STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
Division of Administrative Law
1031 18th Street
Sacramento, CA 95811-4124
Telephone: 916-324-0143
Fax: (916) 327-7955

April 28, 2014

Re: *Orange County Attorneys Association v. County of Orange*
Case No. LA-CE-814-M

Dear Parties:

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

Any party to the proceeding may file with the Board itself a statement of exceptions to the Proposed Decision. The statement of exceptions shall be filed with the Board itself at the following address:

PUBLIC EMPLOYMENT RELATIONS BOARD
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
(916) 322-8231
Fax: (916) 327-7960
E-File: PERBe-file.Appeals@perb.ca.gov

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

A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, §§ 32135, subds. (b), (c) and (d); see also, Cal. Code Regs., tit. 8, §§ 32090, 32091, and 32130.)

The statement of exceptions shall be in writing, signed by the party or its agent and shall: (1) state the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identify the page or part of the decision to which each exception is taken; (3) designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception; and (4) state the grounds for each exception. Reference shall be made in the

statement of exceptions only to matters contained in the record of the case. An exception not specifically urged shall be waived. A supporting brief may be filed with the statement of exceptions. (Cal. Code Regs., tit. 8, § 32300.)

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

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

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

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

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

Very truly yours,

Shawn P. Cloughesy
Chief Administrative Law Judge

PROOF OF SERVICE

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

On April 28, 2014, I served the Cover Letter and Proposed Decision regarding Case No. LA-CE-814-M on the parties listed below by

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

___ personal delivery.

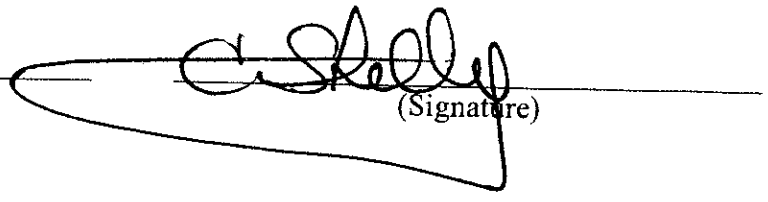
___ facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

Marianne Reinhold, Attorney
Reich, Adell, Crost & Cvitan
2670 North Main St., Suite 300
Santa Ana, CA 92705

Adrianna E. Guzman, Attorney
Liebert, Cassidy & Whitmore
6033 West Century Boulevard, Suite 500
Los Angeles, CA 90045

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 28, 2014, at Sacramento, California.

C. Shelly
(Type or print name)


(Signature)

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ORANGE COUNTY ATTORNEYS ASSOCIATION, Charging Party, v. COUNTY OF ORANGE, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-814-M PROPOSED DECISION (04/28/2014)

Appearances: Reich, Adell & Cvitan, by Marianne Reinhold, Attorney, for Orange County Attorneys Association; Liebert Cassidy Whitmore, by Adrianna E. Guzman, Attorney, for County of Orange.

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, an exclusive representative contends that a public agency violated the Meyers-Milias-Brown Act (MMBA) and Public Employment Relations Board (PERB or Board) Regulations[1] by negotiating in bad faith. The agency denies any violation.

On November 16, 2012, the Orange County Attorneys Association (Association) filed the instant unfair practice charge alleging that the County of Orange (County) violated the duty to meet and confer in good faith during successor agreement negotiations. On April 8, 2013, the PERB Office of the General Counsel issued a complaint.

On April 29, 2013, the Association filed a motion to amend the PERB complaint to add the claim that the County also unlawfully imposed terms on the Association's bargaining unit on or around March 5, 2013. The Association alleged that the imposition was unlawful

[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

because, among other reasons, the terms violated portions of the Public Employees' Pension Reform Act of 2013 (PEPRA).[2]

On May 2, 2013, the parties participated in an informal settlement conference but the case did not settle. On May 3, 2013, the County filed an answer to the PERB complaint, denying the substantive allegations and asserting affirmative defenses, including timeliness.

The parties participated in a formal hearing on October 28-31, 2013. On the first day of hearing, the ALJ granted the Association's motion to amend the PERB complaint over the County's objection and left the record open until November 8, 2013 to allow the County to amend its answer. The County did so that day, again denying the substantive allegations and asserting affirmative defenses.[3]

On February 19, 2014, the parties filed simultaneous closing briefs. At that point, the record was closed and the matter was submitted for decision.

FINDINGS OF FACT

The Parties

The County is a "public agency" within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a). The Association is an "exclusive representative" within the meaning of PERB Regulation 32016(b).

The Attorney Bargaining Unit

The Association represents a bargaining unit of around 500 attorney positions mostly from the following four departments: the Office of the District Attorney (D.A.'s Office), the

[2] PEPRA was passed by the Legislature in 2012 and modified multiple sections of the Government Code concerning public employee pensions. The portions of PEPRA implicated by the parties are at Government Code sections 31581.1, 31581.2, and 31631.

[3] The County's amended answer treated the amended allegations as "paragraph 8 of the Amended Complaint," even though the amendment was not reflected in any document and the existing written PERB complaint did not include an eighth paragraph.

Office of the Public Defender (P.D.'s Office), the County Counsel's Office, and Child Support Services (CSS). The unit also includes positions from the Alternate Public Defender's Office and the Associate Public Defender's Office. Around half the unit works in the D.A.'s office, about one third in the P.D.'s office, with the remainder in the other four offices. Most of the County's attorney positions are "general fund" positions, paid for by property tax revenue. A portion of the D.A.'s Office is also funded by special sales tax revenue for safety operations pursuant to Proposition 172 (Prop 172 funds).

The Attorney series of classifications has five levels, I through IV, and Senior. Senior Attorneys are colloquially referred to as "Turbos." The Attorney I and II positions are temporary probationary positions and the remaining three are permanent.

Prior to the events of this case, the County and the Association were parties to a Memorandum of Understanding (MOU) covering various terms and conditions of employment in the bargaining unit. The original term of the MOU was 2007-2009. The MOU contained provisions for binding arbitration for discipline appeal cases, a pension plan, and a salary scale with multiple steps for each of the positions in the Attorney series.

The expired MOU also contained layoff provisions. Under the layoff article, layoffs generally occur in inverse order of seniority, meaning the least senior employees are laid off first. Seniority is calculated by attributing "layoff points" for each year of continuous County service. Additional layoff points may be assigned for other things such as service as an Association officer. There is also an exception to this process for employees with special knowledge or skills valuable to the County.

The Attorney Unit's Pension Plan

The attorney unit pension plan has evolved over time. Prior to around 2004, the pension benefits formula was 1.67 percent of salary per year of service at age 57.5 (the Base

Plan). As part of the Base Plan, the County agreed to "pick-up," or pay, two sets of pension contributions that would have otherwise been considered employee contributions. Those contributions were referred to in the record as Base Pick-Ups One and Two. The two pick-ups added up to roughly 7.38 percent of each member's income.

In or around the 2004-2005 fiscal year, the parties subsequently negotiated an enhancement to the Base Plan allowing for 2.5 percent of salary per year of service at age 55 (the Enhanced Plan). The parties agreed at the time that the County would continue to fund the Base Plan as it had, including Base Pick-Ups One and Two, and that unit members would pay for any additional costs associated with moving to the Enhanced Plan. The agreement included a 2.7 percent "Reverse Pick-Up," meaning that the Association funded the increased costs, at least in part, by forgoing other compensation owed under the MOU.

The 2008-2009 Recession

Starting in or around the 2008-2009 fiscal year, the County went into recession due to revenue shortfalls. As a result, the County's reserve fund dwindled to what it considered unsafe levels for a county of its size. The County took a variety of steps to address the shortfall, including implementing a hiring freeze, reallocating money from other funds, and deferring improvement projects.

In addition to the actions identified above, the parties negotiated an extension to the 2007-2009 MOU along with a deferral of scheduled salary increases from June 2009 until June 2010 as well as other cost saving measures relating to cashing out accrued leave. The parties further agreed to a salary reopener in 2010 to reassess the County's finances. Around the same time, the parties agreed to unpaid furloughs for the D.A.'s office equaling around a temporary five percent salary reduction. The parties agreed to further cost-saving measures in 2010, including three additional furlough days for the D.A.'s Office and temporarily suspending the

County's obligation under the MOU to pay unit members' 2011 Orange County Bar Association (OCBA) dues.[4]

The 2011 Successor Agreement Negotiations

In April 2011, County Assistant Director of Human Resources Bob Leys contacted Association representative Karen Davis to commence negotiations for a successor MOU. The parties agreed to meet on Friday, May 13, 2011. The parties scheduled most negotiation sessions during a two-hour period around noon on Fridays because those days and times had the least amount of court activity. Most of the Association's bargaining team had heavy workloads involving several court appearances each week.

At the time, County Director of Human Resources Carl Crown spoke primarily for the County. Leys, D.A.'s Office representative Lisa Bohan-Johnson, and P.D.'s Office representative Diana Hantsche also attended on behalf of the County. The Association's negotiating team consisted of Davis, Association President and Turbo D.A. Larry Yellin, Turbo D.A. Ebrahim Baytieh, Turbo P.D.s Scott Van Camp and Karen Kenney.

The County presented its initial proposal at the May 13, 2011 meeting. The County sought financial concessions from the Association in multiple parts of its proposal, including no salary increases for the life of the agreement, eliminating the County's obligation to pay Base Pick-Ups One and Two, reducing the way certain premium pay is accrued, and eliminating the County's obligation to pay OCBA dues. The County also proposed creating a new pension formula where new hires receive 1.62 percent of salary for each year of service at 65 years old (the New Plan). The County also proposed a healthcare reopener after it completed a study about medical benefits savings, eliminating the use of binding arbitration in disciplinary appeals, and other language revisions to reflect current policies or practices. The

[4] The County continued to pay members' State Bar dues, which is required to practice law.

County proposed a two-year term. The County also expressed interest in creating a "Performance Incentive System," but did not elaborate on what it had in mind. According to Association witnesses, Crown said during the meeting that the County's "primary interest was for the attorneys to pay an increased contribution to retirement." Crown did not testify.

The Association did not present a proposal that day, but had a number of questions about the County's proposal. When asked about the Performance Incentive System, Crown said "maybe you can be creative and give us some ideas in that regard."

The Association presented its initial proposal during the June 3, 2011 meeting. It proposed a three-year term, a 3.5 percent salary increase, salary reopeners, and a "cafeteria" benefits plan, where the County provided each unit member with a fixed dollar figure to purchase health insurance privately. The Association also proposed increases to the Optional Benefit Plan (OBP) in the MOU, which is a County fund for expenses such as medical costs and professional development.

The parties met again on June 10, 2011. The County brought someone from its budget office to discuss the County's pension proposals. At this meeting, Association president Yellin proposed that the Association would agree to pay Base Pick-Ups One and Two if the County eliminated the Association-paid Reverse Pick-Up in the Enhanced Plan. The County rejected this proposal.

On July 8, 2011, the Association proposed changes to the salary scale. Specifically, it proposed creating a "Distinguished" class of additional salary steps for the three permanent Attorney classes who were already at the top step and who performed exceptionally well. The Association said that the higher salary for the new level would be funded, in part, by lowering the salary scale for the Attorney I classification. The Association also proposed reallocating the funds from the County's OCBA dues obligation into increasing OBP. If the County agreed

to those changes, the Association said it would agree to eliminate the Base Pick-Ups One and Two, phased in over three years. According to Association witnesses, Crown said he understood the Association's interest in phasing in the increased pension costs but said that there were no salary increases "on the table."

During subsequent meetings, the County proposed phasing in members' pension contribution increases over two years. The County expressed interest in the Association's "cafeteria plan" for health benefits, but both parties acknowledged that the plan lacked detail. It also withdrew its interest in discussing any Performance Incentive System. The Association agreed to the County's proposal for premium pay changes as well as for the New Plan.

The parties met again on August 12, 2011. Association witnesses said that Crown was "pleased" with the parties' progress. The Association made a proposal again seeking to phase in the increased pension contributions over three years, creating the Distinguished salary ranges, lowering the Attorney I salary range, and increasing OBP using OCBA dues funds. The Association also proposed salary reopeners in each of the three years of the agreement. The Association expressed its belief that its proposal would save the County between $1.7 million and $3 million each year of the new MOU.

According to the Association, Crown said he would take the Association's proposal to the Board of Supervisors and that the County wanted to "do some number crunching on their side." He also said he did not expect the County's Board of Supervisors to oppose the Association's OBP proposal. The negotiating teams did not meet again in 2011.

The Hiatus in Negotiations

In early September 2011, Crown contacted Davis by telephone. According to Davis, he said that the County was placing negotiations "on hold." He also said, "I just want you to know that, you know, we're really pleased with the way, with your responsiveness," but that

"we're going to have to put it on hold. I need to check with the Board of Supervisors and we'll let you know when we want to continue negotiations." Davis responded by saying, "We're still ready to negotiate right now and we don't understand why it's being put on hold." On September 7, 2011, Davis sent Crown an e-mail message stating, "Carl: I am sending this e-mail to confirm my understanding that [Association] negotiations have been placed on hold by the County until you notify me of our next negotiation meeting." Crown responded that day, "That is correct."

On December 20, 2011, Davis sent Crown another e-mail message requesting that the County not pay unit members' OCBA dues, per the MOU, because "[t]his may be an issue we wish to discuss during negotiations" once talks resumed. Crown responded, "Thanks Karen."

The County's New Chief Negotiator

In March 2012, the County hired private attorney Bruce Barsook on a contract basis to serve as chief negotiator for the Attorneys' bargaining unit. Barsook contacted Davis about resuming negotiations. He expressed interest in meeting as soon as possible, but the parties were unable to reconvene for around a month because of scheduling conflicts.

The County's April 27, 2012 Proposal

The parties met on April 27, 2012. The Association's negotiating team remained the same. The County's team consisted of Barsook, Assistant Director of Human Resources Terri Bruner, D.A.'s Office representative Bohan-Johnson, and P.D.'s Office representative Hantsche. The County presented a document entitled "County's Initial Proposal, OCAA Negotiations, April 27, 2012."

The Association took umbrage to the County's reference to an "initial" proposal and questioned whether negotiations were starting over. While Barsook did not respond directly to these inquiries, he did explain that the County recently completed a financial analysis and that

the County needed to "live within its means." This meant that employee compensation should be consistent with the County's available resources. He also said that the County was taking a "total compensation approach" in negotiations, meaning that the County would view proposals regarding employee compensation based on the total cost of the positions, including salary, benefits, and retirement costs.

The April 2012 proposal modified the County's position in multiple ways. For example, whereas the County previously proposed phasing in changes to employees' pension contributions over two years, the County's new proposal was to implement all the changes to employee contributions all at once. The County also proposed greater reductions to members' entitlement to premium pay. The County also modified its proposal for the New Plan, proposing a 2 percent limit on any cost of living adjustments (COLAs) to new employees' benefits. The County previously proposed a reopener on health benefits so that it could complete a study about recommended cost-saving measures. That study was complete by 2012 and the County proposed implementing the recommended changes. It did not, however, provide the details of its proposed changes until June 15, 2012. The County also previously proposed salary reopeners. In April 2012, its newer proposal included reducing the number of salary steps attorneys were entitled to advance each year.

The County's proposal also included issues not previously discussed during the 2011 negotiations, including eliminating contract-based workers' compensation pay supplements, and eliminating "length of service and layoff points from consideration of the order of layoff."

The County supported its proposal with County-wide budget figures. Those figures indicated that general fund revenue had remained "relatively flat" since the 2007-2008 fiscal year. The information also showed that employee salary had not increased substantially but

retirement and healthcare costs rose every year and were projected to continue rising. The County did not provide any information specific to the attorney unit at the time.

Association witnesses expressed "shock" over the April 27, 2012 proposal that was different in both format and content from earlier bargaining. In particular, Association bargaining team members said that they were "vehemently opposed" to changing the layoff process because the County D.A. is an elected politician and members were deeply concerned about being laid-off for political reasons. According to Yellin, the Association raised its concerns "every time it came up" in negotiations. When Yellin asked for an explanation, he said Barsook said, "[Yellin] should be in support of this because wouldn't [he] rather have good colleagues rather than longtime colleagues[?]" Davis recalled Barsook saying only that "it would be in the best benefit of the County to be able to select the people." No County witness explained the reasoning behind its layoff proposal.

The Association also objected to raising new issues not previously discussed and to the County's failure to formally respond to the Association's proposal from before the hiatus. Barsook said that the April 27, 2012 proposal was, "in essence," responsive, but that the County would issue a formal response at the next meeting.

The Association's Request for Actual Expense Data

At the April 27, 2012 meeting, the Association objected to the use of County-wide budget materials. It asserted that County-wide information did not accurately reflect circumstances in the attorney unit because the County's roughly 17,000 other employees had different compensation and other terms of employment than the 500 member Attorney unit.

The Association also contended that actual expense data provided a better picture of the County's financial condition since budgets were merely forecasts for future spending. County Chief Financial Officer (CFO) Frank Kim's testimony at the PERB hearing supported this

position. He said that the County's budget tends to project expenses at around 3.8 to 3.9 percent higher than actual costs. He said that the County prefers to over-estimate in its budget because it is preferable to have fewer expenses, not more, than expected at the end of the year. Kim described the difference between budgeted figures and actual expenses as "very, very close" from an accounting standpoint. However, given the size of the County's actual budget, the differential could be quite large. For example, Kim said that the County's total employee compensation budget for the 2011-2012 fiscal year was $1.7 billion and that actual expenses were 3.9 percent less than predicted. The differential between the budgeted amount and the actual expense would therefore be approximately $66.3 million. For that same time period, the County budgeted almost $95 million for attorney unit compensation.

Kim also confirmed the Association's belief that tax revenue was rising. Kim stated that in 2011-2012, property tax revenue increased by around 1 percent. In 2012-2013, tax revenue rose by around 2 percent. In 2013-2014, the fiscal year in which the PERB hearing occurred, Kim testified that tax revenue was rising by around 2.5 percent. The County had asserted during negotiations that it projected no tax revenue growth between 2011 and 2013 and only 1 percent growth in 2012-2014.

The Association requested actual expense data from the County for both the attorney unit and for the County as a whole. According to Association witnesses, Barsook said that he would look into the matter and respond at a later date. Barsook did not recall the discussion during his own testimony.

The June 2012 Meetings

The parties met again on June 15, 2012. The County provided a written response to the Association's August 17, 2011 proposal rejecting the proposed phase-in of members' increased retirement contributions, the creation of additional, Distinguished, steps to the salary scale, and

the use of OCBA money for OBP. Regarding the Distinguished steps proposal, Barsook explained that the Association's proposal would increase the County's compensation costs including raising the pension obligation of any staff in the Distinguished level. The County said it would consider lowering the salary steps of the Attorney I classification and having salary reopeners during the term of the MOU.

The County also provided the details of its healthcare proposal. The County proposed, among other things, creating an optional wellness program, reducing the County's contribution to employee healthcare costs, increasing member co-pay amounts, and reducing coverage for major medical expenses. The County brought in someone to explain the healthcare changes to the Association's negotiating team.

During the June 29, 2012 meeting, the County provided the Association with financial information, cost estimates, and other data pursuant to the Association's information request. It said that it expected to save around $3.46 million annually through its pension contribution proposal. The County's response included budget information specific to the attorney unit. The County did not, however, provide actual expense data for either the attorney unit or for the County as a whole. Davis testified that the Association requested expense information frequently during the parties' negotiations. She said that Barsook's response was that the County could not provide unit-specific expense data because the County "did not track the expenses in that manner" and that it could not provide the County-wide expense data because that information might fluctuate after it was compiled in either year-end or quarterly financial reporting. Barsook did not testify about his response to the Association's request. However, CFO Kim testified that it was possible for the County's Finance Office to pull unit-specific expense data but that there was a "workload issue," meaning processing such a request would take some time. He said that the County receives and responds to similar requests regularly.

Kim also said that his office receives and reviews County-wide expense data as part of generating the budget for the following year.

The Association's Proposals

On July 20, 2012, the Association provided the County with a document entitled "Menu of Discussion Points" with a variety of options to offset the County's proposed concessions. For example, the Association continued to propose creating Distinguished salary steps partially funded by lowering the Attorney I salary scale. The new proposal was less costly for the County. The Association also proposed providing a one-time opportunity to cash-out accrued leave at a reduced rate, a 3.5 percent "signing bonus," and increases to OBP. The Association also proposed some cost-saving ideas. It was understood that the Association was not proposing that the County adopt all of the options identified.

During that meeting, the parties also discussed the Association's idea for an "off schedule" salary increase, meaning that members' entitlement to salary increases would be tied to the amount of tax revenue the County received. Barsook expressed interest in this concept stating that connecting compensation to revenue was "the essence of what our total compensation approach really was." However, he said that the County was not interested in merely using tax revenue as a trigger for pay raises. He also objected to using Prop 172 funds as part of any calculus because sales tax tended to be more volatile and because not all members in the attorney unit were funded by Prop 172 funds.

The parties continued their discussion about an "off-schedule" salary increase in subsequent meetings. The Association continued proposing to connect salary increases to increases in property tax and Prop 172 funds, but that property tax would comprise a larger proportion of the calculation. The Association also stated that it would accept furlough days during the years that tax revenue decreased.

The County also presented a proposal on this issue. It proposed that the parties agree that any increases in property tax revenue be first applied to institutional increases in healthcare and pension costs and that any remainder be used for determining salary increases or decreases. If the Association agreed to that proposal, the County would agree to phase-in its proposed pension contribution changes over two years.

The parties did not reach agreement on either proposal.

The County's Last, Best, and Final Offer and the Impasse Declaration

The parties met again on August 24, 2012. The County presented its Last, Best, and Final Offer (LBFO). The LBFO contained several elements from its April 27, 2012 proposal, including eliminating the Base Pick-Ups One and Two immediately, creating a New Plan with a 2 percent COLA limit, reducing the rate at which employees advance on the salary scale, reducing eligibility for premium pay, eliminating workers' compensation supplement pay, binding arbitration, and eliminating seniority and layoff points as a basis for conducting layoffs. The County also continued to propose implementing the recommended changes to the unit's health benefits plan, but stated that those changes would be effective "January 1, 2013, or such later date as the County determines."

The LBFO included also included the following provision: "for agreement only – 2.5% lump sum bonus payable to unit members on the payroll as of the adoption of this MOU." The County explained that this sum would not be considered "base building," meaning that members could not use the money received when calculating their final pensionable wages.

The County stated that the LBFO would be considered rejected unless the Association expressly accepted it before September 4, 2012. That date was later extended to September 12, 2012 at the Association's request.

On August 31, 2012, the Association requested by letter that the County provide the full text of how the County's LBFO modified the expired MOU. At that point, the County had not provided the text of its proposals concerning the most contentious issues in negotiations. Rather, the LBFO was a summary of the County's position on each issue. Yellin said during the PERB hearing that having contract language prior to the vote on the LBFO was important because the Association's members were all attorneys who were reluctant to vote on an issue without all the details. In the past, the County provided the Association with proposed contract language around the time the parties reached tentative agreement.

Barsook responded to the Association's letter on September 5, 2012, stating that he was "unaware of any legal requirement that a party must provide exact contract language as part of its last, best, and final offer." He also questioned why the Association had not made its request earlier and asserted the County's positions in bargaining were already sufficiently clear. Barsook did not state in his response whether the County actually possessed any of the requested contract language.[5]

The Association membership voted to reject the County's LBFO. On September 13, 2013, the County declared that the parties' negotiations were at impasse. At some point after the Association rejected the LBFO, the County explained that it did not have the full text of its proposals prepared.

The Mediation and Fact-Finding Process

The parties participated in impasse mediation on or around October 18, 2012 without success. The parties then agreed to participate in fact-finding. The parties further agreed that

[5] Barsook testified that he recalled providing contract language with the LBFO. This testimony is not credited because it is contradicted by his own September 5, 2012 letter. If the County had already provided contract language to the Association, Barsook logically would have mentioned that fact in his response to the Association's request. His response instead implies that he did not provide contract language for most of the County's proposals.

the fact-finding process should focus on certain core disputes, namely: (1) pension contributions; (2) merit increases; (3) salary; (4) layoff provisions; (5) arbitration; and (6) term of agreement. The fact-finding hearing took place on or around December 10, 2012.

The fact-finding panel produced a draft of its recommendations in January 2013. On January 24, 2013, Barsook contacted Davis to determine whether the draft report created the possibility for agreement. He told Davis that he thought that the Board of Supervisors could be persuaded to accept the fact-finders' recommendations if the Association did as well.

Davis requested that Barsook draft a summary the fact-finders' recommendations along with the portions of the County's LBFO not covered by the recommendations. Barsook provided Davis with that document, entitled "Deal Points," the next day. The Deal Points also included a provision requiring the Association to withdraw the instant unfair practice charge, which had been filed with PERB by then. The County later clarified that it was not insisting that the Association withdraw the unfair practice charge as a part of any agreement.

The Association's Post-Fact-Finding Proposal

On February 14, 2013, the Association informed the County that its membership voted to reject the Deal Points as a resolution to successor MOU negotiations. The Association further stated that it had a new proposal based on the Deal Points and other items discussed in bargaining. It proposed a 2.5 percent signing bonus, adding Distinguished steps to the salary scale with the proviso that the salary costs could not exceed $1.2 million annually, and a formula connecting future salary increases or furlough days to a combination of property tax and Prop 172 revenue. It also proposed a new pension benefit formula of 2 percent of salary per year of service at 62 years old for new hires and implementation of the recommended changes to the healthcare program once a majority of other County bargaining units also accepted the changes.

On or around March 1, 2013, the County rejected the Association's proposal stating that the items proposed had already been considered by the County earlier in bargaining. Barsook said that it was the County's position that the parties were "deadlocked in negotiations and had completed the mandated impasse procedures[.]" He said that the County would impose its LBFO on the bargaining unit at the March 5, 2013 Board of Supervisors' meeting.

The Imposition of Terms

The County scheduled a Board of Supervisors Meeting for March 5, 2013 to consider unilaterally imposing terms and conditions of employment on the Association's bargaining unit. On March 1, 2013, the County provided the Association with an agenda for that meeting and a copy of all the terms being imposed. This was the first time the County provided the Association with the full-text of how its LBFO modified the parties' expired MOU.

ISSUE

Did either the County's negotiating conduct or its imposition of terms on the Association's bargaining unit violate the duty to bargain in good faith?

CONCLUSIONS OF LAW

The Association accuses the County of bad faith bargaining in violation of MMBA section 3505 and PERB Regulation 32603(c). Good faith in negotiations is commonly evaluated under a "totality of the circumstances," or surface bargaining analysis, which examines the parties' conduct as a whole to ascertain their subjective intent. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 12-13, citing *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, p. 25 (*City of Placentia*), other citations omitted.) Other actions, however, are considered "per se" violations of the duty to bargain because of their inherent ability to frustrate the bargaining process and undermine the authority of exclusive bargaining representatives. (*City of Sacramento*, citing *Vernon Fire Fighters v. City*

of Vernon (1980) 107 Cal.App.3d 802, p. 823.) In this case, the Association alleges that the County violated the duty to bargain in good faith by its conduct during successor MOU negotiations and by later implementing terms on the attorney unit.

1. The Successor MOU Negotiations

The Association contends that the County engaged in unlawful surface bargaining. As its name implies, surface bargaining is where the respondent approaches its bargaining obligations superficially without any intent to work towards or achieve agreement. In other words, "[i]t is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement." (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 13, citing *Inter-Polymer Industries* (1972) 196 NLRB 729, pp. 759-760.)[6] This is because bargaining in "good faith is a subjective attitude and requires a genuine desire to reach agreement." (*City of Placentia, supra*, 57 Cal.App.3d at p. 25, citing *NLRB v. MacMillan Ring-Free Oil Company, Inc.* (9th Cir. 1968) 394 F.2d 26, *NLRB v. Mrs. Fay's Pies* (9th Cir. 1965) 341 F.2d 489.) On the other hand, the duty to bargain "'does not require the yielding of positions fairly maintained.'" (*West Side Healthcare District* (2010) PERB Decision No. 2144-M, warning letter, pp. 5-6, quoting *NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229, p. 232.)

PERB's surface bargaining analysis examines "the entire course of negotiations, including the parties' conduct at and away from the bargaining table, to determine whether they have negotiated with the requisite intention of reaching an agreement." (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 22, citing *Pajaro Valley Unified School District* (1978)

[6] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

PERB Decision No. 51, pp. 4-5; *In re Atlas Mills, Inc.* (1937) 3 NLRB 10.) PERB typically looks for the presence or absence of common indicators of bad faith such as recalcitrance in scheduling meetings or other evasive tactics during bargaining, insisting upon agreement on issues such as ground rules or non-economic items prior to discussing substantive economic terms, or participating in negotiation sessions while lacking any authority to reach agreement. (See *West Side Healthcare District, supra*, PERB Decision No. 2144-M, warning letter, p. 5, citations omitted.) PERB's review of these factors is not a formulaic one; the primary issue in any surface bargaining case is "whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations." (*City of San Jose, supra*, PERB Decision No. 2341-M, p. 19, citing *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S.)

In this case, multiple factors support the Association's surface bargaining claim. Each of these factors will be discussed below, preceded by a discussion regarding timeliness.

a. Timeliness of the Parties' Early Bargaining Conduct

The County contends that some of the parties' bargaining conduct cannot be considered as part of this case because that conduct is untimely. PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072 (*Coachella Valley MVCD*), pp. 1090-1091.) PERB's duties under PERB Regulation 32620(b)(4) include the responsibility to determine whether a charge is subject "to dismissal for lack of timeliness." In addition, PERB Regulation 32620(b)(5) authorizes PERB to dismiss a charge "if it is determined that a charge filed pursuant to Government Code 3509(b) is based upon conduct occurring more than six months prior to the filing of the charge." As a general rule, claims of

misconduct older than six months are subject to dismissal for untimeliness. (*Housing Authority of the City of Los Angeles* (2011) PERB Decision No. 2166-M, p. 3.)

Untimely conduct "may nonetheless be considered as background evidence of the [respondent's] motive." (*Garden Grove Unified School District* (2009) PERB Decision No. 2086, p. 4, fn. 3 (*Garden Grove USD*), citing *Trustees of the California State University* (2008) PERB Decision No. 1970-H; *California State University, Hayward* (1991) PERB Decision No. 869-H; *North Sacramento School District* (1982) PERB Decision No. 264.)[7]

The Board's position on "background evidence" finds support in U.S. Supreme Court precedent. In *Local Lodge No. 1424, International Association of Machinists v. NLRB* (1960) 362 U.S. 411 (*Bryan Manufacturing*),[8] the Court described the two basic contexts in which evidence from outside the statute of limitations may arise.

> The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period[.]

(*Id.* at pp. 416-417.) On the other hand:

> where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice.

(*Ibid.*) In other words, the Court in *Bryan Manufacturing* held that untimely allegations may "shed light" on the nature of already timely claims, but may not be considered where the claims at issue must rely on the untimely claims to demonstrate a violation. Untimely

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[7] Each of those cases concerned whether the respondent possessed a retaliatory motive when taking adverse actions against an employee or union. Intent is a key factor in both PERB's retaliation analysis and its surface bargaining analysis.

[8] *Bryan Manufacturing* is the name of the employer in that case.

evidence in the latter circumstances is inadmissible to prevent "reviving a legally defunct unfair practice charge." (*Ibid.*)[9] The National Labor Relations Board (NLRB) has subsequently applied these concepts to consider conduct outside the statute of limitations period as background evidence in a variety of surface bargaining cases. (See e.g., *Regency Service Carts, Inc.* (2005) 345 NLRB 671, p. 672, fn. 3; *Teamsters Local Union No. 122 (August A. Busch & Co.)* (2001) 334 NLRB 1190, p. 1251; *Sparks Nugget, Inc.* (1990) 298 NLRB 524, fn. 5, p. 550, affirmed in relevant part at *Sparks Nugget, Inc. v. NLRB* (9th Cir. 1992) 968 F.2d 991, p. 995; *Houston County Electric Cooperative* (1987) 285 NLRB 1213, p. 1222.)

PERB has adopted the principles from *Bryan Manufacturing, supra*, 362 U.S. 411, in its own case law. In *Rio School District* (2008) PERB Decision No. 1986 (*Rio SD*), the Board held that an employer's actions outside the statute of limitations period "may be considered to the extent it sheds light on the true character of the District's bargaining conduct within the limitations period." (*Id.* at p. 10, fn. 7, citing *Sparks Nugget, Inc., supra*, 968 F.2d at p. 995, *Trustees of the California State University, supra*, PERB Decision No. 1970-H.; see also *Santa Monica Community College District* (2012) PERB Decision No. 2243, dismissal letter, p. 2.)

In contrast, The Board also held that a surface bargaining claim based solely upon conduct outside the statute of limitations period was not timely. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2017-S, warning letter, p. 8.) In *Gavilan Joint Community College District* (1996) PERB Decision No. 1177, the

[9] *Bryan Manufacturing, supra*, 362 U.S. 411, concerned the enforceability of a union security clause. The Court rejected the employer's argument that the clause was unenforceable because the union lacked majority status at the time the agreement was reached. (*Id.* at p. 415.) The Court reasoned that the employer's argument fell into the second, inadmissible category of anterior events, because majority status had been decided at a time outside the statute of limitations and there was no claim that the agreement was invalid absent relation to that untimely event. (*Id.* at p. 417.)

Board held that a charging party failed to demonstrate the relationship between a respondent's allegedly misleading statements during factfinding and older pre-impasse bargaining conduct described in a prior unfair practice charge. The Board's holding focused on the relevancy of the evidence, not the admissibility, concluding that "the fact that the District was found to have engaged in surface bargaining more than a year prior to the conduct at issue here does not lend support to the instant unfair practice charge." (*Id.* at pp. 5-6.)

In the present case, the Association filed the instant unfair practice charge on Friday, November 16 2012, meaning that under normal circumstances the statute of limitations extends back until and including Wednesday, May 16, 2012. However, the Association described bargaining conduct by the County dating back to April 2011. Normally, claims of misconduct dating that far back cannot form the basis of an unfair practice charge. However, multiple factors warrant considering older bargaining conduct under the circumstances. First, as will be discussed in greater detail below, the Association has put forward significant evidence of the County's bad faith bargaining conduct within the statute of limitations period. Thus, under the principles from *Bryan Manufacturing*, *supra*, 362 U.S. 414, evidence of the County's older conduct may be used to supplement, or "shed light on the true character," of the County's bargaining conduct within the statute of limitations period. (See *Id.* at pp. 416-417.)

In addition, consideration of this conduct is warranted here because the parties' negotiations spanned almost two years. (See *Regency Service Carts, Inc.*, *supra*, 345 NLRB at p. 672 [reviewing the 32 months of negotiations in determining a surface bargaining claim].) Artificially removing from consideration any bargaining conduct older than six months for any purpose is antithetical to the "totality of the bargaining conduct" analysis and would, in this case, exclude more than half of the parties' bargaining sessions.

For these reasons, this proposed decision will review the entirety of the parties' bargaining conduct, including events occurring outside the statute of limitations. Any violation of the duty to meet and confer in good faith will not be based solely on conduct prior to May 16, 2012.

b. The County's Regressive Proposals

The Association accuses the County of regressive bargaining. PERB has previously found that regressive bargaining, such as reneging on agreements already reached during negotiations and/or making proposals that are, as a whole, less advantageous to prior offers may support a surface bargaining claim. (*City & County of San Francisco* (2009) PERB Decision No. 2064-M, p. 3; *Chino Valley Unified School District* (1999) PERB Decision No. 1326, p. 5; *Charter Oak Unified School District* (1991) PERB Decision No. 873, pp. 17-18.) Such actions have the potential to move the parties further away from agreement. However, regressive bargaining is not unlawful in-and-of-itself. Rather, such conduct "is unlawful if it is for the purpose of frustrating the possibility of agreement." (*US Ecology Corp.* (2000) 331 NLRB 223, p. 225, citing *McAllister Bros.* (1993) 312 NLRB 1121.) For instance, parties may offer new, even regressive, proposals if based upon changed economic conditions. (*Id.* at pp. 225-226.) On the other hand, a change in position for suspicious reasons or without any explanation at all is evidence of bad faith. (*Mid-Continent Concrete* (2001) 336 NLRB 258, p. 260, enforced sub nom. *NLRB v. Hardesty Company, Inc.* (8th Cir. 2002) 308 F.3d 859, p. 868.)

Moreover, proposals on individual issues "must be viewed in the context of the entire package of proposals." (*Ventura County Community College District* (1998) PERB Decision No. 1264 (*Ventura CCD*), warning letter, p. 6, citing *Regents of the University of California* (1996) PERB Decision No. 1157-H.) For example, an employer's apparently regressive

proposal about an organizational security issue was not considered regressive as a whole because the proposal also included concessions on wages, the workday, and part-time unit members. (*Ibid.*)

In this case, it is undisputed that the County's proposals in 2012, on the whole, included more concessions than its 2011 proposals. Prior to the hiatus in bargaining, the County proposed phasing-in its pension contribution changes over two years and a New Plan for new hires. The parties had been moving closer to agreement on both of these issues, with the County understanding the Association's interest in phasing-in new costs and the Association accepting the New Plan.

On April 27, 2012, the County proposed that the Association's members pay for the Base Pick-Ups One and Two without a phase-in clause. The County also modified the New Plan, adding a 2 percent COLA limit on benefits. In addition, the County proposed additional concessions, including greater reductions in premium pay accrual, additional healthcare costs,[10] and eliminating other types of pay. Each of these proposals were designed to exact additional concessions from the Association.

The County also regressed from its stated position on OBP. In 2011, County negotiator Crown indicated that he did not think that the County's Board of Supervisors would oppose the Association's proposal to use OCBA money to fund OBP increases. In 2012, the County proposed eliminating its payment of OCBA dues and rejected proposals to increase OBP. In *Oakland Unified School District* (1983) PERB Decision No. 326 (*Oakland USD*), the Board found evidence of bad faith where the employer suggested a willingness to "explore" the union's interest in severance pay during a layoff, but subsequently reverted to its prior position rejecting any severance pay. (*Id.* at pp. 38-39.) The Board reasoned that although the

[10] The County did not explain the nature of its proposed healthcare changes until June 15, 2012.

employer did not make any "firm proposals" on that issue, the union was "reasonably led to believe that some movement on the part of the [employer] was possible." (*Ibid.*) The same reasoning applies here. Although the parties never reached any tentative agreement over the OCBA/OBP issue, the County led the Association to believe that it would accept the Association's proposal. When Davis contacted Crown in December 2011 about suspending payment of OCBA dues to preserve what she believed to be an impending agreement, Crown gave no indication that the County would change its position on this issue.

The County detailed additional healthcare concessions on June 15, 2012, a date within the statute of limitations period. Its healthcare proposal included less County funding and additional unit member costs.

The County asserts that the elimination of the phase-in clause from its proposal was not regressive under the circumstances because the Association was not required to pay any increased pension contributions during the entire eight-month bargaining hiatus. However, the pension savings unit members received by this delay was not established for the record. Thus, one cannot determine the merits of the County's argument. Moreover, this argument does not address the multiple other ways that its proposals in April and June 2012 were regressive. As in *Ventura CCD*, *supra*, PERB Decision No. 1264, the County's 2012 proposals must be evaluated as a whole for evidence of surface bargaining.

The reasoning behind the County's change in position remains unclear. The County explains that its proposals were justified because its pension and healthcare costs have increased every year even when salaries and hiring were limited. These facts might have justified the County's decision to seek concessions from the Association in the first place, but they provide no insight into why the County changed its position midway through bargaining. The County had the same basic budget information available before and after its regressive

proposals. The County also admitted in negotiations that its tax revenue remained fairly consistent since the 2007-2008 fiscal year. County CFO Kim confirmed that tax revenue actually increased each year starting in 2011-2012.

The County also asserts in its closing brief that its 2011-2012 financial situation was impacted by litigation involving certain reserve funds. However, neither the litigation nor the County's budget reserve were mentioned anywhere in the financial analysis attached to its April 27, 2012 proposal. Nor did Barsook testify about the litigation at all when describing the basis for the County's 2012 bargaining position during the PERB hearing. Thus, even if the litigation formed part of the basis of the County's regressive proposals, its failure to explain its impact to the Association during bargaining would be evidence of bad faith.

It is concluded that the County made regressive proposals, which is evidence of bad faith under the facts presented here. The fact that the County engaged in such conduct both outside and inside the statute of limitations suggests a pattern of conduct designed to thwart good faith negotiations.

c. The County's Predictably Unacceptable Offers

There is also evidence that the County made predictably unacceptable offers during negotiations. Such proposals may be evidence of surface bargaining. (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270 (*San Bernardino City USD*), proposed decision, p. 83, citing *Oakland USD* (1983) PERB Decision No. 326; *Redwood City School District* (1980) PERB Decision No. 115 (*Redwood City SD*).) In *San Bernardino City USD*, an employer proposed deleting the organizational security clause of the parties' agreement even though there was no showing that the employer had a problem with that article. The employer also proposed deleting hours and leave provisions from the agreement

that were the subject of recent grievances. (*Id.* at proposed decision, pp. 83-84.) The Board found both proposals were predictably unacceptable and were evidence of bad faith.

In *Redwood City SD, supra*, PERB Decision No. 115, the Board held that a proposal did not evidence surface bargaining "unless it foreclosed future negotiations or was so patently unreasonable as to frustrate possible agreement." (*Id.* at proposed decision, pp. 11-12.) In that case, the Board held that an employer's proposal for a 5 percent pay differential was not so predictably unacceptable so as to evidence bad faith bargaining even though the union preferred a 6.25 percent differential. (*Id.* at proposed decision, p. 11.)

In the present case, it is undisputed that the County's primary interests in bargaining were economic. It said that its main goal was to achieve its proposed pension changes and to "live within its means." Despite these facts, the County proposed eliminating seniority and "layoff points" as a means for determining the order of layoffs, something Barsook admitted was not a cost-saving measure. He also admitted to knowing that the Association was "vehemently opposed" to the County's proposal and would not agree to it under any circumstances. No one from the County explained the basis for this proposal during the PERB hearing.

The County argues that the proposal was not evidence of bad faith because unit members may still only be dismissed through the discipline process for good cause. This argument is unpersuasive for at least two reasons. First, it misapprehends the Association's concern about politically motivated layoffs which are not part of the discipline process. Second, the County also proposed eliminating the right to appeal discipline to binding arbitration. The County maintained its position on both proposals throughout negotiations and ultimately imposed both on the unit.

As in *San Bernardino City USD*, *supra*, PERB Decision No. 1270, here the layoff proposal was not consistent with the County's stated bargaining objectives and there was no evidence of historic problems with prior-existing layoff or discipline processes. Furthermore, the expired MOU already contained an exception to seniority-based layoffs for employees with special skills or abilities. The County never adequately explained the need for either the layoff or the arbitration proposal and furthermore did not explain why the changes were necessary during the already tense negotiations over pension contribution and other compensation changes. Under these circumstances, these proposals were predictably unacceptable and were evidence of bad faith. Because the proposals were originally made outside the statute of limitations period, they will be considered only to the extent they shed light on the County's timely bargaining conduct.

d. The County's Failure to Properly Respond to Information Requests[11]

The MMBA definition of "meet and confer in good faith" includes, among other things, the obligation "to exchange freely information," about negotiations and negotiable subjects. (MMBA, § 3505.) Thus, PERB has held that the duty to bargain in good faith requires negotiating parties to furnish information germane to the negotiations and contract administration. (*City of Burbank* (2008) PERB Decision No. 1988-M, p. 8; see also *Chula Vista City School District* (1990) PERB Decision No. 834, p. 50.) Furthermore, responses to information requests must be timely. (*Saddleback Valley Unified School District* (2013) PERB Decision No. 2333, proposed decision, p. 22, citing *Regents of the University of California*

[11] PERB typically views the failure to properly respond to information requests as a per se violation of the duty to bargain in good faith. (*City of Burbank*, *supra*, PERB Decision No. 1988-M, p. 8). In this case, the Association never alleged such per se violations and adding such a claim as an independent violation of the MMBA at this point would be untimely. (See *County of Riverside* (2010) PERB Decision No. 2097-M, p. 7.) Thus, the County's responses to the Association's information requests will only be considered in this proposed decision as evidence of the County's bargaining conduct under a surface bargaining theory. (See *Rio SD*, *supra*, PERB Decision No. 1986, p. 10.)

(1999) PERB Decision No. 1314-H; *Compton Community College District* (1990) PERB Decision No. 790.)

During bargaining, each side "is entitled to [the] information it needs 'to understand and intelligently discuss the issues raised in bargaining.'" (*Town of Paradise* (2007) PERB Decision No. 1906-M, proposed decision, p. 5, quoting *Trustees of the California State University* (1987) PERB Decision No. 613-H.) A party's failure to clarify its proposals during negotiations may also indicate bad faith. (*Chula Vista City School District*, PERB Decision No. 834, proposed decision, pp. 60-61.)

i. The Request for Actual Expense Data

In this case, the County used County-wide budget information to support its April 27, 2012 proposal. The Association requested data of the County's actual expenses, stating that the County's budgets were merely projections and therefore less accurate. The Association specifically requested both County-wide and a unit-specific expense data. In the June 2012 meetings, the County said that it could not provide unit-specific expense data because it "did not track the expenses in that manner." It also said that it could not provide County-wide expense data because of possible fluctuations in how it kept that information. It instead provided unit-specific *budget* information, even though the Association already previously said such information was inadequate. The County never provided any actual *expense* data.

The County's response to the Association's request for expense data was problematic for multiple reasons. First, the County failed to respond to the Association's request for relevant information. Records of the County's actual compensation expenses is relevant to determining the parameters of the County's "live within its means" position. Under the facts of this case, the County's failure to provide such information upon request suggests an intent to obfuscate its true financial condition. The importance of the requested information was

highlighted by County CFO Kim, who said that budget projections typically exceed actual expenses by around 3.9 percent. Using round figures and the County's own budget information, the differential between the total employee compensation budget figure and actual expense data was approximately $66 million in the 2011-2012 fiscal year. This differential equals roughly two-thirds of the compensation budget for the entire attorney unit that year. In addition, assuming that there was a similar 3.9 percent differential between the budget and actual expenses for the attorney unit, the County's actual expenses would have been around $3.7 million less than projected. This figure is greater than the $3.46 million the County expected to save annually by its pension contribution proposal. Based on these facts, actual expense data could have affected the parties' negotiations over the amount in concessions needed to satisfy the County's fiscal concerns. Kim also confirmed that the County's revenue projections in its budgets were inaccurate. Barsook said that revenue was not expected to increase until 2013-2014. Kim said actual tax revenues have increased every year since 2011-2012. Under these facts, the County's failure to provide the Association with actual expense data suggests bad faith. (See *Compton Community College District* (1989) PERB Decision No. 728, proposed decision pp. 27-28 [holding that an employer's failure to "present a clear picture of its resources or the extent to which it was willing to commit those resources to [compensation]" was evidence of bad faith].)

Furthermore, the County did not simply fail to produce the requested information; it misrepresented the truth about the County's record-keeping. Kim contradicted Barsook's assertion during bargaining that the County could not provide expense data for a specific bargaining unit. He instead said that it was a "workload issue" due to the effort involved in putting the information together. He said that the County receives and responds to similar requests regularly. Kim also said that the County receives and uses County-wide expense data.

Misrepresentations during bargaining further demonstrates bad faith under a totality of the circumstances analysis. (*Trustees of the California State University* (2010) PERB Decision No. 2151-H, dismissal letter, p. 5, citing *Rio SD*, *supra*, PERB Decision No. 1986; *Gavilan Joint CCD*, *supra*, PERB Decision No. 1177, dismissal letter, p. 2.)

The County argues its response to the request for expense data did not evidence bad faith because the Association was required to reassert or clarify the request after the County's June 29, 2012 response. PERB has held that when an employer partially complies with a union's information request, the union is required "to communicate its dissatisfaction, or to reassert or clarify its request." (*Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, dismissal letter, p. 6, citations omitted.) However, the County's position is unpersuasive here because the Association already stated that it did not trust budget projections. Therefore, the County already knew or should have known that providing more budget information would not satisfy the Association's request. The Association was not required to reassert a position that was already sufficiently clear. It is undisputed that the County never provided any expense data. Moreover, the County's position does not address the fact that the County also misrepresented the truth about the availability of its expense data. Therefore, the County's failure to respond to this request for information was further evidence of bad faith.

ii. The Request for the Text of the County's Proposals

On August 31, 2012, the Association requested that the County provide the full text of how the County's LBFO would modify the expired MOU. The County responded on September 5, 2012, stating that it was not required by law to provide exact contact language in its LBFO and questioning why the Association had not made the request earlier. The County never stated whether it possessed any of the requested contract language.

As stated above, parties are only required to provide sufficient detail about their proposals to allow meaningful discussion to occur. (*Town of Paradise*, *supra*, PERB Decision No. 1906-M, proposed decision, p. 5, citations omitted.) However, the duty to bargain also requires the employer to timely respond to requests for information about subjects within the scope of bargaining. (*Saddleback Valley USD*, *supra*, PERB Decision No. 2333, proposed decision, p. 22.) This is true even if the employer's only response is that it had no documents or information responsive to the request. (*Id.* at proposed decision, pp. 24-25.)

Here, information relating to the County's LBFO were clearly relevant to negotiable subjects. At the time of the request, the County questioned both the timing and the need for the Association's request but it never indicated whether it had any responsive documents or explained why it was unable or unwilling to respond. Nor did it ever provide responsive documents until around six months later, shortly after refusing to negotiate with the Association further. Although the County might not have been obligated to have the full text of its proposals prepared at the time it made the LBFO, it was required to respond in good faith about what it did possess. It was not entitled to rebuff the Association's request for relevant information. The County's decision to do so in this case is evidence of bad faith.

After reviewing the entire record of the parties' bargaining, it is concluded that the County lacked the subjective intent to reach a successor MOU agreement with the Association. Its failure to provide important information about its finances and its proposals suggests an intent to conceal pertinent information from the Association when it needed that information most. Its regressive healthcare proposal evidences an intent to move the parties further away from agreement.

The County's conduct earlier in negotiations further supports these conclusions. It made regressive and predictably unacceptable proposals on April 27, 2012 and maintained its

position on those proposals until imposition. Those proposals frustrated progress made during months of earlier bargaining. After considering the totality of the parties' bargaining conduct, it is concluded that the County engaged in unlawful surface bargaining in violation of MMBA sections 3505 and 3506. Such conduct also interferes with protected rights under MMBA section 3503. (*City of Davis* (2012) PERB Decision No. 2271-M, p. 8.)

2. The Imposition of Terms on the Bargaining Unit

An employer who unilaterally changes established policies on negotiable subjects prior to reaching a bona fide impasse violates the duty to bargain in good faith. (*City of Escondido* (2013) PERB Decision No. 2311, p. 8, citing *NLRB v. Katz* (1962) 369 U.S. 736.) PERB has held that "a bona fide impasse exists only if the employer's conduct is free from unfair labor practices; its right to impose terms and conditions at impasse is therefore dependent on prior good-faith negotiations *from their inception through exhaustion of statutory or other applicable impasse resolution procedures.*" (*City of San Jose, supra*, PERB Decision No. 2341-M, pp. 39-40 [emphasis in original], citation omitted.)

a. Failure to Reach Bona Fide Impasse

It is undisputed that the County unilaterally imposed terms on the Association's bargaining unit. Based on the analysis above, it is concluded that the County participated in the negotiations preceding imposition in bad faith. Therefore, the parties were not at a bona fide impasse at the time the County implemented the changes to employee working conditions. (See *City of San Jose, supra*, PERB Decision No. 2341-M, pp. 39-40, citations omitted.) Accordingly, the County's unilateral change to terms and conditions of employment also violated MMBA sections 3505 and 3506. (*Id.*; *County of Sacramento* (2009) PERB Decision

No. 2045-M, p. 4.)[12] Again, this conduct also interferes with protected rights under MMBA section 3503.

b. The Association's Alternative Legal Theories

The Association also asserts that the County's imposition of terms on the bargaining unit violated the duty to negotiate because the imposed terms were not reasonably comprehended within the LBFO and because the imposed changes to unit members' contributions violated a requirement in PEPRA that changes to employee contributions be agreed to in an MOU. However, having already concluded that the County bargained in bad faith and unlawfully imposed terms upon the bargaining unit, it is unnecessary to address the merits of the Association's alternative theories. Moreover, because it is found that the County violated the duty to meet and confer in good faith prior to declaring impasse, it is unnecessary to address the parties' bargaining conduct during impasse.

The Association devoted a significant portion of its closing brief to its claim that the County violated terms in PEPRA. For that reason, this proposed decision will briefly address that claim in greater detail. PERB was created by the Legislature to administer State collective bargaining laws, including, as relevant here, the MMBA. (*Coachella Valley MVCD, supra*, 35 Cal.4th at p. 1086.) PERB has limited authority to interpret statutes outside of its legislatively mandated jurisdiction. (See *Los Angeles Unified School District* (2012) PERB Decision No. 2299, p. 10, fn. 8.) PERB had held, for example, that it could interpret provisions of the "Education Code as necessary to carry out its duty to administer [the Educational Employment

[12] The County implied in its brief that unilateral imposition was justified in this case because of the Association's own bad faith conduct, such as delays in bargaining or direct dealing with the Board of Supervisors. PERB has rejected the "self-help" approach to negotiations, holding that a union's bad faith did not justify unilateral action. (*County of Santa Clara* (2010) PERB Decision No. 2120-M, p. 15.)

Relations Act (EERA)[13]]." (*Whisman Elementary School District* (1991) PERB Decision No. 868, p. 13 (*Whisman ESD*), citing *San Bernardino City Unified School District* (1989) PERB Decision No. 723, p. 2.) In addition, PERB may harmonize the collective bargaining statutes it enforces with other statutes covering similar provisions to ascertain the legislative intent behind the statutes within its jurisdiction. (*Whisman ESD*, at p. 13, citing *People v. Brun* (1989) 212 Cal.App.3d 951, p. 954; *Interinsurance Exchange v. Spectrum Investment Corp.* (1989) 209 Cal.App.3d 1243, p. 1255; see also *Santa Ana Unified School District* (2013) PERB Decision No. 2332, p. 13.) Neither of these circumstances presents itself in this case. As explained in more detail above, it was determined that the County was not privileged to impose terms upon the bargaining unit because the parties never reached a good faith impasse in negotiations. This determination was made irrespective of whether the County's conduct also violated PEPRA. It is accordingly unnecessary for PERB to interpret PEPRA to decide the issues raised in the case. Similarly, although the MMBA and PEPRA appear to address some similar issues, it is not necessary for PERB to interpret PEPRA to better understand the MMBA duty to meet and confer in good faith. Thus, the Association's request for PERB to interpret PEPRA in this case is unwarranted.

The Association argues that *City of Pinole* (2012) PERB Decision No. 2288-M stands for the proposition that an employer violates the MMBA by unilaterally imposing terms that violate California pension statutes, including PEPRA. This position overstates the holding in that case. In *City of Pinole*, a union alleged that an employer's insistence to impasse that its members pay pension contributions in excess of what was allowed under State pension laws was tantamount to unilaterally imposing a waiver of statutory rights. (*Id.* at p. 11.) The Board recognized State pension statutes were outside of its primary area of expertise but nevertheless

[13] EERA is codified at Government Code section 3540 et seq. (Gov. Code, § 3541.5.)

concluded that the union "articulated a viable legal theory" for an MMBA violation if it made a full record of how those laws were applied including "evidence of legislative history, practices throughout the state and other means." (*Ibid.*) The Board expressly declined to address the merits of the claim without a full and complete record. (*Id.* at p. 13.)[14]

Here, the parties did not present any evidence of legislative history or application in other jurisdictions as requested by the Board. More importantly, any discussion about a PEPRA violation in this proposed decision would be merely academic because the parties in this case never reached lawful impasse.[15] Therefore, the Association's asserted PEPRA violation will not be addressed further.

REMEDY

MMBA section 3509(b) authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M, p 8.) This includes an order to cease and desist from conduct that violates the MMBA. (*Id.* at p. 9.) PERB's remedial authority also includes the power to order an offending party to take affirmative actions to effectuate the purposes of the MMBA. (*City of Redding* (2011) PERB Decision No. 2190-M, pp. 18-19.)

PERB also has the authority to order the County to restore the status quo ante and rescind the unilateral policy change. In *California State Employees' Association v. PERB* (1996) 51 Cal.App.4th 923, p. 946, the court found:

> Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members' exclusive representative an

[14] The Board later interpreted its use of the word "viable" in *City of Pinole*, *supra*, PERB Decision No. 2288-M to mean, "not frivolous." (*City of San Jose*, *supra*, PERB Decision No. 2341-M, p. 45.)

[15] Unlike in the present case, in *City of Pinole*, *supra*, PERB Decision No. 2288-M, PERB dismissed the claim that the employer in engaged in surface bargaining. (*Id.* at p. 4.)

> opportunity to meet and confer over the decision and its effects. This is usually accomplished by requiring the employer to rescind the unilateral change and to make the employees "whole" from losses suffered as a result of the unlawful change.

(Citations omitted; see also *County of Sacramento* (2009) PERB Decision No. 2045-M, pp. 3-4, citing *County of Sacramento* (2008) PERB Decision No. 1943-M.)

These are appropriate remedies here. Therefore, the County is ORDERED to cease and desist from bargaining in bad faith with the Association and it is furthermore ORDERED to cease and desist from violating employee and employee organization rights.

The County is also ORDERED to rescind its March 5, 2013 unilateral imposition of policies within the scope of representation and also to make Association unit members whole for financial losses resulting directly from the County's unilateral action. Those financial losses shall be augmented by interest at a rate of 7 percent per annum. (See *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 50.)

Finally, the County is ORDERED to post a notice incorporating the terms of this order at all locations where notices to the Association's unit members are usually posted. A notice posting, signed by an authorized representative of the County, provides employees with notice that the County acted in an unlawful manner, must cease and desist from its illegal action, and will comply with the order. It effectuates the purposes of the MMBA to inform employees of the resolution of this controversy. (*City of Redding*, *supra*, PERB Decision No. 2190-M, pp. 19-20, citing *Placerville Union School District* (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, and 3506 and PERB Regulations 32603(a), (b), and (c). The County violated the MMBA by negotiating in bad faith and by imposing

terms subject to negotiations upon the Orange County Attorneys Association (Association) bargaining unit prior to reaching bona fide impasse.

Pursuant to section 3509(b) of the Government Code, it hereby is ORDERED that the County, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with the Association over issues within the scope of representation;

2. Imposing changes within the scope of representation without reaching either agreement with the Association or a bona fide impasse;

3. Interfering with the Association's right to represent its members; and

4. Interfering with employees' right to be represented by the Association.

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

1. Rescind any portion of the County's March 5, 2013 imposition of terms concerning issues within the scope of representation;

2. Compensate Association unit members for any financial losses directly resulting from the County's March 5, 2013 unlawful imposition; and

3. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the Association's bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

Right to Appeal

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

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

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-814-M, *Orange County Attorneys Association (Association) v. County of Orange (County)*, in which all parties had the right to participate, it has been found that the County violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by negotiating in bad faith and by imposing terms subject to negotiations upon the Association's bargaining unit prior to reaching bona fide impasse.

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

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with the Association over issues within the scope of representation;

2. Imposing changes within the scope of representation without reaching either agreement with the Association or a bona fide impasse;

3. Interfering with the Association's right to represent its members; and

4. Interfering with employees' right to be represented by the Association.

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

1. Rescind any portion of the County's March 5, 2013 imposition of terms concerning issues within the scope of representation; and

2. Compensate Association unit members for any financial losses directly resulting from the County's March 5, 2013 unlawful imposition.

Dated: _____ COUNTY OF ORANGE

By: _____
Authorized Agent

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