STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case No. LA-CE-577-M PERB Decision No. 2360-M March 25, 2014

Appearances: Weinberg, Roger & Rosenfeld by Alan G. Crowley, Attorney, for Service Employees International Union, Local 721; The Zappia Law Firm by Edward Zappia, Attorney, for County of Riverside.

Before Huguenin, Winslow and Banks, Members.*

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the proposed decision (attached) of an administrative law judge (ALJ). The ALJ ruled that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally eliminating step pay increases before a genuine impasse in negotiations was reached. He ordered that employees whose "anniversary date" fell on July 30, 2009 be made whole.

*Chair Martinez did not participate in this case.

[1] The MMBA is codified at Government Code section 3501 et seq. Unless otherwise indicated, all statutory references herein shall be to the Government Code.

Both the County and the Service Employees International Union, Local 721 (SEIU) except to the proposed decision.[2] The County excepts to the ALJ's finding that the parties were not at a genuine impasse when it unilaterally suspended the step increases, and SEIU excepts to a finding by the ALJ that it claims has the potential effect of mistakenly omitting hundreds of employees who were eligible to receive the step increase on the first day of the pay period beginning on July 30, 2009.

The Board itself has reviewed the record in this matter, including the pleadings, the hearing record, the proposed decision, the parties' exceptions and their respective responses. We conclude that the ALJ's findings of fact are supported by the hearing record, with one exception, which we correct below. The ALJ's conclusions of law are well-reasoned and in accordance with applicable law. We, therefore, affirm the ALJ's proposed decision, subject to the following discussion of the issues raised by the parties' exceptions.

FACTUAL SUMMARY

SEIU represents approximately 6,000 employees of the County in bargaining units for para-professionals, professionals, registered nurses and supervisory employees. Negotiations began in March 2009 for a successor memorandum of understanding (MOU) to the 2006-2009 agreement that expired on June 30, 2009. At the first session on March 26, 2009, the County's Negotiator, Thomas Prescott, announced that he would be on vacation for most of April. He was replaced as chief negotiator on May 7, 2009 by Steve Komers (Komers).

From the outset of bargaining, the County made clear that it needed economic concessions from SEIU. The County's goal was to obtain a 10 percent reduction in labor costs

[2] The County also requested oral argument, which was denied because it was untimely filed. The County did not appeal the administrative decision denying its request, so we do not consider it here.

for all employees. The County initially presented SEIU with a list of cost reductions from which it asked SEIU to choose in order to reach the 10 percent reduction. The County never intended that all the proposed reductions would be accepted or imposed if impasse were reached.

The parties agree that this "menu" approach did not result in productive negotiations but for different reasons. According to SEIU witnesses, when SEIU selected some items from the list, the County would then insist that employee furloughs had to be part of the concessions. The County's witness testified that SEIU failed to pick any item from the menu until late in negotiations, around July 2009. The County's witness also testified that it chose to abandon the "menu" approach after concluding that SEIU misrepresented the proposal to its membership by adding the sum total of concessions on the menu and claiming the County was seeking up to a 30 percent reduction in wages and benefits. The County also asserted that furloughs would result in immediate savings.

In mid-June 2009, bargaining was suspended for approximately 12 days by mutual agreement in order to pursue a different approach to cost savings. A bilateral task force was established to work with members of the County's Board of Supervisors and the respective negotiating teams to explore various money-saving ideas, such as a four-day per week, ten-hour-day work schedule. Controversy over this process emerged when SEIU sought "credit" at the bargaining table for its cost-saving ideas, i.e., the value of the cost-savings agreed to through the task force would count toward the 10 percent labor cost savings demanded by the County. Komers refused to agree.

The parties returned to negotiations on June 22, 2009, when the County presented SEIU with a complete proposed MOU. SEIU made counterproposals to this offer, some of which

were in the form of package proposals. Komers generally responded by refusing to discuss any SEIU proposal "until you give me the cuts I want." For example, he rejected SEIU's offer that employees pay part of their Public Employees' Retirement System contribution because "that's not what we're asking for." Furloughs had to be included in any final agreement in the County's view. On July 9, 2009, the County made a "final offer" that was unsatisfactory to SEIU.

Believing that negotiations were not progressing and seeking to avoid impasse, SEIU contacted the Board of Supervisors in early July. On July 14, 2009, the SEIU bargaining team met with Supervisor Jeff Stone (Stone) to discuss their complaints about the County's conduct in negotiations. According to SEIU's witnesses, Stone eliminated certain items from the County's June 22, 2009 offer at the July 14, 2009 meeting, because the value of those proposed reductions exceeded the County's goal of reducing labor costs by 10 percent. Stone informed the SEIU representatives that what the County really needed was an agreement on furloughs and a freeze in the step increases.

Between July 16, 2009 and July 22, 2009, the parties exchanged several proposals in an effort to narrow the gap between them. For example, on July 21, 2009, SEIU presented a proposal in which it agreed to eight hours of furlough per pay period per unit member (24 days per year), a freeze to merit/step increases, and a one-year term for the MOU. These concessions were conditioned on the County agreeing to SEIU's proposal on overtime and stewards' pay.

July 22, 2009, was a critical day for these negotiations. Both sides believed that agreement for the entire MOU was imminent. Proposals were exchanged on the remaining issues that kept the parties from final agreement such as furloughs, stewards' pay, and

overtime. SEIU made concessions on furloughs and Komers indicated that he could agree to SEIU's proposal regarding overtime if the union was flexible in other areas, such as agreeing to more furlough hours.[3]

The parties' dispute over the effective date of the new MOU seemed to play out in the spirit of good faith give-and-take. The County proposed an effective date of July 1, 2009. SEIU rejected this because it would eliminate the step increases for those employees who were entitled to receive them in July. But to accommodate the County's need for cost saving, SEIU agreed to an additional hour of furlough per pay period to account for the one-month delay in furloughs, if the MOU was to be effective on August 1 instead of July 1, 2009. Agreement on this issue was reached on July 22, 2009.

Several tentative agreements were signed during the course of July 22, 2009, resulting in twelve articles of the MOU being put to rest. Agreement had also been reached on a "me-too" clause, an issue that had kept the parties from agreement throughout negotiations. In a sidebar conversation between Komers and Steve Matthews (Matthews), SEIU's Negotiator, Komers indicated, in response to an SEIU proposal on overtime, that it "looks like we're making progress" on the overtime issue. SEIU had also backed away from its previous proposal regarding salary compaction. But by late afternoon, it seemed that overtime and stewards' pay were the two issues that held up final agreement.

Around 7:00 p.m. on the evening of July 22, 2009, Komers abruptly ended negotiations. According to one SEIU witness, he said he could not come up with a counterproposal to the

[3] The County excepts to the ALJ's finding on this point, claiming that it was not supported by the evidence. We reject this exception. The ALJ found: "At the table, Komers expressed a willingness to take an overtime pay proposal to the County Board, depending on some certainty as to cost and/or leeway in making up that cost." As the ALJ noted, this finding is supported by the bargaining notes kept by both SEIU and the County.

stewards' issue, so he declared negotiations were at an impasse. He also claimed he was going on vacation the next day. When reminded by the SEIU negotiators that the parties had scheduled further negotiations for July 27, 2009, he changed his explanation to claim that he was negotiating with another unit. Komers testified that he declared impasse on July 22, 2009, even though he thought the parties would reach agreement that day, because SEIU responded to the County's last, best and final offer (LBFO) with a counterproposal that had new things in it that were unacceptable, including stewards' language. This caused him to believe the parties were not making progress, so he declared impasse. Stewards' pay and overtime were the main issues identified by Komers on which the parties were at impasse.

In response to this declaration, Matthews told Komers that he did not believe the parties were at impasse because there were still plenty of issues to discuss and that the stewards' language was not a deal-breaker, a message that had been conveyed to Komers by Matthews the day before, as well, and a message that Komers admitted to receiving before he declared impasse. SEIU reiterated that they were prepared to stay all night to complete negotiations, and reminded Komers that the parties had also scheduled July 27, 2009 to bargain. Komers refused to meet on July 27, 2009, or to set up any future bargaining dates.

The parties did meet again on July 27, 2009, despite Komers' earlier refusal. SEIU attempted to present proposals, including one on stewards' pay, but Komers refused to accept them, explaining that the County was done with negotiations. He also informed SEIU that the County would not agree to the overtime language that SEIU believed had been verbally agreed to on July 22, 2009. Komers also reneged on the agreement he had reached on the "me-too" clause and announced that the effective date of the MOU would be July 30, 2009, instead of the previously-agreed to August 1, 2009.

On July 27, 2009, the County informed SEIU that it believed mediation and fact-finding would be fruitless and it would impose terms and conditions of employment on July 30, 2009. Included in those terms was the elimination of step increases. At the same time, Komers informed SEIU that the County would be open to negotiations after July 30, 2009.

Shortly after this imposition, the parties met on August 10 and 19, 2009 and reached an agreement on a successor MOU, which had an effective date of August 1, 2009, and included the elimination of step increases. This agreement was subsequently ratified by both parties.

Step Increases

The 2006-2009 MOU, Article V, provided that employees are to receive a step increase on their "anniversary date" as defined in the MOU. An employee's anniversary date is the "first day of the pay period following the completion of one year in a paid status," or following the completion of additional years in a paid status. In 2009, the first day of the third pay period in July fell on July 30, 2009. Thus, any employee who had completed a year in paid service between July 16 and July 30, 2009 had an "anniversary date" of July 30, 2009.

In mid-September 2009, SEIU learned that the County had not paid step increases to those employees who would have been entitled to those increases on or before July 30, 2009. Komers explained that these employees were not entitled to the step increases, because the previous MOU expired on June 30, 2009, and the County imposed terms and conditions on July 30, 2009. According to Komers, those terms and conditions applied until the effective date of the new MOU, August 1, 2009. Upon learning of this position, SEIU filed this unfair practice charge, and a complaint issued alleging, inter alia, that the County had unilaterally changed its policy concerning step increases by refusing to grant such increases to employees whose anniversary date fell on July 29, 30, or 31, 2009.

The ALJ concluded that negotiations were not at a genuine impasse as of July 27, 2009, the last date the parties met before the County imposed its LBFO. He based this conclusion on several factors. The parties had achieved some momentum in resolving the issues that needed to be settled for a successor MOU. On July 22, 2009, they signed 18 tentative agreements, having signed 10 previously. SEIU had made concessions on the number of furlough days and had even proposed a suspension of all step increases for the duration of the MOU, which had been agreed to be one year. As of July 22, 2009, only two major issues stood in the way of agreement—SEIU's proposal for stewards' pay and its proposal concerning overtime pay, and SEIU had clearly indicated it had room to move on both, and that stewards' pay in particular was not a "deal-breaker." Nonetheless, Komers declared the parties were at impasse over stewards' pay and overtime and that he would implement terms and conditions of employment on July 30, 2009.

Based on these facts, the ALJ concluded that "not 'all attempts at reaching agreement through meeting and conferring had been exhausted.'" (Proposed Dec., p. 11.) The fact that Komers said the County would be open to negotiations after July 30, 2009, also led the ALJ to conclude that attempts to reach agreement had not been exhausted.

Ultimately the ALJ framed the issue: "the question is whether the County took unilateral action because there was an impasse, or whether the County declared impasse because it wanted to take unilateral action." (Proposed Dec., p. 12.) Based on Komers' testimony in which he said he was aware there was "a date beyond which, I think was the 29th of July, that we could not pass because those people would get their step increases," and the additional factors described above, the ALJ concluded the County declared impasse

because it wanted to take unilateral action, not because all attempts at reaching agreement had been exhausted.

The ALJ ordered the County to cease and desist from unilaterally changing its policy on step increases and ordered the County to make whole all those employees adversely affected by the unilateral change, viz., those employees whose "anniversary date" as defined in the MOU, "fell on July 30, 2009."[4]

COUNTY'S EXCEPTIONS

The County' exceptions are summarized as follows and can be grouped into five broad categories. We address each exception in the subsequent discussion section of this decision, but summarize them here.

(1) Under the MMBA it is the employer that has the discretion to determine when an impasse exists. By ruling that there was not a genuine impasse, the ALJ improperly usurped the County's statutory right to declare impasse and improperly imposed PERB's discretion on the County.

(2) The ALJ erred as a factual and legal matter by concluding that there was not a genuine impasse in this case. The parties met over a course of six months for at least 18 sessions, and "the County declared impasse at the anticipated time of its stated goal to complete negotiations—July 28, 2009." (County Exceptions, p. 5.) There is no requirement that the parties exhaust all avenues to agreement before declaring impasse, otherwise impasse could always be indefinitely thwarted by any party asserting that there is more negotiating to be done. Under the "totality of circumstances," including the number of sessions over six

[4] The ALJ did not issue a bargaining order, presumably because, the parties reached agreement on a successor MOU, including terms regarding step increases, on August 19, 2009.

months of bargaining, the County's good faith contrasted with SEIU's delaying tactics, and the County's need to reduce expenses in the economic crisis, all support the County's claim that the ALJ erred in finding that the declaration of impasse was premature. The ALJ also erred in concluding that the County declared impasse in order to impose the freeze on step increases.

(3) The County was legally permitted to impose the freeze in step increases, because SEIU had already agreed to that proposal before the County implemented it.

(4) PERB does not have authority under the California Constitution to issue any order against the County regarding wages.

(5) The remedy ordered by the ALJ is not supported by the record even if the impasse was premature. The vast majority of employees were entitled to receive step increases on July 31, 2009, not on July 30, 2009. According to the County, only about 20 employees had an anniversary date on July 29, 2009, and no one had an anniversary date on July 30, 2009.

Though not specifically described as an exception, the County renews its request for an investigation of alleged bias of the Board agent who issued the complaint in this case. The County asserts that its charge of bias was not addressed or resolved.

SEIU'S EXCEPTION

SEIU lodges only one exception and that is to the ALJ's finding that about 200 employees "completed a year of service on July 30, 2009." (Proposed Dec., p. 3.) According to SEIU, these employees completed their year of service before then, and were entitled to the step increases on July 30, 2009, the first day of the pay period following completion of a year of service. In other words, according to SEIU, the ALJ confused completion of a year of service with "anniversary date," which is defined in the MOU as the first day of the first pay period following the completion of a year of service.

DISCUSSION

Essential to determining liability in this case is to determine whether the parties were at a genuine impasse in negotiations prior to the County's implementation of its LBFO which suspended the payment of step increases. If the impasse was not bona fide, or was premature, the County has violated its duty to bargain in good faith by unilaterally changing its policy regarding wages. If the impasse was bona fide, the County has not violated the MMBA by implementing its LBFO. Before addressing the specific exceptions raised by the parties, a review of the relevant law governing impasse as articulated by PERB and the National Labor Relations Board (NLRB) is in order.

Absent mutual agreement, a public employer may impose terms and conditions of employment reasonably comprehended within its LBFO, but only after reaching a bona fide impasse in negotiations after negotiating in good faith, including participating in good faith in impasse resolution procedures, if they exist. (MMBA, § 3505.7; *Taft Broadcasting Co.* (1967) 163 NLRB 475, 478 (*Taft Broadcasting*); *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813.) Thus, an employer's premature imposition of its LBFO, prior to reaching impasse and exhausting impasse resolution procedures, if they exist, is an illegal unilateral change. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro Valley*); *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 200; *Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*), p. 38; *County of Sonoma* (2010) PERB Decision No. 2100-M (*County of Sonoma*).) Prematurely imposing proposed changes in terms and conditions of employment wreaks the same damage to collective bargaining that we recently described in *County of Santa Clara* (2013) PERB Decision No. 2321-M (*Santa Clara*), pp. 23-24. Such imposition is a unilateral

change and thus a per se violation of the duty to bargain in good faith. (*Salinas Valley Memorial Healthcare System* (2012) PERB Decision No. 2298-M, pp. 19-20 (*Salinas Valley*).)

In addition, an employer's premature declaration of impasse has been found to demonstrate an intent to subvert the negotiating process and therefore in violation of the duty to bargain in good faith, even in the absence of any imposed term and condition of employment. (*Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M (*Kings IHSS*), p. 11.)

While there is no definition of "impasse" in the MMBA, the County's local Employee Relations Resolution (ERR) defined it thusly:

> IMPASSE means a deadlock in the meet and confer process between a recognized employee organization and the County over any matters subject to that process.

Our precedents have articulated similar definitions. In *Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124 (*Mt. San Antonio*), p. 5, the Board stated: "[I]mpasse exists where the parties have considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." *Modesto, supra,* PERB Decision No. 291 described impasse as the "point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." (See also, *City & County of San Francisco* (2009) PERB Decision No. 2041-M (*San Francisco*) [Proposed Dec., p. 40.].)

Case law regarding impasses developed in the private sector under the National Labor Relations Act (NLRA) is similar.[5] (*Walnut Creek Honda Associates 2, Inc. v. NLRB* (1996) 89 F.3d 645, 649 [impasse is a state "in which the parties, despite the best of faith, are simply deadlocked"]; *Taft Broadcasting, supra,* 163 NLRB 475, 478.) Succinctly put: "impasse [is] the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. . . . 'Both parties must believe that they are the end of their rope.'" (*A.M.F. Bowling Co.* (1994) 314 NLRB 969, 978.)

As the U.S. Supreme Court noted with some understatement in *NLRB v. Wooster Div. of Borg-Warner Corp.* (1958) 356 U.S. 342, 352, there is difficulty in establishing the "inherently vague and fluid a standard is" applicable to an impasse reached by hard bargaining, as opposed to an impasse resulting from an unlawful refusal to bargain. However, certain factors have emerged in the case law that provide guidance in the instant case. For example, in *Newcor Bay City, Div. of Newcor, Inc.* (2005) 345 NLRB 1229 (*Newcor Bay City*), the NLRB found there to be no bona fide impasse where the parties met only seven times, and the employer admitted that it considered the contract expiration date "a deadline for negotiations." Nor was there an impasse where the union continued to display flexibility and willingness to compromise. (*Grosvenor Resort* (2001) 336 NLRB 613.) Where the employer determined to change the wage structure immediately upon the expiration of the contract, the NLRB determined that no legitimate impasse existed. (*Dust-Tex Service, Inc.* (1974) 214 NLRB 398, enforced, 521 F.2d 1404.)

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

Recognizing that the determination of a bona fide impasse is a question of fact, both the NLRB and PERB consider several factors in assessing whether an impasse exists. PERB Regulation 32793(c)[6] permits consideration of the number and length of negotiating sessions between the parties; the time period over which negotiations have occurred, the extent to which proposals and counterproposals have been made and discussed; the number of tentative agreements reached; and the extent to which unresolved issues remain. Depending on the facts of a case, certain factors may increase in importance over others, such as in *Mt. San Antonio, supra,* PERB Order No. Ad-124, where there was no evidence of any meaningful discussion or exchange of proposals. In such a case, the number and length of meetings and the time period over which they occurred "are not as useful in a determination of impasse as those factors, noted above [no meaningful discussions], which evidence a meaningful effort to reach agreement." (*Mt. San Antonio*, p. 5.)

In addition to bargaining history, evidence of good faith bargaining, and the fluidity of positions, the Board may consider additional factors, such as the nature and importance of the outstanding issues and the extent of difference or opposition. (*Sierra Publishing Co. d/b/a The Sacramento Union* (1988) 291 NLRB 552, enforced, 888 F. 2d 1384 (9th Cir. 1989) [even if deadlock was reached on union security, deadlock was not reached in entire negotiations and the duty to bargain on other critical issues continued].)

In accordance with these general principles, we conclude that the County's July 22, 2009, declaration of impasse was premature for the reasons identified by the ALJ. The evidence shows that on the two issues Komers identified on July 22, 2009,

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

that prevented agreement—stewards' pay and overtime—SEIU had unequivocally signaled to him that it had room to move. Indeed, it had moved on its overtime proposal in a direction favorable to the County on July 22, 2009, and Komers acknowledged in a side-bar conversation with Matthews that it looked like they were making progress on the overtime issue.

Komers' testimony supports the ALJ's conclusion that the County had a fixed deadline by which it believed it needed to conclude negotiations, regardless of whether there was mutual agreement. He said that it was "absolutely imperative to have concessions in place by the time the new budget began hitting the books. The budget was put together assuming 10 percent labor concessions . . . . we had to complete negotiations and enter that budget not creating a deficit." (Reporter's Transcript (RT), Vol. III, pp. 83: 28 through 84: 1-9.) This "deadline" fell in mid-July 2009. Komers also explained at the hearing that in July 2009, the County was still giving merit increases, which were not budgeted, "and we had to stem that tide and stop the merit increases." (RT, Vol. III, p. 113: 2-4.) According to Komers, the County had given a substantial pay increase to about 250-300 professional information technology employees the year before. Their anniversary date was coming up in late July 2009, and was worth about $1 million. In his view, "I had to protect the County from that expense." (RT Vol. III, p. 114: 16.) Komers could not let July 29, 2009, pass without a deal, because the Information Tech (IT) workers would get their step increase. It was this event and not wanting to allow unbudgeted expenses to be recorded to the following year's budget that determined the "end date" for negotiations, according to Komers.

After declaring impasse on July 22, 2009, and informing SEIU that the County would impose its LBFO on July 30, 2009, Komers told Matthews that the County would be open to further negotiations after July 30, 2009, and admitted at the hearing that the County still had room to negotiate at that point.

Thus, the ALJ's conclusion that the impasse declared on July 22, 2009, was premature and declared for the purpose of unilaterally imposing the freeze in step increases before July 30, 2009, is amply supported by the record and in accordance with the legal principles discussed above.[7]

We turn now to the County's other specific exceptions.

1. PERB's Authority to Determine That a Bona Fide Impasse Exists

As an initial matter, the County excepts to the authority of the ALJ to determine that the impasse was not bona fide, asserting that the MMBA sections 3505 and 3505.6 authorize a public agency exclusively to declare impasse after meeting and conferring for a reasonable period of time. It follows, according to the County, that its determination of impasse is unreviewable, and the ALJ usurped the County's absolute right to determine an impasse in negotiations. We reject this contention for several reasons.

The MMBA was enacted for two primary purposes: to "promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment . . . [and to] promote the improvement . . . [in] employer-employee relations . . . by providing a uniform

[7] We note that as a general rule, there is nothing improper about establishing bargaining objectives that cut labor expenses, but such goals cannot be used as an excuse to terminate negotiations prematurely. (*City of San Jose* (2013) PERB Decision No. 2341-M (*San Jose*), pp. 39-42.)

basis for recognizing the right of public employees to . . . be represented by those organizations in their employment relationships with public agencies." (MMBA, § 3500.) From the inception of the statute in 1968, it has been recognized that the purposes of the MMBA are achieved through collective bargaining, a system that rejects unilateralism. Full communication between employers and their employees and improvement in employer-employee relations is brought about by a system based on mutual obligation and respect and equal status at the bargaining table, a notion that is recognized and embodied in the text of the statute.

MMBA section 3505 defines "[m]eet and confer in good faith . . . [as] the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement . . . . The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule . . . or when such procedures are utilized by mutual consent." (Emphasis added.)

Although the MMBA itself provides no definition of impasse and no requirement that parties utilize any particular method to break an impasse, PERB decisions have applied concepts developed in the private sector under the NLRA in determining issues arising under the MMBA regarding impasse. (*San Francisco, supra,* PERB Decision No. 2041-M.) While it is indisputable that either party may unilaterally declare that it believes negotiations are at an impasse, such a declaration is not immunized from review by PERB. If a party has prematurely declared impasse and thereafter unilaterally imposed its last, best and final offer, PERB necessarily is called upon to review the bona fides of the impasse declaration in the process of determining whether the employer committed an unfair practice by unilaterally

changing negotiable terms and conditions of employment without completing good faith negotiations (*Salinas Valley, supra,* PERB Decision No. 2298-M), or whether the premature declaration indicates an intent to subvert the bargaining process. (*Kings IHSS, supra,* PERB Decision No. 2009-M.) Pursuant to PERB's unquestioned authority to determine whether unfair practices have occurred, it necessarily has the authority to determine whether an impasse declared by either party is genuine, and has done so several times since assuming jurisdiction of MMBA.[8] (*San Francisco; County of Sonoma, supra,* PERB Decision No. 2100-M; *Kings IHSS.*)

2. The ALJ's Consideration of the Totality of Circumstances in Concluding There Was Not a Genuine Impasse in Negotiations on July 22, 2009

The County asserts numerous exceptions to the ALJ's legal and factual conclusions that the impasse declared by the County on July 27, 2009 was premature. We address each in turn.

The County claims that because there was no finding that it had engaged in bad faith bargaining prior to its declaration of impasse, the ALJ's finding that the impasse was premature was unwarranted. This argument, which we reject, fails to appreciate the difference between bad faith bargaining measured by the "totality of circumstances" and per se violations of the duty to bargain in good faith. The County is charged here with unilaterally changing wages by eliminating step increases. This is a per se violation of the duty to bargain in good faith, requiring no inquiry into the subjective intent of the employer. The conduct carries such potential to frustrate negotiations, that it is considered unlawful even without evidence of subjective bad faith or malign motive. (*Pajaro Valley, supra,* PERB Decision No. 51;

[8] MMBA section 3509 gives PERB exclusive initial jurisdiction to determine whether an unfair practice has been committed and if so, to prescribe an appropriate remedy.

San Mateo County Community College District (1979) PERB Decision No. 94 (*San Mateo CCD*); *Santa Clara, supra,* PERB Decision No. 2321-M.)

The ALJ made no dispositive finding regarding SEIU's allegation of surface bargaining against the County. Yet that does not resolve the unrelated claim that the County committed a per se violation of the duty to bargain in good faith by unilaterally eliminating the step increases after declaring impasse prematurely. The lack of subjective bad faith in the negotiations leading up to the County's impasse declaration does nothing to absolve it of liability for implementing a unilateral change in wages before impasse was genuinely reached.

The County takes exception to the ALJ's conclusion because he did not consider the "totality of circumstances," such as the 18 negotiating sessions over six months, the economic crisis, SEIU's alleged delaying tactics, and the County's own testimony that the parties were at impasse. The ALJ's conclusion that the impasse declared on July 22, 2009, was premature was based on several factors, all of which supported his conclusion that the parties still had room to move and that not all attempts at reaching agreement had been exhausted. SEIU's negotiator signaled very clearly that the issue of stewards' pay was not a "deal-breaker," and that SEIU could move on overtime pay. Despite the fact that SEIU had already moved towards the County's position on several significant economic issues, including agreeing to take furlough days and agreeing to freeze step increases for the duration of the new MOU, the County declared impasse over comparatively minor issues that it had reason to believe SEIU would make further movement on. These facts, coupled with Komers' testimony that negotiations could not pass beyond July 29, 2009, because "people would get their step increases," offer ample support for the ALJ's reasonable conclusion that the County declared impasse, because it wanted to impose the elimination of the step increases, not because the possibilities for compromise had been exhausted.

As for the County's claim of economic urgency, we recognize that it, and virtually every other public agency in California was under severe economic pressure during the period of time encompassed by these negotiations. It has long been noted that such economic exigency provides no justification for suspending the duty to bargain in good faith. (*San Francisco Community College District* (1979) PERB Decision No. 105; *San Mateo CCD, supra,* PERB Decision No. 94; *Pleasant Valley School District* (1985) PERB Decision No. 488. See also, *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 303-314.) Nor is an employer's deadline such as the beginning of a budget year or the expiration of an MOU, an excuse to avoid bargaining in good faith. (*Newcor Bay City, supra,* 345 NLRB 1229; *Salinas Valley, supra,* PERB Decision No. 2298-M, fn. 9; *Calexico Unified School District* (1983) PERB Decision No. 357; *City of Davis* (2012) PERB Decision No. 2271-M, Proposed Dec., pp. 45-47.) The County's claim, made throughout this case, that it could not allow the new budget year to pass without settling the issue of step increases, misunderstands and conflates the process of bargaining in good faith with the position it took, or may take, during negotiations to rescind the step increases or other cost-saving measures. Instead of imposing its LBFO after prematurely declaring impasse in order to avoid the cost of the step increases from being charged to the following budget year, the County could have changed its economic proposal to take into account its increased costs incurred by the step increase payable at the end of July 2009.

We also reject the County's claim that the ALJ erred by relying on the fact that the parties ultimately reached an agreement for support of his conclusion that the impasse declaration was premature. This mischaracterizes the ALJ's findings and reasoning. He did not base his conclusion on the fact that the parties ultimately reached agreement. What he

observed was that the County "seemed to acknowledge that not all attempts to reach an agreement had been exhausted. On July 27, 2009, Komers said the County . . . . 'remain[ed] agreeable to continued negotiations to reach mutual agreement on a new MOU.'" (Proposed Dec., p. 12.) This reasonably demonstrated to the ALJ that not all attempts to reach agreement had been exhausted when the County declared impasse, a conclusion with which we agree. (See *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74, p. 8.)

Nor do we agree with the County's exception that the ALJ improperly mandated an optional impasse procedure contained in Section 15 of the ERR. By the terms of this provision, impasse procedures are voluntary after "all attempts at reaching an agreement through meeting and conferring have been unsuccessful." (Proposed Dec., p. 4.) After that point, the parties may mutually agree to request the assistance of a mediator, and/or a factfinder, or may mutually agree to any other impasse-resolving procedure. The ALJ noted that there was no evidence whether the County requested impasse procedures, but this observation was irrelevant to his conclusion that the impasse was not bona fide.

The County excepts to the ALJ's conclusion that at the time impasse was declared, the parties had room to move and there was momentum in the negotiations. According to the County, this is erroneous because SEIU did not make any concessions until July 21, 2009, and had engaged in delaying tactics. As discussed above, we affirm the ALJ's findings regarding the state of negotiations prior to the declaration of impasse. As for delaying tactics, we note that the County did not file any unfair practice charges alleging that the conduct by SEIU it characterizes as delaying tactics constituted bad faith bargaining, and the evidence it presented does not support its assertion that SEIU's conduct amounted to bad faith bargaining.

The County elicited testimony at the hearing from its witnesses concerning what it alleged were burdensome information requests submitted by SEIU. The County also claimed

that SEIU had engaged in direct dealing with the County's Board of Supervisors, which it asserted delayed negotiations. However, the County's own predictably unacceptable proposals prompted the information request it claimed to be so burdensome, and those proposals remained on the table well into July 2009, which undoubtedly delayed ultimate agreement.[9]

As for its claim that SEIU by-passed the County's negotiators, the County presented no evidence showing that the meetings SEIU negotiators had with members of the Board of Supervisors either delayed negotiations or constituted illegal by-passing of the County's negotiators. There was no evidence that SEIU presented any proposal to the supervisors that had not been presented to the County's bargaining team during the course of negotiations. (*San Ramon Valley Unified School District* (1982) PERB Decision No. 230, p. 16.) Contrary to the County's claim that these meetings delayed negotiations, the evidence shows that at least some meetings resulted in SEIU accepting the concept of furloughs, which moved the parties closer to agreement.

The County admitted that stopping the step increases was a "motivating factor" in declaring impasse when it did, and excepts to the ALJ's failure to take into consideration as part of the totality of circumstances how important it was to the County to stop "the unnecessary accrual of step increases" by imposing its LBFO before the step increases would go into effect. The County here confuses a position it may legitimately take in negotiations—proposed elimination of step increases to take effect before a certain date—with its obligation to bargain in good faith. The fact that it set a deadline for eliminating the step increases did not permit it to circumvent its duty to bargain in good faith to a legitimate impasse. The

[9] Those proposals were to render all professional employees in the bargaining unit at-will employees and to order future layoffs on the basis of merit, rather than seniority.

County claims that by not eliminating the step increases by July 29, 2009, it would incur at least $1 million in expenses that it had not budgeted for. This again misses the point of collective bargaining and ignores the reality that what it could not get from one type of concession, it could get from another. For example, if SEIU refused to agree to the elimination of step increases, the County was free to propose, and ultimately impose at the point of legitimate impasse, a greater number of furlough days, or larger wage reductions, etc., in order to make up the costs it incurred when the step increases went into effect.[10]

We also affirm the ALJ's finding that Komers declared that the July 2009, deadline to end negotiations was for the sole purpose of avoiding the payment of step increases and reject the County's claim that this finding misquoted Komers. Komers testified as follows:

> Q: . . . Now, you testified that you felt an urgency to finish negotiations by a certain date in July?
>
> A: Correct.
>
> Q: What was that date?
>
> A: I think it was the 22nd or the 27th, one of the other, I can remember specifically, 22nd, I think.
>
> Q: What did that date mean?
>
> A: . . . that was the last date that any expenses could be, the last date after which all expenses would be credited to the new budget.
>
> Q: Okay. I thought you also said that there was a date at the end of July where you knew that lots of IT workers were going to have their step increase?

[10] This principle was demonstrated in the parties' negotiations concerning furloughs. SEIU refused to agree to a July 1, 2009, date for the MOU to become effective, because it would eliminate the step increases for those employees who were entitled to receive them in July. Having agreed to accept furloughs, SEIU proposed nine additional hours of furlough per employee per pay period to account for the fact that the furloughs were to be delayed by a month, because the MOU would not be effective until August 1, 2009.

A: I knew that information early on in the process. But there was a date beyond which, I think was the 29th of July, that we could not pass because those people would get their step increases.

. . . . . .

Q: . . . So, was it the increase for the IT workers, along with . . . the items not being credited to the new budget that in your mind had July 27th or 28th as the end date?

A: Yes.

(RT, Vol. III, pp. 139-140.)

This testimony more than adequately supports the ALJ's finding that the County declared impasse not because negotiations were genuinely at an impasse, but because it sought to avoid paying the step increases and sought to avoid July expenses from being shown on the new fiscal year budget.

3. Implementation of the Suspension of Step Increase Was Not Permitted Simply Because SEIU Agreed to Such a Proposal

The County next claims that the ALJ erred in holding that the County's unilateral change in policy concerning step increases violated MMBA section 3505.[11] The County asserts that, because the elimination of the step increase was contemplated within its LBFO, and in fact had been agreed to by SEIU, it was free to implement that term once the County declared impasse. We deny this exception for two of reasons. First, it assumes that the impasse was bona fide, a conclusion we reject.

We also disagree that an employer is free to unilaterally implement terms and conditions of employment to which an employee organization has tentatively agreed to pre-

[11] MMBA section 3505 requires public agencies to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations."

impasse. As we have noted in recent decisions, bargaining in good faith is a complex web of trade-offs and compromises, requiring a fluidity of positions. Parties frequently make concessions on one subject based on concessions the other side offers to make, a process that is the essence of good faith collective bargaining. (*Los Angeles Unified School District* (2013) PERB Decision No. 2326; *San Jose, supra,* PERB Decision No. 2341-M.) Just as we have condemned piece-meal bargaining, we will not condone an employer selectively implementing terms prior to a bona fide impasse, even if the employee organization has tentatively agreed to such term during negotiations preceding the impasse. An employer is not privileged to implement an agreed-upon concession made as a tentative agreement unless there was a legitimate impasse reached on negotiations as a whole. (*Visiting Nurse Services v. NLRB* (1st Cir. 1999) 177 F.3d 52; *E.I. Du Pont & Co.* (1991) 304 NLRB 792.) This is especially true where, as here, the parties were exchanging package proposals at this stage in their bargaining.

4. PERB's Authority to Order a Remedy Affecting County Employees' Wages

The County asserts that it alone has exclusive authority to set its own wages. (County Exceptions, p. 10) and cites Article XI, Section 1(b) of the California Constitution, relying on *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 (*County of Riverside*); and *Dimon v. County of Los Angeles* (2008) 166 Cal.App.4th 1276.) Although not well-developed, this argument implies that PERB does not have the authority to order any remedy contrary to the County's own determination regarding the step increases.

As an initial matter, PERB is constitutionally prohibited from declaring any of the statutes it administers unconstitutional.[12] (*Regents of University of California v. Public*

[12] Article III, Section 3.5 of the California Constitution provides, in relevant part:

An administrative agency . . . has no power:

Employment Relations Bd. (1983) 139 Cal.App.3d 1037, 1042; *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028; *Regents of the University of California* (1999) PERB Decision No. 1359-H, p. 16; *The Regents of the University of California* (1998) PERB Decision No. 1301-H, pp. 18-19.) Thus, any argument that PERB should refrain from enforcing the MMBA by ordering a back-pay remedy, because such an order is unconstitutional cannot be considered by this agency.

We also conclude that the County's reliance on *County of Riverside, supra,* 30 Cal.4th 278, is misplaced. That case declared unconstitutional Senate Bill (SB) 402, which provided for binding interest arbitration to resolve contract disputes between local agencies and unions representing firefighters or law enforcement officers. The Court based its determination on two separate provisions of Article XI of the California Constitution. Subsection 1(b) of Article XI grants to local jurisdictions the plenary authority to set employee compensation.[13] The statute provided that impasse over wages and other terms and conditions of employment would be resolved by a panel of three arbitrators that was empowered to determine the final terms and conditions of employment by selecting between the LBFO of the respective parties. In the Court's view, this provision removed from counties, the authority to set compensation and therefore violated Article XI, Section 1(b).

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made such a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

[13] Section 1(b) provides, in relevant part: "The governing body [of each county] shall provide for the number, compensation, tenure, and appointment of employees."

However, the Court distinguished SB 402 from the MMBA and cited with approval *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*), noting the critical distinction between, on the one hand, a binding tribunal that divested a county's authority to set wages and, on the other hand, a process—meeting and conferring—by which disputes over wages and other working conditions are to be resolved. As the MMBA establishes a procedure for negotiating over wages, hours and other conditions of employment without mandating standards for those wages, hours and other conditions of employment, it does not contravene Article XI, Section 1(b). As the Court noted in *Seal Beach*, "While the Legislature established a procedure for resolving disputes regarding wages, hours, and other conditions of employment, it did not attempt to establish standards for the wages, hours and other terms and conditions themselves." (*Seal Beach*, p. 597, emphasis added.)

The County's implication that PERB cannot constitutionally order the County to retroactively pay step increases also misapprehends the difference between PERB's remedial authority to cure violations of the MMBA and the prescriptive establishment of a wage rate. (*City of Pasadena* (2014) PERB Order No. Ad-406-M: "because the back pay award does not impose a prospective *substantive* obligation on [the City] with respect to employee compensation and seeks only to enforce [the union's] *procedural* rights to bargain collectively, it does not exceed PERB's authority under the MMBA nor run afoul of well-settled constitutional boundaries.") (Citations omitted.)

SB 402 was also deemed to be constitutionally infirm because by delegating to a panel of arbitrators, the power to decide economic issues, the statute violated Article 11(a), which forbids the Legislature from delegating to a private person or body the power to "control, appropriate, supervise or interfere with . . . . municipal functions." To the extent the County

claims that this applies to PERB, it is mistaken. Arbitrators are private persons. They are not public officials, and SB 402 could not confer upon them the power to fix salaries pursuant to Article 11(a).

PERB, in contrast, is a public body staffed with public officials and is statutorily authorized to administer and enforce the MMBA, including fashioning remedies for violations. (MMBA, § 3509(a).) Since the constitutionality of the MMBA has been established in *Seal Beach, supra,* 36 Cal.3d 591, and since the remedial provisions of the MMBA now reside with PERB in the first instance, rather than with the courts, the holding of *County of Riverside, supra,* 30 Cal.4th 278, with respect to private arbitration panels does not divest PERB of its jurisdiction to remedy violations of the MMBA.

Allegations of Bias

While not styled as an exception, the County reiterates its request for a Board investigation of its claims that the Board agent who investigated the charge and issued the complaint was biased. In support of its claim, the County attached to its brief in support of its exceptions a letter its counsel had written to PERB's former General Counsel on August 10, 2010, requesting an investigation into alleged bias. However, this letter was not introduced into evidence at the hearing in this case and is therefore not part of the record before us. (PERB Reg. 32300(b) "Reference shall be made in the statement of exceptions only to matters contained in the record of the case.") The County complains that its request for an investigation of its bias claim was never investigated or resolved. If the County believed that the investigating Board agent was biased, it could have requested that she disqualify herself pursuant to PERB Regulation 32155(c).[14] This regulation provides a mechanism for a party to

[14] PERB Regulation 32155(c) provides, in pertinent part:

promptly bring claims of bias to the attention of a Board agent, so that Board agent may, under appropriate circumstances, recuse himself or herself at the beginning of an investigation.

The County provides no cogent reason it failed to avail itself of this procedure to request the Board agent's recusal immediately when it allegedly had reason to believe she was biased against it. Having not done so at the outset of the investigation of the unfair practice charge, the County may not be heard to complain now. (*Brawley Union High School District* (1983) PERB Decision No. 266a.)

At the commencement of the formal hearing of this case, the County made a motion to the ALJ, contending that the complaint contained allegations that did not appear in the unfair practice charge, Case No. LA-CE-577-M, and requesting that "the complaint be investigated by PERB internally . . . for the appropriateness of, one, whether a complaint was even appropriate to be issued on the charges made in the charge, and two, even if so, then what would be appropriate to put in the formal complaint." (RT, Vol. I, pp. 8-9.) The ALJ noted that he did not understand that he was being asked to do anything, since the original letter was addressed to PERB's General Counsel. He then proceeded to conduct the formal hearing. No interlocutory appeal was filed. (See PERB Reg. 32200.) Nor did the County make a motion to strike those portions of the complaint it deemed outside the scope of the allegations in the unfair practice charge, either at the hearing or when it filed its answer to the complaint in April 2010. It could have easily done so under PERB Regulation 32190.

> Any party may request the Board agent to disqualify himself or herself whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held by the Board agent to whom the matter is assigned . . . . If the Board agent admits his or her disqualification, such admission shall be immediately communicated to the General Counsel . . . who shall designate another Board agent to hear the matter.

The County has not been treated unfairly by PERB's case processing. After the complaint was issued, the investigating Board agent had no further involvement in this case. Once a complaint issues, PERB assigns a different Board agent to preside over the informal conference. Such a procedure was followed in this case. After the informal conference, the case was transferred to PERB's Division of Administrative Law where it was assigned to the ALJ.

At the evidentiary hearing, the County was given full opportunity after the issuance of the complaint to rebut the allegations contained therein, to present its defense and fully argue to the ALJ why the complaint should be dismissed on the merits.

We conclude that by not moving to disqualify the Board agent in November 2009, by not moving to strike those parts of the complaint it believed were inappropriately included, and by not filing an interlocutory appeal of the ALJ's ruling at the outset of the hearing, the County waived its right to complain about these matters at this stage in the proceedings. For this reason and because, as a practical matter, the County had the right to fully defend against the allegations contained in the complaint, we reject its claim of bias.

The Remedy

Both parties except to the proposed remedy, albeit for very different reasons. SEIU excepts to the ALJ's finding that over 200 bargaining unit members completed a year of service on July 29, 2009, claiming that the ALJ confused the date of completing a year of service with the "anniversary date" as defined in the MOU. The result of this confusion, according to SEIU, is that the vast majority of employees who were entitled to the step increase before the new MOU took effect on August 1, 2009, were deprived of that increase.

The County excepts to the ALJ's findings of fact concerning employees' anniversary date. It claims that approximately 20 employees had an anniversary date on July 29, 2009,

none had an anniversary date on July 30, 2009, "and the high majority of the employees were eligible to receive step increases on July 31." (County's Exception, p. 13.)

As noted previously, the MOU defines "anniversary date," as "the first day of the pay period following the completion" of a year in paid status. (MOU, Art. V.) Thus, an "anniversary date" could fall any time between one and 14 days after the employee completed a year of service, because pay periods are 14-days long. The parties stipulated that July 30, 2009, was a Thursday, and the evidence showed that pay periods begin on Thursdays.

The evidence also shows the following. The date an employee is entitled to receive a step increase is shown on his or her paystub. The end of the last pay period in July 2009 fell on July 29, 2009. Thus, July 30, 2009, was the first day of the following pay period. (Respondent's Exh. 3.) Respondent's Exhibit 81 is a list of 336 employees whose "step increase date" the year before was on July 31, 2008. We take administrative notice that July 31, 2008 fell on a Thursday. Of those 336 employees listed on Respondent's Exhibit 81, the County deemed 241 "eligible".

Contrary to the County's exception, its Exhibit 81 lists the step increase dates for 2008, not 2009. The County is correct that the majority of employees listed on this document had an anniversary date of July 31, 2008, the first day of that pay period in 2008. However, this document supports SEIU's claim that these same employees (or the vast majority of them) were entitled to the step increase on the first day of the relevant pay period the following year, i.e., on July 30, 2009.

On September 28, 2009, SEIU requested from the County a list of employees who did not receive step increases effective July 29, 30, and 31, 2009, and for an explanation of why those individuals did not receive the raise. The County replied, attaching a list entitled "SEIU Step Increase Suspension" consisting of approximately 237 names, all of whom had a previous

effective step increase date of either July 31, 2008 or July 29, 2008. The County explained that these employees were not paid a step increase in 2009 because "SEIU's contract expired on June 30, 2009 and we imposed new terms and conditions effective July 30, 2009. The effective date of the new contract is August 1, 2009. Therefore, the terms and conditions applied until the ratification of the new contract." (SEIU's Exh. ZZ.)

These documents, combined with Komers testimony,[15] establish that there were over 200 bargaining unit members who were entitled to receive a step increase on July 30, 2009, the first day of the pay period following the completion of their year of service.[16] July 30, 2009, was their "anniversary date," as that term is used in the MOU. We, therefore, correct the ALJ's finding of fact on page 3 of the proposed decision that reads: "It appears that over 200 SEIU unit members completed a year of service on July 30, 2009, while about 20 unit members completed a year of service on July 28, 2009." The record shows that over 200 unit members had their "anniversary date" on July 30, 2009, the first day of a pay period. They had completed a year of service on any of the 14 days within the previous pay period. Accordingly, with that clarification, we affirm the ALJ's make-whole remedy for unit members whose "anniversary date" fell on July 30, 2009.

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 Riverside (County) violated the Meyers-Milias Brown Act

[15] Komers was asked: "So, assuming there is no new MOU and no bona fide impasse reached, those step increases for several hundred IT workers was scheduled to occur at the end of July, correct?" He replied: "That is my understanding, yes." (RT Vol. III, p. 140: 18-26.)

[16] We do not rely on the County's Exhibit 82, despite the fact that counsel for SEIU attached it to his statement of exceptions. This exhibit was not received into evidence due to objection from counsel for SEIU. Attaching the excluded exhibit violates PERB Regulation 32300(b) which provides "[r]eference shall be made in the statement of exceptions only to matters contained in the record of the case."

(MMBA), Government Code section 3501, et seq., by unilaterally changing its policy regarding step increases for eligible employees prior to completing negotiations.

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

A. CEASE AND DESIST FROM:

Unilaterally changing its policy regarding step increases.

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

1. Make whole, with interest at the rate of seven (7) percent per annum, those employees whose "anniversary date," as defined by Article V, Section 1 of the 2006-2009 memorandum of understanding with Service Employees International Union, Local 721 (SEIU), fell on July 30, 2009, and who otherwise would qualify for a step increase on that date, but for the County's unilateral elimination of the step increase.

2. Within ten (10) workdays of the service of this decision, post at all work locations where notices to employees in the County are customarily 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 thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the bargaining unit represented by SEIU. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel or her designee. All reports regarding compliance with the Order shall be concurrently served on SEIU.

Members Huguenin and Banks joined in this Decision.

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-577-M, *Service Employees International Union, Local 721 v. County of Riverside*, in which all parties had the right to participate, it has been found that the County of Riverside (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by unilaterally changing its policy regarding step increases for eligible employees prior to completing negotiations.

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

A. CEASE AND DESIST FROM:

Unilaterally changing its policy regarding step increases.

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

1. Make whole, with interest at the rate of seven (7) percent per annum, those employees whose "anniversary date," as defined by Article V, Section 1 of the 2006-2009 memorandum of understanding with Service Employees International Union, Local 721 (SEIU), fell on July 30, 2009, and who otherwise would qualify for a step increase on that date, but for the County's unilateral elimination of the step increase.

Dated: _____ COUNTY OF RIVERSIDE

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SEIU LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-577-M PROPOSED DECISION (7/15/2011)

Appearances: Weinberg, Roger & Rosenfeld by Alan G. Crowley, Attorney, for SEIU Local 721; The Zappia Law Firm by Edward P. Zappia and Day B. Hadaegh, Attorneys, for County of Riverside.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges an employer unilaterally changed a policy concerning step increases in violation of Meyers-Milias-Brown Act (MMBA) section 3505 and PERB Regulation 32603(c).[1] The employer denies any violation of law.

SEIU Local 721 (SEIU) filed an unfair practice charge against the County of Riverside (County) on November 9, 2009. The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued an unfair practice complaint (Complaint) against the County on March 17, 2010. The County filed an answer to the Complaint on April 27, 2010.

PERB held an informal settlement conference on April 30, 2010, but the case was not settled. PERB held a formal hearing on August 30-31, September 1 and October 6, 2010. With the receipt of the post-hearing briefs on January 10, 2010, the matter was submitted for decision.

[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.

FINDINGS OF FACT

The County is a public agency under the MMBA and PERB Regulations. SEIU is an exclusive representative of four units of County employees.

The alleged unilateral change

The Complaint alleges in part:

> 8. Before July 29, 2009, Respondent's policy concerning employee step increases was that employees were entitled to the step increase on their employment anniversary date.
>
> 9. On or about July 29, 2009, Respondent changed this policy by refusing to grant step increases to those employees whose employment anniversary date fell on July 29, 30 or 31, 2009.

The policy referenced in the Complaint was set forth in Article V ("Pay Practices"), Section 1 ("Step Advance") of the parties' Memorandum of Understanding for 2006-2009 (2006 MOU), which stated in part:

> A. The compensation of every person employed in a regular position on a step basis shall be considered for increase upon their anniversary date, except as herein otherwise provided.
>
> C. Employees appointed on or after January 9, 1992:
>
> The first anniversary date as a result of an original appointment shall be *the first day of the pay period following the completion of one year in a paid status* in the position not including overtime. [Emphasis added.]
>
> The second anniversary date shall be *the first day of the pay period following the completion of an additional one year in a paid status*, not including overtime, and subsequent anniversary dates shall occur at like intervals. [Emphasis added.]

The 2006 MOU thus gave a special technical meaning to the term "anniversary date." Because County pay periods are 14-days long, an employee's "anniversary date" could be 1 to 14 days after the employee completed a year in a paid status.

In 2009, the dates of July 16 and July 30 were the first days of pay periods. The date of July 30 was therefore the "anniversary date" for employees who completed a year in a paid status from July 16 to July 29. The "anniversary date" for employees who completed a year from July 30 to August 12 was August 13, 2009, the first day of the next pay period. It appears that over 200 SEIU unit members completed a year of service on July 30, 2009, while about 20 unit members completed a year of service on July 28, 2009.

The 2006 MOU expired by its terms at midnight on June 30, 2009, while the parties were engaged in negotiating a successor MOU. On July 22, 2009, the County's lead negotiator declared impasse. On July 27, 2009, the County sent a letter to an SEIU representative, stating:

> Representatives of the County have been meeting with you and other representatives of SEIU, Local 721 for approximately four months to negotiate a renewal of the 2005[sic]-2009 Memorandum of Understanding.
>
> The fundamental issue in these negotiations, from the County's perspective, has been reducing payroll costs to respond to the current budget situation faced by the County. Unfortunately the parties have been unable to agree on the necessary cuts to reach the County's budgetary targets and have reached an impasse in the negotiations.
>
> Section 15 of the County's Employee Relations Resolution No. 99-379 provides several options when the parties are unable to conclude an agreement. The first three require mutual agreement of the parties and the fourth requires action of the Board of Supervisors.
>
> Given the nature of the issues that separate the parties, the County does not believe that mediation, fact-finding, or other impasse resolution procedure will break the log jam. On that basis the Board of Supervisors has acted to give me authority to unilaterally impose terms and conditions of employment.
>
> Enclosed is a document outlining the terms and conditions of employment for the units you represent, including the Parks and Waste District employees. These will be effective as of

> July 30, 2009, and will continue in effect until June 30, 2010, the end of the current fiscal year; unless a new MOU has been negotiated, ratified, and adopted by the Board before that time.

There is no other evidence whether, when or how the County Board of Supervisors (County Board) acted as described in the letter.

The County's Employee Relations Resolution (ERR) defines impasse:

> IMPASSE means a deadlock in the meet and confer process between a recognized employee organization and the County over any matters subject to that process.

The ERR further provides in part:

> Section 15 IMPASSE PROCEDURE
>
> a. Impasse procedures shall not be requested by either party until all attempts at reaching an agreement through meeting and conferring have been unsuccessful.
>
> 1. The parties may mutually agree to request the assistance of a mediator from the California State Conciliation Service or any other mutually agree[d] upon mediator.
>
> 2. The parties may mutually agree to request the assistance of a fact-finder.
>
> 3. The parties may mutually agree to any other impasse-resolving procedure.
>
> 4. The Board may determine on the action to be taken with or without a hearing thereon.

Apart from the letter of July 27, 2009, there is no evidence whether, when or how the County requested impasse procedures.

In a letter dated July 28, 2009, SEIU insisted that "the parties are not yet at impasse" but also stated in part:

> The Union [SEIU] is therefore willing to participate in either the mediation or fact-finding suggested by your own [ERR] and

> requests that the County reconsider its decision to bypass these procedures which frequently facilitate mutual agreement.

In a letter dated July 29, 2009, the County replied in part:

> The County finds that the circumstances warrant and require unilateral implementation of the Terms and Conditions of Employment as set forth above. We are proceeding with implementation but remain agreeable to continued negotiations to reach mutual agreement on a new MOU.

The County unilaterally imposed Terms and Conditions of Employment (TCE) on SEIU unit members effective July 30, 2009. Among other things, the TCE suspended step increases for the duration of the TCE.

Notwithstanding the County's declaration of impasse and imposition of the TCE, the parties continued to meet, and on August 19, 2009, they reached a tentative agreement on a successor MOU for 2009-2010 (2009 MOU). As later signed and ratified by the parties, the 2009 MOU provided in part (in Article 5, Section 1):

> *Special Provision*: Step increases for all classifications shall be suspended for the duration of the MOU.

By its terms, the 2009 MOU was to be "in effect from August 1, 2009, to midnight June 30, 2010."

The 2009 negotiations

The parties had begun meeting and negotiating a successor to the 2006 MOU on March 26, 2009. Neither the County's ERR, nor the 2006 MOU, nor any ground rules between the parties set a deadline for the completion of negotiations. In the 2009-2010 final budget recommendations sent to the County Board on June 24, 2009, the County said it had "targeted July 28 as the deadline to finalize labor contracts," but there is no evidence that SEIU agreed to this or any other deadline.

Throughout the negotiations, the County's stated goal was to reduce personnel costs 10 percent. Not surprisingly, SEIU resisted such a reduction. At the same time, SEIU sought to get more employees overtime pay and to get stewards regular pay for conducting steward business during regular work hours. The County resisted these changes. Negotiations were difficult.

On July 9, 2009, at the parties' 14th meeting, the County made what it called its "Final Offer." The County proposed no expansion of overtime pay and no steward pay. The County also proposed mandatory furloughs of "up to two (2) days per month." Furthermore, the County proposed the suspension of step increases for the duration of the MOU, which was to be July 1, 2009 through June 30, 2010. SEIU did not accept the County's "Final Offer."

On July 17, 2009, the County made what it called it's "Last Best and Final Offer" (LBFO). As in its "final offer," the County proposed no expansion of overtime pay and no steward pay. The County also proposed mandatory furloughs of "twenty-four (24) days (one hundred ninety-two (192) hours) beginning August 14, 2009." Furthermore, the County proposed the suspension of step increases for the duration, which was to be from adoption by the County Board through June 30, 2010. On July 20, 2009, the County made a slightly revised LBFO.

On July 21, 2009, SEIU twice countered the County's LBFO. In both of its counterproposals, SEIU still sought expanded overtime pay. It also still sought steward pay, but "with exception [sic] to eliminate any new economic costs to County that may be in such proposal." It also proposed, however, the suspension of all step increases for the duration of the MOU, which was to be from ratification through June 30, 2010.

In its first counterproposal of July 21, 2009, SEIU further proposed mandatory furloughs for a maximum of "4 hours per pay period (104 hours/year) for the duration of the

contract." In its second counterproposal of the day, SEIU proposed mandatory furloughs for a maximum of "8 hours per pay period for the duration of the contract."

On July 22, 2009, the parties met for the 16th time, expecting to reach agreement that day. Having previously signed 10 tentative agreements, they signed 18 more, including one setting the term of the MOU as August 1, 2009, through June 30, 2010. They verbally agreed to 208 total hours of mandatory furloughs. They apparently did not discuss the suspension of step increases, presumably because they seemed to have agreed on that subject.

With regard to overtime pay, SEIU's regional director, Steve Matthews (Matthews), testified about a sidebar with the County's human resources director Ron Komers (Komers):

> Well, actually he [Komers] was insistent on as [sic] not being overtime on all hours but it had to be on hours worked. And we showed him a proposal where we would get there, and he said good. This looks like we're making progress. We should be able to move on this issue was what he had said in the sidebar.

The bargaining notes of both parties indicate that at the table Komers expressed a willingness to take an overtime pay proposal to the County Board. According to SEIU's notes, Komers' willingness was dependent on giving the County "leeway to make up that [cost] difference." According to the County's notes, his willingness was dependent on "some degree of certainty of how much this is going to cost."

With regard to steward pay, SEIU proposed limiting it to representational stewards only. Komers rejected steward pay for anyone, and he declared that the parties were at impasse on both steward pay and overtime pay. According to Komers' own testimony, Matthews responded that "there's a lot of issues we are still ready to [talk] about" and that "the stewards' language was not a deal breaker." Komers insisted the parties were "done" and would not meet again on July 27, 2009, as previously scheduled.

The parties nonetheless did meet briefly on July 27, 2009. The County submitted an amended LBFO responding to SEIU's counter proposals of July 22, 2009, specifically rejecting SEIU's proposals on overtime pay and steward pay. Komers insisted the parties were at impasse. Matthews disagreed, stating SEIU had room to move on steward pay and overtime pay. SEIU had proposals prepared, but the County refused to entertain them. Komers said the County would implement terms and conditions of employment on July 30, 2009, but would be open to negotiations from that point forward. After the meeting, the County issued its letter of July 27, 2009, quoted above.

As stated above, the parties continued to meet. On August 5, 2009, Matthews and Komers met with Supervisor Jeff Stone of the County Board. Matthews testified about their conversation:

> It was really centered around the overtime question and where we were apart and what was important to us. He made it very clear that, you know, the stewards' question was not the, not something that was going to hold us up. It was all about the overtime. We spoke for two hours and 15 minutes explaining what was real on the overtime and what was not real on the overtime in terms of the costs.
>
> And finally, after two hours and 15 minutes, I very pointedly turned to Supervisor Stone and said, look, you're being told numbers that are incorrect. Let me use Ron Komers' own numbers to you on the issue because I think it's illustrative when you get down to the back and forth on all the numbers that we were given, the overtime additional costs on, based on the language that we're proposing would be four million dollars.
>
> And Supervisor Stone looked at Ron Komers and said, is that correct. Because we were using Ron's numbers. And Ron said, yeah, that's correct. They'd given a number, a larger number, but that included another issue of overtime. See, when there is furloughs, people that are exempt employees end up getting overtime, even if they're exempt, even if they don't have rights by a contract, they have, they're considered non-exempt for the purpose of overtime in a furlough week. So, we had to get him to admit what he was giving us a number with everything

> mixed together, but our language would have given a four million dollar extra cost.
>
> So, when it was clear to Supervisor Stone that the overtime would be four million, the furloughs with the number that Ron Komers had given was 52 million savings, at that point, Supervisor Stone turned to Ron Komers after two hours and 15 minutes, just turned around to him and said, make the deal, that we can live with this. And that actually is what got us to conclusion.

Ultimately, the County gave in on overtime pay, and SEIU gave in on steward pay.

On August 24, 2009, Komers submitted the 2009 MOU to the County Board for approval, along with the following background information:

> SEIU, which represents approximately 5,900 employees, asked to open negotiations for a new Memorandum of Understanding. Discussions started on March 26, 2009, and twenty three (23) bargaining sessions were held. A tentative agreement for a new eleven (11) month Memorandum of Understanding, covering August 1, 2009, through June 30, 2010, was reached on August 19, 2009. The cost of the contract does not exceed the parameter given by the Board of Supervisors and it achieves the goal of a 10% reduction in salary costs for fiscal year 2009-2010, a cost savings of approximately $48.4 million. Most terms also apply to the Regional Parks and Open Space District and the Water Resources Management Districts. SEIU has advised that they plan to have this agreement ratified by ballot of the represented members and will notify us on or about September 1, 2009, of its ratification.

By my count, the parties held about 18 (not 23) actual bargaining sessions. In any case, the MOU was approved.

Komers' hearing testimony revealed one reason he had wanted to end negotiations in July: he knew that many SEIU members would soon be eligible for step increases. He testified:

> I knew that information early on in the process. But there was a date beyond which, I think was the 29th of July, that we could not pass because those people would get their step increases.

It does not appear, however, that Komers told SEIU that those particular step increases were an issue in negotiations.

ISSUE

Did the County unilaterally change policy concerning step increases?

CONCLUSIONS OF LAW

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.)[2] Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

MMBA section 3505.4 states:

> If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the

[2] 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.)

> right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

In the present case, the County's ERR does provide for impasse procedures, but they are not to be requested "until all attempts at reaching an agreement through meeting and conferring have been exhausted."

The central question in this case, as argued by the parties, is whether there was a genuine impasse that could justify unilateral implementation under the MMBA and the County's ERR. I conclude that there was not a genuine impasse, because under the ERR not "all attempts at reaching an agreement through meeting and conferring [had] been exhausted" when the County declared impasse.[3]

The County declared impasse on steward pay and overtime pay. With regard to steward pay, Matthews told Komers on July 22, 2009, that "the stewards' language is not a deal breaker." On July 29, 2009, Matthews told Komers that SEIU still had room to move on steward pay. It thus appears that the parties had not exhausted all attempts to reach an agreement on steward pay. Ultimately, SEIU gave in on the issue.

With regard to overtime pay, Komers told Matthews in a sidebar on July 22, 2009, that the parties were making progress and should be able to move. At the table, Komers expressed a willingness to take an overtime pay proposal to the County Board, depending on some certainty as to cost and/or leeway in making up that cost. On July 27, 2009, Matthews told Komers that SEIU still had room to move on overtime pay. It thus appears that the parties had

[3]SEIU also argues that "the County bargained in bad faith and therefore a bona fide impasse was not reached." Because I conclude for other reasons that there was no genuine impasse, I find it unnecessary to address the issue of the County's alleged bad faith.

not exhausted all attempts to reach an agreement on overtime pay. Ultimately, the County gave in on the issue, finding the cost of overtime pay to be acceptable.

It appears that when the County declared impasse the parties not only had room to move but also had momentum. On July 21, 2009, SEIU for the first time proposed mandatory furloughs that could save the County over $50 million. On July 22, 2009, the parties signed 18 tentative agreements, bringing the total to 28. Komers nonetheless verbally declared impasse that same day.

The County seemed to acknowledge that not all attempts to reach an agreement had been exhausted. On July 27, 2009, Komers said the County would be open to negotiations after July 30, 2009. In its letter of July 27, 2009, the County said it "remain[ed] agreeable to continued negotiations to reach mutual agreement on a new MOU."

In some ways, the question is whether the County took unilateral action because there was an impasse, or whether the County declared impasse because it wanted to take unilateral action. Komers testified to his understanding that there was a bargaining date "beyond which, . . . we could not pass because those people [SEIU unit members] would get their step increases." It appears that the County made the choice to deal with those step increases unilaterally rather than through negotiations.

I conclude that there was not a genuine impasse and that the County's unilateral change in policy concerning step increases therefore violated MMBA section 3505 and PERB Regulation 32603(c). Because this conduct denied SEIU's rights and interfered with the rights of unit members, it also violated MMBA sections 3503 and 3506 and PERB Regulation 32603(a) and (b).

REMEDY

MMBA section 3509(b) states:

> A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

In the present case, the County has been found to have violated the MMBA by unilaterally changing policy on step increases. It is therefore appropriate to order the County to cease and desist from such conduct.

It is also appropriate to order the County to make whole those employees adversely affected by the unilateral change. It should be noted that those employees are limited to the ones whose "anniversary date," as defined by Article V, Section 1, of the 2006 MOU, fell on July 30, 2009. Employees whose "anniversary date" fell on August 13, 2009, ultimately were affected by the 2009 MOU, which was effective August 1, 2009, rather than by the County's unilateral action.

It is also appropriate to order the County to post a notice incorporating the terms of the order in this case. *(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 this case, it is found that the County of Riverside (County) violated the Meyers-Milias-Brown Act (Act), Government Code section 3500 et seq. The County violated the Act by unilaterally changing policy on step increases.

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:

Unilaterally changing policy on step increases.

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

1. Make whole those employees whose "anniversary date," as defined by Article V, Section 1, of the 2006-2009 Memorandum of Understanding with SEIU Local 721 (SEIU), fell on July 30, 2009, qualifying them for a step increase on that date.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the County 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 thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. 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 SEIU.

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 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

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 which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

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).)

Thomas J. Allen
Administrative Law Judge