then any remaining funds used to increase or decrease

1 employee wages.

- 2 • Not willing to add salary steps (distinguished level or not), pay a signing bonus,
3 increase the optional benefits program, or guarantee payment of annual leave
4 accruals, even with a discount;
- 5 • Except as indicated here, no other changes to the County's most recent positions.

6 (HT Vol. III, p.44:27-48:6; p.118:3-8.)

7 The County had no interest in establishing a distinguished level of compensation because
8 it would cost the County more money and the County was not having a problem retaining
9 attorneys. (HT Vol. III, p.129:13-130:5.)

10 OCAA did not agree with the County's proposal, but advised that they would take it under
11 review, and get back. (HT Vol. III, p.47:4-7.) OCAA, however, remained vehemently opposed to
12 the County's proposal to eliminate seniority as a factor when considering layoffs and its proposal
13 to change binding arbitration to advisory arbitration. (HT Vol. III, p.48:1-22.)

14 **12. OCAA's August 17, 2012 Proposal**

15 The parties next met on August 17, 2012, and OCAA presented the County with a
16 "Suggested Proposal." In that proposal, OCAA identified a formula based on changes in property
17 tax revenue and Prop. 172 sales tax revenue for funding OCAA salary increases. OCAA also
18 proposed a "two year term" for the MOU covering June 15, 2012 to June 26, 2014. OCAA
19 advised that it would "accept" a 2.1% salary increase at the time of contract approval, and salary
20 increases for 2013 and 2014 based on its proposed formula. Mr. Yellin advised that OCAA felt
21 that its proposal was responsive to the County's desires. (HT Vol. I, p. 110:27-111:7; HT Vol. II,
22 p.41:1-11; p.99:18-100:5; p.140:12-22; HT Vol. III, p.48:24-49:15; p.52:1-10; p.52:13-26;
23 **Exhibit U.**)

24 Mr. Barsook, however, disagreed. There was nothing in OCAA's proposal that contained
25 any language that would allow for an ongoing salary reduction if revenues went down. Mr.
26 Barsook questioned OCAA on that issue, and OCAA advised that would be willing to talk about
27 "some form of furlough." (HT Vol. II, p.19:20-20:14; p.100:6-101:9; p.140:23-141:3; HT Vol.
28 III, p.49:16-28; p.50:18-51:4; **Exhibit U.**) Mr. Barsook explained, however, that any furlough

1 was temporary, and would not reduce the unit member's salary; it would just reduce the pay
2 received during the time that the furlough was in effect. He advised that OCAA's proposal on this
3 issue was very problematic. (HT Vol. II, p.141:4-18; HT Vol. III, p.50:1-17.)

4 Mr. Barsook also reiterated his prior objections to the use of Prop. 172 sales tax funds.
5 While Prop. 172 sales tax funds could be used as a funding source for the District Attorney's
6 office, they could not be used for public defenders or county counsel. (HT Vol. II, p. 142:7-
7 143:27; HT Vol. III, p.50:18-24.) Further, the County was not obligated to use those funds in the
8 District Attorney's office, but could be converted for use by the Sheriff's Department. Moreover,
9 Prop.172 funds were a relatively small portion of the County's resources, and sales tax was too
10 variable to use in such a formula. (HT Vol. III, p.130:6-131:4.)

11 When Mr. Barsook expressed concern about increasing expenses, OCAA advised that
12 they would be willing to look at total compensation. (HT Vol. I, p.111:11-112:2.) But OCAA
13 also advised that they "really didn't care that much about the concern of expenditures because it
14 was fluid and in [the County's] control." (HT Vol. II, p.155:21-156:9.)

15 Mr. Barsook asked if this proposal was the best OCAA could do, and OCAA said "no."
16 (HT Vol. III, p.52:27-53:10; p.119:22-120:1.)¹²

17 **13. The County's Last, Best, and Final Offer**

18 The parties held another negotiation session on August 24, 2012. During that meeting, the
19 County presented OCAA with its Last, Best, and Final Offer (LBFO). (HT Vol. III, p.53:11-54:7;
20 **Exhibit V.**) That LBFO set forth the County's position on the outstanding issues, including the
21 following:

- 22 • Term – from date of implementation to June 27, 2013 (thus rejecting OCAA's
23 August 17, 2012 proposal for term that expired June 26, 2014);
- 24 • Retirement –employees pay full member contribution with no phase in, and new
25 hires enrolled in new retirement tier of 1.62%^{@55} with 3 year FAS, 2% COLA,
26 and 2% defined contribution match (OCAA's August 17, 2012 proposal was silent
27 on retirement);

28 ¹² In her testimony, Ms. Davis stated that OCAA responded "*gosh, yes, we've given you a myriad of options.*" (HT Vol. I, p.112:16-26; emphasis added.)

- 1 • Implement Mercer Recommendations for health insurance (OCAA's August 17,
2 2012 proposal was silent on health insurance);
- 3 • Advisory arbitration for disciplinary appeals, and mediation upon either party's
4 request (OCAA's August 17, 2012 proposal was silent on advisory arbitration);
- 5 • Premium pay – paid for hours actually worked, and paid at dollar amount, rather
6 than percentage (OCAA's August 17, 2012 proposal was silent on premium pay);
- 7 • Salary – for agreement only – 2.5% lump sum bonus payable to unit members on
8 the payroll as of the MOU's adoption (thus rejecting OCAA's August 17, 2012
9 proposal for a 2.1% salary increase, compensation formula, and increases in 2013
10 and 2014); and
- 11 • Eliminate seniority as consideration in layoff.

12 (HT Vol. I, p.112:3-10; HT Vol. II, p.105:25-106:7; p.107:18-109:16; **Exhibit V.**)

13 Mr. Barsook discussed the proposal in terms of substance but did not go through it line by
14 line. (HT Vol. III, p.54:8-18.) OCAA was very angry with the County's proposal, especially the
15 proposal that the retirement contributions kick in right away. (HT Vol. II, p.111:2-6; p.111:15-
16 22; HT Vol. III, p.54:24-27.) Mr. Barsook explained the basis for the City's proposal, and also
17 noted that the 2.5% signing bonus had more economic value to OCAA than what the County had
18 previously proposed. The signing bonus, however, was contingent on the parties reaching an
19 agreement and would be a one-time payment. (HT Vol. III, p.54:27-57:14.)

20 The County advised that if OCAA did not accept the LBFO by 5:00 p.m. on September 4,
21 2012, the County would assume that it had been rejected. The County also advised that if OCAA
22 timely accepted the LBFO, then it had until September 25, 2012 to ratify the MOU. The County
23 advised that if the LBFO was not ratified by that date, the County would assume it has been
24 rejected, and the negotiations would be at an impasse. (HT Vol. I, p.115:12-22; HT Vol. III,
25 p.57:19-58:58:21; **Exhibit V.**) The County established these dates because it did not want the
26 tentative agreement review process to extend indefinitely. It chose these dates after looking at the
27 OCAA bylaws and it seemed that OCCA could have a ratification vote within that time period.
28 (HT Vol. III, p.57:19-58:21.)

1 OCAA was also upset with the amount of time provided for it to accept or reject the offer.
2 (HT Vol. II, p.111:2-6; p.111:15-22.) Mr. Barsook explained that OCAA's Board could provide
3 notice of a tentative agreement, and then have its members vote to ratify it. OCAA took the
4 position, however, that the County's proposal was not how OCAA operates, and it was not going
5 to do that now. (HT Vol. II, p.112:11-16.)

6 **J. OCAA ENGAGES IN DIRECT DEALING**

7 After the County issued its LBFO, Mr. Yellin bypassed the County's designated
8 negotiators to meet directly with the BOS Chair, Supervisor Moorlach regarding the LBFO. (HT
9 Vol. II, p.112:18-26.)

10 On August 31, 2012, Mr. Yellin advised Mr. Barsook that OCAA could not agree to the
11 County's offer because the proposal did not contain actual contract language for at least four
12 items, including, use of advisory arbitration and premium pay. He asked for additional time to
13 consider the County's LBFO after the County provided the exact language. He also claimed that
14 the County's April 27, 2012 proposal was not a real proposal, even though the proposal clearly
15 states that "the County is proposing several issues to enhance operational efficiency and/or obtain
16 longer term savings" and provides 8 specific proposals.

17 Mr. Yellin also claimed that in the four months the parties had been back at the table,
18 OCAA "provided no less than eight proposals to address the County's concerns." In truth,
19 however, OCAA presented one "menu of discussions points" on July 20, 2012, and "suggested
20 proposals" on August 17, 2012. Neither of these proposals, however, was responsive to the
21 County's proposal or its stated interests. (HT Vol. I, p.107:21-108:9; p.110:27-111:7; HT Vol. II,
22 p.18:17-19:6; p.19:20-20:14; p.41:1-11; p.94:9-14; p.94:22-95:14; p.99:18-101:9; p.112:27-
23 113:8; p.140:12-141:18; HT Vol. III, p.38:19-39:1; p.48:24-49:28; p.50:1-51:4; p.52:1-10;
24 p.52:13-26; p.58:25-59:6; p. 127:11-128:9; **Exhibit O, Exhibit S, Exhibit U, Exhibit W.**)

25 Mr. Barsook responded to Mr. Yellin on September 5, 2012. Mr. Barsook advised that he
26 was not aware of any legal requirement that a party must provide exact contract language as part
27 of its last, best and final offer. Nonetheless, he invited Mr. Yellin to provide any contrary
28 authority so he could review it. Mr. Barsook further advised that the deadline for OCAA to

1 accept the County's LBFO would be extended to September 12, 2012. (HT Vol. II, p.113:9-15;
2 HT Vol. III, p.59:7-21; **Exhibit X**.) On September 10, 2012, Mr. Yellin responded to Mr.
3 Barsook, but did not provide Mr. Barsook with the legal authority to support his position that the
4 County was obligated to provide exact contract language as part of its LBFO. (HT Vol. II, p.
5 114:27-115:2; HT Vol. III, p.59:22-60:9; **Exhibit Y**.)

6 Throughout the negotiations, the County provided contract language after the parties
7 reached tentative agreement on the issue, or on those items that were identified as not being a
8 problem or which were identified as language clean-ups. (HT Vol. II, p.13:28-15:16; p.22:5-
9 23:2; p.133:8-136:1; p.137:17:13; **Exhibit 8**.) The parties never reached agreement, however, on
10 the County's proposals concerning advisory arbitration, health plan changes, or layoff provisions.
11 (HT Vol. II, p.138:14-139:6.)

12 **K. COUNTY DECLARES IMPASSE AND THE PARTIES PARTICIPATE IN**
13 **FACT FINDING**

14 OCAA did not accept the County's LBFO by September 12, 2012. Thus, on September
15 13, 2012, having received no response from OCAA, the County declared impasse. (HT Vol. II,
16 p.115:3-5; HT Vol. III, p.60:10-28; **Exhibit Z**.) The parties subsequently participated in
17 mediation and fact finding on the issues of retirement, salary, term, merit increases, layoffs, and
18 arbitration. (HT Vol. I, p.116:14-16; HT Vol. II, p.115:14-17; HT Vol. III, p.61:1-62:7.)

19 **L. COUNTY EXPRESSES WILLINGNESS TO ACCEPT FACT FINDER'S**
20 **DRAFT REPORT IF OCAA ALSO ACCEPT**

21 After the fact finding hearing was completed, the panel chair issued a draft report. (HT
22 Vol. III, p.62:16-18.) Upon receipt of that draft report, the parties engaged in settlement
23 discussions. (HT Vol. III, p.62:19-21.) Mr. Barsook and Ms. Davis had a telephone
24 conversation regarding the draft report. During that conversation, Mr. Barsook advised Ms.
25 Davis that it was his understanding that the BOS:

26 ... would agree to adopt the recommendations contained in the draft
27 report (assuming it included the issues referenced in our last, best &
28 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**

- Maintain current layoff factors – (rather than elimination of seniority factor).
(HT Vol. III, p.20-80:12.)

He also provided Ms. Davis with information on the OCAA employee retirement rate calculator. He provided that information because Ms. Davis had previously questioned how the County could implement changes to the retirement contribution without an agreement. Mr. Barsook advised her that the County absolutely had that right, and that nothing in PEPRA changed that. He also noted that while OCERS had not provided clarification on that issue, CalPERS had issued a circular, and he would send it to her. (HT Vol. I, p.118:17-119:14; HT Vol. III, p.66:7-67:5; p.76:12-24; **Exhibit AA**.)

Mr. Barsook included “resolution of unfair practice charge” in the “deal points” because that was how Ms. Davis and Mr. Barsook had resolved the OCMA negotiations, and he assumed that when Ms. Davis had asked him to provide the same thing for OCAA, the parties were looking to resolve all outstanding issues. (HT Vol. III, p.67:10-19.)

Ms. Davis forwarded those “deal points” to Mr. Yellin, and told him that she had received the “deal points” from Mr. Barsook. Ms. Davis, however, changed the document’s description from “Deal Points” to “Key Points of Proposal,” and represented that what she sent was what she had received from Mr. Barsook. (HT Vol. II, p.116:8-21; HT Vol. III, p.82:4-17; HT Vol. IV, p.6:18-7:28; p.24:19-28; HT Vol. IV, p.34:2-11; p.35:11-16; **Exhibit AA (Exhibit 10); Exhibit 9**.) Mr. Yellin instructed Ms. Davis to post it on the OCAA website, make copies for the meeting, and email it to the personal emails of members. (HT Vol. IV, p.7:19-23.)

On January 28, 2013, Ms. Davis advised Mr. Barsook that OCAA would be voting on the deal points on February 13, 2013. (HT Vol. II, p.28:12-29:19; **Exhibit 7**.) In actuality, however, the members were voting on the “Key Points of Proposal” document that Ms. Davis created, but represented as coming from the County. (HT Vol. IV, p. 8:27-9:17; **Exhibit 9**.)

M. OCAA REJECTS THE DEAL POINTS

On February 8, 2013, Ms. Reinhold wrote Mr. Barsook and objected to the County’s inclusion of resolution of unfair practice charge as one of the deal points. She advised that OCAA was not willing to withdraw its unfair practice charge, and that instance on that would be a deal

1 breaker. (HT Vol. III, p.67:20-68:2; **Exhibit BB**.) Mr. Barsook responded that same day. He
2 advised that Ms. Davis had asked him to send her “deal points similar to what [he] provided to
3 OCMA.” He noted that since those deal points contained resolution of outstanding litigation, he
4 assumed Ms. Davis was interested in setting all aspects of the negotiation dispute between OCAA
5 and the County. (HT Vol. III, p.68:6-19; **Exhibit CC**.)

6 In that same letter, Mr. Barsook also stated:

7 ...the “Deal Points” were not meant to be considered as a proposal from
8 the County. The Deal Points were developed at your client’s request and
9 meant as a good faith attempt to resolve the negotiating impasse between
10 the parties.

11 (HT Vol. III, p.68:6-10; **Exhibit CC**.)

12 Although Ms. Reinhold responded to Mr. Barsook on February 13, 2013, and took the
13 position that the “Deal Points” which Ms. Davis had requested were a proposal, Mr. Barsook saw
14 no need to respond. He had previously stated his position that the ““Deal Points’ were not to be
15 considered as a proposal” and did not see what would be gained by simply repeating the same.

16 (HT Vol. III, p.124:7-25; **Exhibit CC**, **Exhibit DD**.)

17 OCAA membership rejected the deal points. (HT Vol. I, p.118:24-26; HT Vol. II, p.30:10-
18 12; p.116:22-1; HT Vol. III, p.69:2-6.) As a result, the fact finding panel issued a final report,
19 and OCAA filed a dissent. (HT Vol. III, p.62:8-15; p.69:7-9.)

20 OCAA then presented the County with a counterproposal, which the County rejected.
21 That counterproposal proposed that if funding decreased, OCAA would take a furlough day, but
22 the reduction would be capped at 5%. (HT Vol. I, p.119:9-120:3; p.120:177-24; HT Vol. II,
23 p.101:10-19; HT Vol. III, 69:10-16; p.71:10-25; **Exhibit EE**, **Exhibit FF**.)

24 In rejecting OCAA’s counterproposal, Mr. Barsook advised that the items OCAA added
25 to the fact finder’s recommendation were concepts that the County had previously rejected as not
26 meeting important County interests. He further advised that OCAA’s proposal did not appear to
27 be a significant and meaningful effort to reach agreement, and that it was the County’s intent to
28 present its LBFO to the BOS at its March 5, 2013 meeting for implementation. (HT Vol. I,
p.119:25-120:3; HT Vol. III, p.69:17-71:9; **Exhibit FF**.)

1 **N. COUNTY IMPOSES ITS LAST, BEST, AND FINAL OFFER**

2 Shortly after Mr. Barsook's March 1, 2013 email, Ms. Davis received an email from Steve
3 Danley, Human Resources Director, with the documents that would be filed with the BOS for
4 implementation of the County's LBFO. (HT Vol. I, p.120:25-121:5; HT Vol. II, p.30: 17-31:11;
5 **Exhibit GG.**)

6 On March 5, 2013, the BOS heard the County's request to implement its LBFO. Before
7 the BOS voted on the County's request, Mr. Yellin appeared before the BOS and argued that
8 PEPRA did not allow the County to increase employee pension contributions until 2018, and that
9 if the County did, OCAA would sue them. Mr. Yellin had also previously made these threats of
10 litigation to other members of the BOS in private discussions with them; again bypassing the
11 County's designated negotiator, Mr. Barsook. (HT Vol. II, p.119:23-121:2; p.125:15-24; p.126:7-
12 127:13; HT Vol. III, p.71:26-72:7)

13 Mr. Barsook also appeared before the BOS. He advised that OCAA was misrepresenting
14 the nature of the state of the law with respect to the impact of PEPRA. He explained that current
15 law provides that the contribution that the employer makes on behalf of an employee organization
16 is not a vested right, and that the employer may decide to change that. He noted that PEPRA did
17 not change that statute. (HT Vol. III, p.76:24-77:18.)

18 Notwithstanding Mr. Yellin's threat that OCAA would sue the County, the BOS voted to
19 implement the County's LBFO. (HT Vol. II, p.121:3-7; **Exhibit GG, Exhibit HH.**)

20 As set forth in Article XIX, section 1 of the Imposition of Terms and Conditions of
21 Employment document, the County would contribute a set percentage of the employee's
22 healthcare premium. (**Exhibit HH**, pp.83-84.) Although Mr. Yellin had not previously seen the
23 exact language set forth in the Terms and Conditions document, the terms were reasonably
24 comprehended within the information the County provided OCAA on June 15, 2013 in support of
25 its proposal to adopt the Mercer recommendations. (HT Vol. II, p.121:22-124:16; **Exhibit P,**
26 **Exhibit HH.**)

27 **O. COUNTY'S FISCAL YEAR 2013-2014 BUDGET**

28 For fiscal year 2013-2014, the County assumed a 4.6% growth on Prop.172 sales tax. It

1 also experienced a 3.5% growth in property tax revenues. (HT Vol. III, p.154:21-155:10.) This
2 growth, however, was far exceeded by the increases in the County's costs for SEB. (HT Vol. III,
3 p.167:6-168:4; p.168:15-19; p.169:2-170:4, **Exhibit Q.**)

4 **P. COUNTY ADOPTS MERCER RECOMMENDATIONS**

5 On July 22, 2013, Mr. Yellin wrote BOS Chairman Shawn Nelson, and urged that the
6 BOS not move forward with its scheduled vote to adopt the Mercer recommendations. He
7 advised that OCAA strenuously objected to the change in unit member's health insurance and that
8 such change would constitute a unilateral change in terms and conditions of employment. (HT
9 Vol. II, p.124:18-125:1; **Exhibit KK.**) Mr. Yellin did not receive a response to his letter directed
10 to Chairman Nelson from anyone in the County. (HT Vol. II, p.125:2-6.) Mr. Yellin's letter,
11 however, did not ask for a response. (**Exhibit KK.**)

12 On July 23, 2013, the BOS adopted the Mercer recommendations as authorized by the
13 March 5, 2013 resolution adopting the Imposition of Terms and Conditions of Employment
14 document, and made if effective January 1, 2014 for the attorneys. (HT Vol. II, p.121:3-7; p.125:
15 7-10; HT Vol. III, p.106:14-20; p. 2 of **Exhibit V** ["Health Insurance – a. Implement Mercer
16 recommendations effective January 1, 2013, or such later date as the County determines"]; p.5 of
17 **Exhibit GG** ["Health Insurance – implement the Mercer recommendations at such date as the
18 County determines"].) Although attorneys are currently the only employees who are under the
19 plans set forth in the Mercer recommendations, County managers will join the same plan as the
20 attorneys once 50% of County employees accept the plans. (HT Vol. I, p.102:20-104:27; HT Vol.
21 II, p.17:24-28; **Exhibit JJ.**)

22 **VI. ARGUMENT**

23 As the charging party, OCAA bore the burden of proof as to the allegations in the
24 complaint (as amended during the hearing) PERB issued against the County. As demonstrated
25 below, however, OCAA failed to prove its case by a preponderance of the evidence.

26 //

27 //

28 //

1 48:3; **Exhibit L.**) Thus, the evidence undeniably shows that OCAA knew, or certainly should
2 have known, that the alleged unfair practice occurred no later than September 7, 2011 —more
3 than eight months beyond the limitations period and 14 months prior to OCAA filing its initial
4 UPC in this case.

5 The evidence also established that Ms. Davis knew on December 20, 2011 that
6 negotiations remained on hold, and that “the County is holding off on OCAA negotiation
7 meetings”. (HT Vol. I, p.74:9-75:7; **Exhibit M.**) Thus, even if OCAA could be excused for not
8 filing its unfair practice charge based on the County’s conduct in September 2011, it certainly
9 knew or should have know no later than December 20, 2011, that the County’s position had not
10 changed. As such, OCAA certainly should have filed its UPC no later than June 2012, instead of
11 waiting another 11 months before doing so.

12 The evidence further established that OCAA never objected to the County putting
13 negotiations on hold. In fact, in the six months that negotiations were hold, OCAA never
14 objected to the County’s actions, and never requested a return to the bargaining table. (HT Vol. I,
15 p.147:15-24; p.148:15-23; HT Vol. II, p.49:11-18; p.129:26-130:7; **Exhibit L, Exhibit M.**)

16 The evidence is clear that OCAA made the strategic decision to remain silent because it
17 knew that as long as negotiations were on hold, the County could not move forward with its
18 proposal to cease paying the employee’s portion of the retirement contribution, which amounts to
19 approximately 7%, and, instead, have employee’s pay for their own retirement. (See **Exhibit J.**)

20 Neither is OCAA entitled to have the statute of limitations tolled. Under the equitable
21 tolling doctrine:

22 ...the statute of limitations is tolled during the period of time the parties are
23 utilizing a non-binding dispute resolution procedure if: (1) the procedure is
24 contained in a written agreement negotiated by the parties; (2) the
25 procedure is being used to resolve the same dispute that is the subject of
26 the unfair practice charge; (3) the charging party reasonably and in good
faith pursues the procedure; and (4) tolling does not frustrate the purpose of
the statutory limitation period by causing surprise or prejudice to the
respondent.”

27 (*County of Riverside* (2011) PERB Dec. No. 2176-M, quoting *Long Beach Community*
28 *College District* (2009) PERB Dec. No. 2002.) OCAA presented no evidence to warrant

1 application of the equitable tolling doctrine. The record contains no evidence that OCAA utilized
2 a non-binding dispute resolution procedure to challenge the County placing a hold on
3 negotiations. In fact, the record is to the contrary, OCAA did nothing to move negotiations
4 forward. (HT Vol. I, p.147:15-24; p.148:15-23; HT Vol. II, p.49:11-18; p.129:26-130:7; **Exhibit**
5 **L, Exhibit M.**)

6 Thus, because the evidence proves that OCAA did not timely file its UPC, this claim is
7 barred by the statute of limitations and the Complaint as to this allegation must be dismissed.

8 **2. OCAA Knew No Later than April 27, 2012 that the County's Proposal**
9 **Was Different from its Last Proposal in 2011**

10 When the parties returned to the bargaining table on April 27, 2012, the County presented
11 an "initial proposal" to OCAA. The evidence shows that Mr. Barsook went through the entire
12 proposal with OCAA, and discussed the reasons for the County's position. OCAA was very
13 upset about this proposal and felt that the County was dictating to them. (HT Vol. I, p.85:6-14;
14 93:6-19; p.156:10-157:9; Vol. II, p.34:13-21; p.78:26-p.79:23; p.80:7-22; p.93:25-94:9; HT Vol.
15 HT Vol. III, p.11:18-13:17; HT Vol. IV, p. 27:15-27.) As such OCAA knew, or certainly should
16 have known no later than April 27, 2012 that the County's proposal's differed from the one it
17 presented to OCAA on July 22, 2011, more than nine months previously. (**Exhibit J, Exhibit**
18 **O.**)

19 OCAA failed to prove the timeliness of this allegation. As noted above, conduct that
20 occurred prior to May 16, 2012 is time-barred. (*SEIU-United Healthcare Workers West, supra.*)
21 OCAA offered no evidence that would excuse it from complying with the 6-month limitations
22 period applicable to claims under the MMBA, and, as noted above, offered no evidence to
23 warrant application of the equitable tolling doctrine. (*County of Riverside, supra.*) Thus, because
24 the evidence proves that OCAA did not timely file its UPC, this claim is barred by the statute of
25 limitations and the Complaint as to this allegation must be dismissed.

26 //

27 //

28 //

1 **B. OCAA FAILED TO PROVE BY A PREPONDERANCE OF THE**
2 **EVIDENCE THAT THE COUNTY VIOLATED GOVERNMENT CODE**
3 **SECTION 3505**

4 To establish a claim of failure to meet and confer in good faith, the charging party bears
5 the burden of proving that the conduct meets either the “per se” or the “totality of the
6 circumstances” test. (*State of California (Department of Personnel Administration) (2003) PERB*
7 *Dec. No. 1516.*)

8 1. **There is No Evidence the County Engaged in Any Conduct That**
9 **Would Constitute a “Per Se” Violation of the Duty to Meet and Confer**

10 A “per se” violation of the duty to meet and confer in good faith occurs when one party’s
11 conduct is so egregious, and has the potential to frustrate the bargaining process to such a degree,
12 that a finding of bad faith is unnecessary. (*State of California, supra.*) The “per se” categories
13 include: (1) an outright refusal to bargain; (2) refusal to provide information necessary and
14 relevant to the employee organization’s duty to represent bargaining unit employees; (3)
15 insistence to impasse on a non-mandatory subject of bargaining; (4) bypassing the employee
16 organization’s negotiators; and (5) implementation of a unilateral change in working conditions
17 without notice and an opportunity to bargain. (*South Bay Union School District (1990) PERB*
18 *Dec. No. 815; Oakland Unified School District (1996) PERB Dec. No. 1156.*)

19 Here, the record is devoid of any evidence within the applicable limitations period that
20 would indicate the County engaged in any conduct that would constitute a “per se” violation of
21 section 3505. Although the County did place negotiations on hold for a six month period, there is
22 no evidence that the County ever refused to bargain. Instead, the evidence proves that during that
23 six month period, OCAA never objected to the negotiations being placed on hold, and never
24 requested that the County return to the bargaining table. Indeed, as Ms. Davis testified, she saw
25 the parties as just “taking a break.” (HT Vol. I, p.83:10-12; p.147:15-24; p.148:15-23; HT Vol. II,
26 p.49:11-18; p.129:26-130:7; **Exhibit L, Exhibit M.**)

27 And while OCAA attempted to allege that the County failed to respond to OCAA’s
28 information requests, the evidence established that the County responded to all the requests. The

1 evidence also shows that when Ms. Davis advised the County that OCAA had not received a
2 chart of what the retirement pick-ups would be, and requested a copy of the PERS circular, the
3 County promptly provided that information. The evidence also showed that, other than her email
4 of January 24, 2013, neither Ms. Davis nor anyone else from OCAA ever reasserted or clarified
5 any prior information requests, or advised the County that its response was non-responsive. (HT
6 Vol. I, p.99:20-100:4; pp.2-5; p.100:28-101:2; p.102:1-19; p.106:17-27; p.107:1-17; HT Vol. II,
7 p.16:2-7; p. 87:4-90:8; p.90:17-91:12; p.130:21-131:2; p.147:20-148:13; p.149:17-150:1; HT
8 Vol. III, p. 20:26-26:25; p.28:1-13; p.30:10-15; p.99:18-27; p.103:11-104:12; p.105:13-106:6;
9 p.157:4-25; HT Vol. IV, p. 25:1-26:14; **Exhibit AA, Exhibit P, Exhibit Q, Exhibit 9.**¹⁴)

10 Thus, OCAA has not proved that the County committed a “per se” violation of the duty to
11 meet and confer in good faith.

12 **2. OCAA Failed to Prove by a Preponderance of the Evidence That the**
13 **County’s Conduct Constitutes Bad Faith Bargaining Under the**
14 **“Totality of Circumstances” Test**

15 Under the totality of the circumstances test, a party’s conduct is generally examined
16 during the entire course of negotiations to determine if the party had the requisite subjective intent
17 of attempting to resolve differences and reach a common ground. (*City of San Jose* (2013) PERB
18 Dec. No. 2341-M; *Chino Valley Unified School District* (1999) PERB Dec. No. 1326.) Some
19 indicators of bad faith bargaining include surface bargaining, evasive tactics and delay, utilizing a
20 negotiator who does not possess sufficient bargaining authority, and regressive bargaining
21 techniques that move the parties away from agreement, such as withdrawal of previous proposals
22 or renegeing on previously reached agreements. (*Id.*) As explained below, the evidence does not
23 support OCAA’s claim that the County engaged in bad faith bargaining in violation of
24 Government Code section 3505.

25 //

26 //

27 ¹⁴ Although ALJ Cu did not allow OCAA to amend its complaint a further time to allege a
28 purported failure to provide information necessary and relevant, he advised that he would
consider the issue of the request and the County’s response as part of the whole of the parties’
bargaining conduct. (HT Vol. IV, p.11:28-12:8.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

a. The Evidence Proved that the County’s Proposals Were Not Regressive

Regressive bargaining occurs when an employer takes backward steps, such as renegeing on agreements. (*Alhambra City and High School Districts* (1986) PERB Dec. No. 560.) It is well settled, however, that proposals are not necessarily regressive just because certain provisions are less advantageous than previous proposals. (See *Charter Oak Unified School District* (1991) PERB Dec. no. 873, [no finding of regressive bargaining violation where two items of package proposal were less advantageous to charging party, but two other items in package were more advantageous to charging party].)

As reflected in the LBFO, the parties had reached tentative agreement on a number of items, and the County offered a one-time signing bonus of 2.5% for an agreement. Those terms are much better than what the County offered on April 27, 2012, and far better than what was proposed in 2011. (**Exhibit D, Exhibit O, Exhibit V.**)

b. The County Had Good Cause for its Proposal

Even if the County’s proposals are viewed as regressive, the evidence established that the County had good cause for its proposals. Regressive bargaining may be justified when the party had good cause to support its action. (See *Chicago Local No. 458-3M v. N.L.R.B.* (2000) 206 F.3d 22, 31-33.) Changed economic circumstances is one recognized type of good cause to justify regressive bargaining. (*Id.*)

Here, the evidence established that when the County presented OCAA with its April 27, 2012 proposal, the County was still facing significant financial difficulties due to increasing retirement and healthcare costs. (HT Vol. III, p.141:5-24; p.158:25-159:7; **Exhibit O**, p.4.) The County’s reserves were significantly below where they should have been, and the County knew that it was at risk of losing 10% of its general purpose revenues due to the VLF litigation. (HT Vol. III, p.142:19-145:28; p.150:28-151:13.)

//
//
//

1 **3. OCAA Failed to Prove by a Preponderance of the Evidence that the**
2 **County Failed to Respond to OCAA's Proposals Submitted in**
3 **Response to the County's April 27, 2012 Proposal**

4 As established at the hearing, after the County presented its April 27, 2012 proposal,
5 OCAA waited until July 20, 2012 before presenting its "Menu of Discussion Points" to the
6 County. (HT Vol. I, p.107:21-108:9; Vol. II, p.18:17-19:6; p.94:9-14; p.94:22-95:15; HT Vol.
7 III, p.38:19-39:1; **Exhibit S.**) The County verbally responded to that proposal on July 27, 2012.
8 (HT Vol. III, p.44:27-48:6; p.118:3-8.) OCAA then presented the County with a "Suggested
9 Proposal" on August 17, 2012. (HT Vol. I, p.110:27-111:7; HT Vol. II, p.41:1-11; p.99:18-
10 100:5; p.140:12-22; HT Vol. III p.48:24-49:15; p.52:1-10; p.52:13-26; **Exhibit U.**)

11 OCAA presented no evidence that the County failed to respond to those proposals.
12 Indeed, the evidence was to the contrary. (HT Vol. III, p.49:16-28; p.50:18-51:4; p.53:11-54:7;
13 **Exhibit V.**) Simply because OCAA did not like the County's responses or the terms set forth in
14 its LBFO, does not mean that the County did not respond.

15 **4. The Evidence Proved that the County Acted in Good Faith With the**
16 **Intent of Reaching Agreement**

17 The evidence overwhelmingly established that, throughout the course of negotiations with
18 OCAA, the County had the subjective intent to reach agreement. The mere fact that negotiations
19 were not productive at certain points in time does not mean that they were in bad faith. (*County*
20 *of Riverside* (2004) PERB Dec. No. 1715-M.)

21 It is well settled that adamant insistence on a bargaining position is not necessarily a
22 refusal to bargain in good faith. (*City of Fresno* (2006) PERB Dec. No. 1841.) The obligation to
23 bargain in good faith merely requires the parties to explain the reasons for a particular bargaining
24 position with sufficient detail to permit the negotiating process to proceed on the basis of mutual
25 understanding. (*Jefferson School District* (1980) PERB Dec. No. 133.)

26 While OCAA may have disagreed with the County's reasons for its proposals, OCAA
27 prevented no evidence that it did not understand the County's proposals or that the County ever
28 refused to discuss the reasons for its proposals.

1 Instead, the evidence shows that throughout negotiations the County acted in good faith.
2 For instance, the record established that the County began negotiations with OCAA on May 13,
3 2011, at which time it submitted its initial set of proposals. (HT Vol. I, p.34:24-35:12; **Exhibit**
4 **D.**) The record proves that the County then offered and exchanged substantive proposals, along
5 with responsive information, to OCAA, all of which served to fairly advance the County’s intent
6 to reach agreement with OCAA. (HT Vol. I, p.45:11-47:16; p.55:1-22; p.62:3-8; p.62:16-64:25;
7 p.65:9-66: 8; HT Vol. II, p.71:12-22; p.76:21-77:16; **Exhibit F, Exhibit I, and Exhibit J.**)

8 When the parties returned to the table in April 2012 at the County's request, the County
9 again presented substantive proposals to OCAA, explained the reasons for its proposals, held
10 eight bargaining sessions with OCAA, reached what it believed was tentative agreement on seven
11 issues, and sent OCAA draft contract language on those issues—all in an attempt to reach an
12 agreement. The County also demonstrated its interest in reaching an agreement by including a
13 one-time signing bonus in its last, best, and final offer. (See Section IV ¶ I (4), (6)-(10), *supra*,
14 **Exhibit O, Exhibit P, Exhibit Q, Exhibit R, and Exhibit V.**)

15 Despite the County’s many concessions, the parties remained divided on the major
16 economic issues of salaries and retirement contributions. (See Section IV ¶ F, *supra*.) But
17 simply because negotiations were not productive does not mean that they were in bad faith.
18 (*County of Riverside* (2004) PERB Dec. No. 1715-M.) Indeed, the County’s interest in trying to
19 reach an agreement with OCAA is further evidenced by the fact that, upon receiving the draft fact
20 finder’s report, it approached OCAA and advised that it believed the BOS would agree to adopt
21 the recommendations set forth in the draft report, together with those other terms set forth in the
22 County’s LBFO not addressed in the factfinding, “**if, and only if**, the OCAA agreed to such
23 recommendations...” (HT Vol. I, p.116:19-118:10; HT Vol. II, p.23:3-24:24; p.26:1-26;
24 p.115:19:116:6; HT Vol. III, p.62:22-63:27; p.64:3-15; p.120:2-15; **Exhibit AA; Exhibit 6**,
25 emphasis added.)

26 When OCAA claimed it did not know what that meant, the County provided it with the
27 very “deal points” that it specifically requested. (HT Vol. I, p.118:3-7; HT Vol. II, p.25:12-24;
28 HT Vol. III, p.63:28-64:2; p.64:16-28; p.65:4-14; **Exhibit AA.**) Had the County not had any

1 intent to try and reach an agreement, it could have simply gone through the impasse resolution
2 procedures required by the MMBA, and then proceed to imposition. (Gov. Code § 3505.7.)

3 And although OCAA subsequently presented the County with a “counter-proposal,” it did
4 not demonstrate such a change in position to indicate agreement may be possible. It is well
5 settled that:

6 The [employer’s] duty to resume negotiations following good faith
7 completion of impasse arises only if the [union’s] proposals contained a
8 ***concession from its earlier position which demonstrates that***
9 ***circumstances have changed and agreement may be possible.*** (*State of*
10 *California (Department of Personnel Administration) (2010) PERB Dec.*
11 *No. 2102-S, emphasis added (citing Rowland Unified School District*
12 *(1994) PERB Dec. No. 1053-E).*)

13 OCAA’s proposal did not break impasse because it continued to demand a “distinguished
14 level” on the attorney salary range, and sought other items that either increased County costs or
15 otherwise did not meet important County interests. (HT Vol. I, p.119:9-120:3; p.120:177-24; HT
16 Vol. II, p.101:10-19; HT Vol. III, 69:10-71:9; p.71:10-25; **Exhibit EE, Exhibit FF.**)

17 **C. OCAA FAILED TO PROVE BY A PREPONDERANCE OF THE**
18 **EVIDENCE THAT THE COUNTY IMPROPERLY OR PREMATURELY**
19 **DECLARED IMPASSE**

20 “Impasse is the point in negotiations at which the parties have considered each other’s
21 proposals and counterproposals and genuinely attempted to narrow the gap of disagreement, but
22 have, nonetheless, exhausted the prospects for concluding an agreement, so that, absent a change
23 in circumstances, further discussion would be fruitless.” (*City of San Jose, supra, citing Mt. San*
24 *Antonio Community College District (1981) PERB Order No.Ad-124, p.5; Modesto City Schools*
25 *(1983) PERB Dec. No. 291.)* Further, an “impasse may exist when the parties are deadlocked on
26 one or several major issues, even if the parties continue to meet and even if concessions on minor
27 issues are possible.” (*Regents of the University of California (1985) PERB Dec. No. 520-H.*)

28 Here, the evidence overwhelmingly proved that the parties were at a genuine impasse in
negotiations. The records further showed that the parties remained divided on such major issues
as (1) employees paying 100% of member contributions upon adoption of the MOU, (2)
eliminating seniority as a factor for consideration in case of layoffs; and (3) no salary increases.

1 (See Section IV ¶ I (12)-(14), *supra*; Exhibit V.)

2 Although OCAA claims that the County improperly declared impasse, it failed to prove its
3 claim by a preponderance of the evidence. Instead, the evidence showed that OCAA rejected the
4 County's LBFO, but offered no counterproposal that would indicate agreement was possible,
5 even though Mr. Yellin had represented that OCAA's August 17, 2012 proposal was not the best
6 it could do. (See Section IV ¶ I (12)-(13).)

7 Thus, because the undisputed facts overwhelmingly show that the parties remained
8 deadlocked over such major issues as retirement contributions, seniority factors in layoffs, and
9 salaries, a genuine impasse existed.

10 **D. OCAA FAILED TO PROVE BY A PREPONDERANCE OF THE**
11 **EVIDENCE THAT THE COUNTY'S IMPOSITION WAS INCONSISTENT**
12 **WITH ITS LAST BEST AND FINAL OFFER**

13 It is well settled that, once an employer has exhausted applicable impasse resolution
14 procedures, the employer may lawfully implement policies reasonably comprehended within its
15 pre-impasse proposals. (*City of San Jose, supra.*; *Public Employment Relations Board v. Modesto*
16 *City Schools District* (1982) 136 Cal.App.3d 881, 900-901.) As demonstrated above, the County
17 fully complied with its obligation to meet and confer with OCAA, and complied with all
18 applicable impasse resolution procedures.

19 In challenging the County's imposition, OCAA argued that the terms the BOS imposed on
20 March 5, 2013 were not reasonably comprehended within the County's "deal points," which it
21 claimed constituted a revised last, best, and final offer. It also argued that the County never
22 discussed certain specific changes reflected in the Imposition of Terms and Conditions document.
23 (HT Vol. II, p.119:23-124:26; p.125:14-24; p.126:7-127:13.) The evidence, however, is to the
24 contrary.

25 First, as noted above, in presenting OCAA with the "deal points" it requested, the County
26 informed OCAA that it believed the BOS would agree to adopt the recommendations set forth in
27 the draft report (together with those issues not addressed during the fact finding hearing), "*if, and*
28 *only if, the OCAA agreed to such recommendations.*" (See Section IV ¶ G, *supra*; Exhibit 6,

1 emphasis added.) Further, even before OCAA voted on the “deal points,” the County clearly and
2 unambiguously advised OCAA that the “‘Deal Points’ were not meant to be considered as a
3 proposal from the County. The Deal Points were developed at [OCAA’s] request and *meant as a*
4 *good faith attempt to resolve the negotiating impasse between the parties.*” (See Section IV ¶ H,
5 *supra*; **Exhibit CC**, emphasis added.) Since OCAA rejected the fact finder’s recommendations,
6 the final fact finder report issued, and the County was free to implement its last, best and final
7 offer. (HT Vol. III, p.62:22-63:26; p.64:3-15; p.120:2-15; **Exhibit 6**.)

8 Second, the evidence overwhelmingly proved that the parties discussed all the issues
9 imposed at the bargaining table. Throughout negotiations, the County remained adamant about
10 eliminating seniority as a factor to be considered for purposes of layoff, and OCAA remained
11 vehemently opposed to it. (See Section IV ¶II (4), (6)-(13).) Since seniority would no longer be a
12 factor for determining layoffs, the language granting “special seniority” for purposes of layoff is
13 necessarily obsolete and of no significance. Likewise, once seniority was eliminated as a factor
14 to be considered for purposes of layoff, employees no longer earned “layoff points” based on
15 seniority, and language determining layoff according to layoff points was also obsolete. (**Exhibit**
16 **HH**, pp. 63-65.)

17 **E. OCAA FAILED TO PROVE THAT THE COUNTY VIOLATED THE**
18 **PEPRA**

19 OCAA contends that the County lacked authority to eliminate the employer payment
20 (pick-up), and that such action violated the PEPRA. The basis for its contention derives from its
21 misinterpretation of both the CERL and PEPRA.

22 The CERL allows a county to *choose* to pick-up all or a portion of the member
23 contribution rate that classic employees are required to pay. The CERL *requires* that the County
24 retain the right to discontinue paying employee member contributions even without agreement of
25 the union. The authority for the County’s pick-up of member contribution rates is found in
26 sections 31581.1 and 31581.2. Section 31581.1 provides:

27 (a) The board of supervisors *may elect* to pay up to one-half of the
28 contributions normally required of members *for any period of time*
designated in the resolution providing for such payment. The payments
shall not become part of the accumulated contributions of the member.

1 These payments may be made with respect to employees in one or more
2 bargaining units irrespective of whether they are made with respect to other
3 employees.

4 (b) This section shall not apply to members who are subject to Section
5 7522.30.¹⁵ ([Emphasis added].)

6 In addition, Section 31581.2 reads:

7 The board of supervisors...*may agree* to pay any portion of the
8 contributions required to be paid by a member. All payments shall be in
9 lieu of wages and shall be reported simply as normal contributions and
10 shall be credited to member accounts.

11 The enactment of a resolution pursuant to this section *shall not create*
12 *vested rights* in any member. The board of supervisors or the governing
13 body of the district *may amend or repeal the resolution at any time*,
14 subject to the provisions of Sections 3504 and 3505, or any similar rule or
15 regulation of the county or district.¹⁶

16 This section shall not apply to members who are subject to Section
17 7522.30. ([Emphasis added].)

18 The County pick-up provided to classic employees prior to the March 5, 2013 imposition
19 was in accordance with both sections 31581.1 and 31581.2. Both make clear that it is the
20 County's *choice* to either pick-up any part of employee member contributions or to discontinue
21 that benefit so long as it exhausts all collective bargaining procedures, including impasse
22 procedures. Neither statute requires OCAA's agreement before the County can discontinue the
23 County pick-up.

24 Generally, when a collective bargaining agreement expires, so do the terms stated therein.
25 But if the language of the MOU expressly or impliedly states that a benefit is to continue after the
26 expiration of the MOU, the parties are contractually bound to continue the benefit. (*International*
27 *Broth. v. City of Redding* (2012) 210 Cal.App.4th 1114, 1119-20 [contractual promise to provide
28 retiree health benefits "in the future" was sufficient to allege a benefit that survived the expiration
29 of the contract].)

30 ¹⁵ Section 7522.30, a provision in the PEPRA, provides that employers may not pay any portion
31 of the member contributions of a "new member."

32 ¹⁶ The cross-reference to Government Code sections 3504 and 3505, part of the MMBA which
33 governs labor relations for California's municipal governments, refers to the employer's
34 obligation to engage in good faith negotiations with a labor organization. However, it does not
35 require an employer to reach agreement with the employee organization. Where impasse
36 procedures under the MMBA are unsuccessful, the MMBA allows an employer to unilaterally
37 impose terms and conditions of employment upon employees. (Gov. Code §§ 3505.2 – 3505.7.)

1 Here, the County and OCAA agreed that the enhanced retirement formula would not
2 increase the County's costs over what the County was paying for the prior formula. (**Exhibit LL**,
3 pp.86-87.) More importantly, OCAA agreed that the Reverse Pick-Up, "shall continue beyond
4 the expiration date of this MOU, for the purpose of amortizing, over a 30 year period, the cost of
5 the retirement benefit improvement resulting from the adoption of the '2.7% at 55' benefit
6 formula in Section 31676.19 of the Government Code." (**Exhibit LL**, pp.86-87.)

7 OCAA, however, claims that the County imposed the reverse pick-up on employees. The
8 County did nothing of the sort. It is undisputed that OCAA agreed to it. A plain reading of the
9 Imposition of Terms and Conditions document shows that the only thing the County imposed in
10 terms of retirement benefits is that it will no longer pick-up any of the normal member
11 contributions required of employees. The imposition of terminating the County pick-up had no
12 effect whatsoever on the continuation or value of the reverse pick-up. The reverse pick-up
13 remains the same as the parties agreed before the County discontinued the County pick-up.
14 (**Exhibit HH**, p.95.)

15 Moreover, while Government Code section 31631 requires that the cost sharing be
16 approved in an MOU, it does not mandate that the MOU must perpetually exist for these promises
17 to be enforced. The County never imposed this requirement; it was agreed to by OCAA and, by
18 the express terms of the MOU, OCAA agreed that the cost sharing provision would continue even
19 after the MOU expired. Therefore, the County's imposition did not violate Government section
20 31631 or the PEPRA, and did not constitute an unfair labor practice.

21 //
22 //
23 //
24 //
25 //
26 //
27 //
28 //

Liebert Cassidy Whitmore
A Professional Law Corporation
6033 West Century Boulevard, 5th Floor
Los Angeles, California 90045

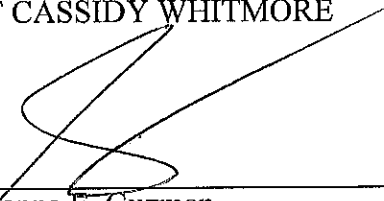
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VII. CONCLUSION

For each of the foregoing reasons, Respondent County of Orange respectfully requests that PERB dismiss the unfair practice charge filed by Charging Party Orange County Attorneys' Association, as well as the complaint which issued on it.

Dated: February 19, 2014

Respectfully submitted,
LIEBERT CASSIDY WHITMORE

By: 

Adrianna E. Guzman
Attorneys for Respondent
COUNTY OF ORANGE

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18
4 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th**
5 **Floor, Los Angeles, California 90045.**

6 On **February 19, 2014**, I served the foregoing document(s) described as **RESPONDENT**
7 **COUNTY OF ORANGE'S CLOSING BRIEF** in the manner checked below on all interested
8 parties in this action addressed as follows:

9 **BY E-MAIL & OVERNIGHT MAIL**

10 **Eric Cu**
11 **Administrative Law Judge**
12 **Public Employment Relations Board**
13 **Los Angeles Regional Office**
14 **700 N. Central Avenue, Suite 200**
15 **Glendale, CA 91203-3219**
16 **Tel: (818) 551-2806**
17 **Fax: (818) 551-2820**
18 **Email: PERBe-file.LARO@perb.ca.gov**

9 **BY U. S. MAIL ONLY**

10 **Marianne Reinhold**
11 **Reich, Adell & Cvitan, LLP**
12 **2670 North Main Street**
13 **Suite 300**
14 **Santa Ana, CA 92705**

- 15 **(BY U.S. MAIL)** I am "readily familiar" with the firm's practice of collection and
16 processing correspondence for mailing. Under that practice it would be deposited with
17 the U.S. Postal Service on that same day with postage thereon fully prepaid at Los
18 Angeles, California, in the ordinary course of business. I am aware that on motion of
19 the party served, service is presumed invalid if postal cancellation date or postage meter
20 date is more than one day after date of deposit for mailing in affidavit.
- 21 **(BY OVERNIGHT MAIL)** By overnight courier, I arranged for the above-referenced
22 document(s) to be delivered to an authorized overnight courier service, FedEx, for
23 delivery to the addressee(s) above, in an envelope or package designated by the
24 overnight courier service with delivery fees paid or provided for.
- 25 **(BY ELECTRONIC SERVICE)** By electronically mailing a true and correct copy
26 through Liebert Cassidy Whitmore's electronic mail system from
27 **ebernabe@lcwlegal.com** to the email address(es) set forth above. I did not receive,
28 within a reasonable time after the transmission, any electronic message or other
indication that the transmission was unsuccessful.

Executed on **February 19, 2014**, at Los Angeles, California.

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



Erlinda Bernabe

Liebert Cassidy Whitmore
A Professional Law Corporation
6033 West Century Boulevard, 5th Floor
Los Angeles, California 90045