

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



STATE OF CALIFORNIA,

Employer,

and

PEACE OFFICERS OF CALIFORNIA,

Petitioner,

and

CALIFORNIA STATEWIDE LAW
ENFORCEMENT ASSOCIATION,

Exclusive Representative.

Case No. SA-SV-171-S

PERB Decision No. 2214-S

November 1, 2011

Appearances: Rose Law Firm by Joseph W. Rose, Attorney, for Peace Officers of California; Carroll, Burdick & McDonough by Jason H. Jasmine and Gary M. Messing, Attorneys, for California Statewide Law Enforcement Association.

Before Martinez, Chair; McKeag and Huguenin, Members.

DECISION

HUGUENIN, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Peace Officers of California (POC) to a proposed decision (attached) of the administrative law judge (ALJ) arising out of a severance petition filed by POC. POC seeks to sever a group of state employees in classifications designated under the Penal Code as peace officers from existing state Unit 7 (Protective Services and Public Safety).¹ Unit 7 is currently represented by the California Statewide Law Enforcement Association (CSLEA).

¹ The petition specifically stated the proposed unit included:

In the proposed decision, the ALJ concluded that, contrary to POC's contention, state-employed peace officers do not have a statutory right to a separate peace officer-only unit and that POC failed to rebut the presumption that the existing Unit 7 is more appropriate than POC's proposed unit. Therefore, the ALJ proposed to dismiss POC's severance petition.

We have reviewed the entire record, including the proposed decision, the hearing transcripts and exhibits, POC's exceptions² and CSLEA's response, in light of the relevant law. Based on this review, the Board finds the findings of fact and conclusions of law to be well-reasoned, adequately supported by the evidentiary record and in accordance with the applicable law. Accordingly, the Board adopts the proposed decision as the decision of the Board itself, as supplemented by the following discussion of POC's exceptions.

ISSUES ON APPEAL

All of POC's claims were raised and considered in the proceedings below, and adequately addressed in the ALJ's proposed decision. In adopting the ALJ's findings of fact and conclusions of law, the Board concurs in the ALJ's reasoning and determination that the

All job classifications within Bargaining Unit 07, which are declared by law to be peace officers within the meaning of the Calif. Penal Code, Part 2, Title 3, Chapter 4.5, commencing with Section 830.

POC's unit description is identical to that set forth in the Meyers-Milias-Brown Act (MMBA), section 3508(a), and the former George Brown Act (Brown Act), former Government Code section 3535. (The MMBA is codified at Gov. Code, § 3500 et seq.)

² POC also requests oral argument. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453; *Monterey County Office of Education* (1991) PERB Decision No. 913.) Based on our review of the record, all of the above criteria are met in this case. Accordingly, POC's request for oral argument is denied.

severance petition should be dismissed. By the following supplemental discussion, the Board focuses attention on the following two pivotal points: (1) peace officer employees are not statutorily entitled to a separate unit; and (2) the presumption that the existing unit is “more appropriate” than the proposed unit has not been rebutted.

In response to POC’s exceptions, CSLEA argues that POC’s exceptions contain inappropriate factual allegations and inadmissible evidence, and that POC’s filing is not timely and should be disregarded. As noted below, we conclude that POC’s exceptions were timely, but did include inappropriate content which we disregard.

DISCUSSION

I. Peace Officer Employees Are Not Statutorily Entitled To A Separate Unit

The Brown Act was enacted in 1961 to provide organizational rights for state and local public employees. Specifically, former Government Code section 3535 provided:

The state may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws, and may by resolution adopted after a public hearing, limit or prohibit the right of employees in such positions or classes of positions to form, join or participate in employee organizations where it is in the public interest to do so; however, the state may not prohibit the rights of its employees who are full-time ‘peace officers,’ as that term is defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, to join or participate in employee organizations which are composed solely of such peace officers, which concern themselves solely and exclusively with the wages, hours, working conditions, welfare programs, and advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization.

The right of employees to form, join and participate in activities of employee organizations shall not be restricted by the state on any other grounds other than those set forth in this section.[³]

³ MMBA section 3508 is almost identical to former Government Code section 3535.

Dills Act Section 3521.7⁴ provides:

The board may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws. Employees so designated shall not be denied the right to be in a unit composed solely of such employees.

Dills Act section 3521.7 does not contain the prohibitory language of the Brown Act or the MMBA, which gives peace officers the right to belong to an employee organization composed solely of peace officers. The omission of this language means that as to Dills Act employees, PERB is not compelled by law to form peace officer-only units, and that peace officer employees do not have the right to belong to a peace officer-only unit. (*State of California (Department of Personnel Administration)* (1989) PERB Decision No. 773-S (*CSPOA/CAUSE*).

Subsequent to the passage of the Dills Act in 1978, the California Attorney General opined that although PERB has the discretion to designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws, until PERB exercises that discretion no rights are conferred by Dills Act section 3521.7. (61 Ops.Cal.Atty.Gen. 405, 410 (1978).)

In *Unit Determination for the State of California* (1979) PERB Decision No. 110-S (*Unit Determination*) PERB created 20 state bargaining units. PERB then declined to exercise its authority under Dills Act section 3521.7 to designate “law enforcement” positions. Instead, PERB utilized criteria specified in Section 3521 apart from Section 3521.7 for making its unit determinations, including Unit 7.

⁴ The Dills Act is codified at Gov. Code § 3512 et seq.

Thereafter, a severance petition in Unit 7 resulted in a PERB decision.

(*CSPOA/CAUSE*.) In that case, the California State Peace Officers Association sought to sever a group of uniformed peace officers who patrolled a set geographic region. Again, PERB declined to exercise its statutory discretion to designate “law enforcement” positions pursuant to Dills Act section 3521.7 noting that the bargaining history did not justify a departure from the initial unit determination.

Thus, state-employed peace officers do not have a statutory right to a separate peace officer-only unit unless and until PERB designates positions or classes of positions whose primary duties involve the enforcement of state laws. PERB has not yet made that designation and we do not do so here.

II. The Presumption That The Existing Unit Is “More Appropriate” Than The Proposed Unit Has Not Been Rebutted

The standard for determining the appropriateness of severance under the Dills Act derives from Board precedent under the Educational Employment Relations Act.⁵

In *Sweetwater Union High School District* (1976) EERB⁶ Decision No. 4 (*Sweetwater*), the Board developed the concept of presumptively appropriate bargaining units. In *Livermore Valley Joint Unified School District* (1981) PERB Decision No. 165 (*Livermore*), the Board determined that when a petition is filed to sever a unit from a larger, presumptively appropriate *Sweetwater* unit, the burden is on the petitioner to show that the requested unit is more appropriate. (See *San Juan Unified School District* (1995) PERB Decision No. 1082;

⁵ EERA is codified at Government Code section 3540 et seq.

⁶ Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

Los Angeles Unified School District (1998) PERB Decision No. 1267; *Temple City Unified School District* (1995) PERB Decision No. 1110.)

In *Unit Determination*, PERB created 20 state bargaining units, including Unit 7 (Protective Services and Public Safety Unit).⁷ Ten years later, the Board decided *CSPOA/CAUSE*, which involved a severance petition filed under the Dills Act. In *CSPOA/CAUSE*, the Board dismissed a petition to sever uniformed peace officers from Unit 7. Adopting the ALJ's proposed decision, the Board concluded that the proposed unit shared a community of interest with the existing unit, the interests of the petitioned-for employees had not been trampled upon or ignored, and the issues of primary concern to the uniformed employees' sub-unit were addressed in negotiations. (*Ibid.*)

In *State of California (Department of Personnel Administration)* (1990) PERB Decision No. 794 (*CSEA*), the Board established a rebuttable presumption in favor of the existing 20 state bargaining units. In that case, the Board ruled that a petitioner seeking to modify an existing unit has the burden of proving that the proposed unit is more appropriate than the established unit. The Board approved the proposed unit modification. (*Ibid.*) This case represents the only successful change in the original 20 bargaining units created under *Unit Determination*.⁸ The Board reasoned that the modification was appropriate because there was a lack of common skills, working conditions and duties between the existing unit and the proposed unit.

⁷ Also included in the 20 state bargaining units were Unit 5 (Highway Patrol) and Unit 6 (Corrections), both containing mostly peace officer employees. The only non-peace officer class now in Unit 5 is the Highway Patrol Cadet. The only other classification in the Unit is Officer, California Highway Patrol (CHP). The only non-peace officer class in Unit 6 is the Parole Services Associate.

⁸ The unit modification divided Unit 3 into two bargaining units, one of which was designated Unit 21.

In *State of California (Department of Personnel Administration)* (1993) PERB Decision No. 988-S, the Board affirmed the rebuttable presumption standard, dismissing a severance petition to remove 21 psychologist classes from existing Unit 19, based on a shared community of interest with the current unit and a stable bargaining history.

In *State of California (Department of Personnel Administration)* (1993) PERB Decision No. 1025-S (*Guild*), the Board again relied on the rebuttable presumption standard when it dismissed a severance petition to remove pharmacists from established Unit 19. In that case, the petitioner failed to demonstrate a community of interest separate and distinct from the existing unit.⁹ The Board also noted that the petitioner produced little evidence of the type of dramatic change in circumstances since *Unit Determination* that would justify the severance. (*Guild*.)

In *State of California* (2011) PERB Decision No. 2178-S, the Board again relied on the rebuttable presumption standard when it dismissed a petition to sever a group of Information Technology classifications from Unit 1. The petitioner failed to establish that its proposed unit was more appropriate than the existing unit. The Board concluded that the petitioner established neither that the interests of the petitioned-for employees had been trampled upon or ignored, nor that their representational rights had been abrogated because of the existing Unit 1 structure.

In its exceptions here, POC argues that CSLEA has not adequately represented the interests of peace officers in Unit 7. POC's exceptions focus on the community of interest shared among members of the proposed unit, the salary disparity between peace officers in Unit 7 and peace officers in other units, and POC's contention that the dissimilarity of interests

⁹ The Board also relied on the six-part test used in *Livermore*.

between peace officers and other members of Unit 7 has impaired peace officer interests throughout the bargaining history.

The employees within POC's proposed severance unit obviously share a strong community of interest among themselves. The employees have a commonality of skills, working conditions, duties, and similarity in the types of training. These similarities, however, are not limited solely to those included within the petitioned-for unit. As the Board noted in its initial unit determination, these interests are shared, in varying degrees, with other Unit 7 employees.

The salary disparity between Unit 7 peace officers and peace officers in other units does not indicate that the interests of peace officers in the unit have been trampled upon or ignored. A comparison of the salaries of Units 5, 6 and 7 show that the Special Agent, Department of Justice (DOJ) is within 5.9 percent of the top step of the Parole Agent I and the Special Agent Supervisor is within 5.7 percent of the top step of the Parole Agent II. The highest compensated Unit 7 uniformed officer class, the Fish and Game Warden, is within 8.9 percent of the top step of the Correctional Officer, and 22.3 percent of the top step of the CHP Officer.¹⁰ Although DOJ Special Agents may not have achieved parity with California Department of Corrections and Rehabilitation Special Agents, CSLEA has advocated for such parity and the special agents are within 6 percent of the Unit 6 Parole Agents.

Moreover, in 2006 when the Legislature approved a \$30 million augmentation to the employee compensation budget item to focus on recruitment and retention for wardens in

¹⁰ The Correctional Officer (top step) was within 12.3 percent of the salary of the CHP Officer.

Unit 7, peace officer classes received most of the salary adjustments. The exclusive representative has made genuine efforts to cure pay disparity issues.¹¹

The bargaining history between CSLEA and the State also supports dismissal of the severance petition. Almost all large bargaining units include a diversity of interests. Unit 7, at the initial unit determination, was no exception. The record indicates however, that the exclusive representative took specific organizational steps to accommodate pre-existing differences. It organized special sub-units to insure representation of the individual concerns of all unit employees. Although no one group of employees could expect to achieve all its bargaining goals, issues that relate to the sworn officers have been addressed in negotiations.

Even if bargaining success was not achieved in every area of concern to Unit 7 peace officers, especially in relation to parity with Unit 5 peace officers, POC still must show that this lack of success was due to CSLEA's failure to represent or assert adequately the interests of Unit 7 peace officers in relation to its non-peace officers. The record reflects many examples where CSLEA actively asserts the interests of peace officers. POC has failed to demonstrate that any lack of bargaining success was due to CSLEA's failure to represent adequately peace officer interests.

Additionally, one of the ways in which CSLEA represented its members was to convert non-peace officer classes to peace officers. If the unit were severed, such advocacy could not continue. A non-peace officer unit would have no interest in seeing that its members leave the bargaining unit in order to become peace officers with better salaries and benefits. In this

¹¹ Pay parity is not a dispositive factor, especially where the comparison is to a class that is dissimilar in enforcement duties.

sense, the members of Unit 7 are better served having a mixed unit of peace officers and non-peace officers.

Therefore, for the reasons above, we concur in the ALJ's conclusion that POC has failed to demonstrate that rights of peace officers have been trampled upon or ignored, or that issues of primary concern to peace officers have not been addressed in negotiations by the exclusive representative. Nor has POC demonstrated a dramatic change in circumstances since PERB's decision in *Unit Determination* and in *CSPOA/CAUSE*. Unlike the petitioner in *CSEA*, POC has not shown that there is a lack of common skills, working conditions and duties between the existing unit and the proposed unit.

In sum, POC has failed to rebut the presumption that the existing unit is more appropriate than the proposed unit.

III. Inappropriate Factual Allegations And Inadmissible Evidence In POC's Statement Of Exceptions

PERB Regulation 32300(b)¹² states: "Reference shall be made in the statement of exceptions only to matters contained in the record of the case." (*San Diego Community College District*) (2001) PERB Decision No. 1445; *California State University, San Francisco* (1991) PERB Decision No. 910-H.) Failure to comply with these requirements will result in dismissal of the exceptions. (*City of Torrance* (2009) PERB Decision No. 2004.)

POC's statement of exceptions references matters not contained in the record. Furthermore, POC attaches new exhibits that were not offered into evidence. POC has made no showing that the new exhibits could not have been offered as evidence at the hearing. Under PERB Regulation 32300, these extra-record matters and exhibits have not been

¹² PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

considered by the Board. Moreover, even if the additional evidence were taken into consideration by the Board, POC has still not shown that severance is appropriate.

IV. Timeliness Of POC's Statement Of Exceptions

Any right or duty to act or respond within a prescribed period or on a date certain after service of a document by mail must be extended five days if the address is within California.

(State of California (State Personnel Board) (2004) PERB Order No. Ad-343-S; PERB Reg. 32130(c).)

By mail, PERB granted POC an extension of time to April 21, 2010 to file its exceptions. Under PERB Regulation 32130(c), because PERB notified POC of its grant of the extension by mail, POC had five additional days beyond the deadline to file its exceptions. POC filed its exceptions on April 23, 2010 and thus POC's statement of exceptions is timely filed.

ORDER

For the above reasons and based upon the entire record in Case No. SA-SV-171-S, it is hereby ORDERED that the severance petition filed by the Peace Officers of California is DISMISSED.

Chair Martinez and Member McKeag joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



STATE OF CALIFORNIA,

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CALIFORNIA STATEWIDE LAW
ENFORCEMENT ASSOCIATION,

Exclusive Representative.

REPRESENTATION
CASE NO. SA-SV-171-S

PROPOSED DECISION
(3/26/2010)

Appearances: Shannan J. Truong, Labor Relations Counsel and Linda A. Mayhew, Assistant Chief Counsel, for State of California; Rose Law Firm, by Joseph W. Rose and Diane M. Sabonis, Attorneys, for Peace Officers of California; Carroll, Burdick & McDonough by Gary M. Messing and Jason H. Jasmine, Attorneys, and Kasey C. Clark, General Manager/Chief Counsel, for California Statewide Law Enforcement Association.

Before Shawn P. Cloughesy, Administrative Law Judge.

PROCEDURAL HISTORY

On August 20, 2008, the Peace Officers of California (POC) filed a petition to sever a group of state employees, primarily classifications (classes) designated under the Penal Code as peace officers, from existing state Unit 7 (Protective Services and Public Safety).¹ The

¹ The petition specifically stated the proposed unit included:

All job classifications within Bargaining Unit 07, which are declared by law to be peace officers within the meaning of the Calif. Penal Code, Part 2, Title 3, Chapter 4.5, commencing with Section 830. . . .

POC's unit description is identical to that set forth in the Meyers-Milias-Brown Act (MMBA), Government Code section 3508(a), and the former George Brown Act (Brown Act), former Government Code section 3535. (The MMBA is codified at Gov. Code, § 3500 et seq.)

proposed unit at the time the petition was filed was approximately 2656 state employees.² On September 18, 2008, the Public Employment Relations Board (PERB or Board) Sacramento Regional Office found proof of support for the petition to be sufficient. The exclusive representative, California State Law Enforcement Association (CSLEA), opposed the petition. The State of California (State) initially declared its position as neutral. On November 21, 2008, the State changed its position to oppose.

A settlement conference was held on October 22, 2008, but the parties did not reach a resolution.

A prehearing conference was held on November 24, 2008. Formal hearing was held on January 29 and 30; February 26 and 27; March 10, 11, 12, 24, 25 and 26; and April 23, 2009. Briefs were submitted by POC and CSLEA on July 20, 2009, and reply briefs were submitted on August 10, 2009. The State did not file a post-hearing or reply brief.

Motion to Exclude Exclusive Representative's Legal Representative

On December 30, 2008, the State Park Peace Officers Association of California (SPPOAC), a CSLEA affiliate and supporter of the severance petition, moved to disqualify the law firm of Carroll, Burdick & McDonough (CB&M), and especially Gary M. Messing (Messing), from representing CSLEA pursuant to Rules of Professional Conduct, rule 3-310(E)³ as SPPOAC announced its support for POC on October 1, 2007, and Messing

² The proposed unit constituted approximately 40 percent of the established unit.

³ Rules of Professional Conduct, rule 3-310 provides in pertinent part:

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

had obtained confidential information by representing SPPOAC. Messing represented SPPOAC supervisors in February 2006 when he sent a letter to Department of Personnel Administration (DPA) Labor Relations Officer Kristine Rodrigues (Rodrigues) requesting DPA to analyze Supervisory State Park Peace Officer classes to adjust their salaries under the “like pay for like work” provisions of Government Code section 19286. Messing was also retained by CSLEA as chief negotiator in negotiating a memorandum of understanding (MOU) in the 1990’s when a SPPOAC president was on the California Union of Safety Employees (CAUSE) bargaining team, and Messing obtained information from SPPOAC in negotiating the MOU. POC joined SPPOAC’s motion to disqualify on January 14, 2009.

CSLEA contended that SPPOAC had no standing to bring the motion because the SPPOAC affiliate was now in trusteeship, and the actual representative of SPPOAC was the trustee appointed by CSLEA, Ricardo Sanchez (Sanchez).

According to the CSLEA Constitution and Standing Rules, CSLEA’s authority resides in its Board of Directors (CSLEA Board), which is comprised of the elected representative of each affiliate, and the CSLEA Board elects the President. The CSLEA President is the corporation’s Chief Executive Officer and has “executive, administrative and judicial authority” over the day-to-day operations of CSLEA and its affiliates. Included in the

(2) “Informed written consent” means the client’s or former client’s written agreement to the representation following written disclosure;

(3) “Written” means any writing as defined in Evidence Code section 250.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(Emphasis added.)

President's powers is the ability to retain legal counsel whenever necessary for the "provision of expert legal opinion and/or action."

The Administrative Law Judge (ALJ) denied SPPOAC's motion. When Messing negotiated on behalf of CSLEA, he represented one client, CSLEA, the Unit 7 exclusive representative. While SPPOAC may have a seat on the CSLEA Board, its President does not retain legal counsel, and the affiliate is not individually represented by Messing. Thus, SPPOAC was not a "former client" under Rules of Professional Conduct, rule 3-310(E).

While Messing represented the SPPOAC Supervisors for purposes of "like pay for like work," he withdrew from that representation when it announced its support for POC. Messing's representation of SPPOAC Supervisors also did not concern collective bargaining issues as SPPOAC Supervisors are excluded from collective bargaining. This severance hearing concerns matters within the scope of collective bargaining for Unit 7 rank-and-file employees. It cannot be found that Messing obtained confidential information from SPPOAC Supervisors which is relevant to his defense of CSLEA against the severance petition. The two SPPOAC witnesses, Richard Bergstresser (Bergstresser) and Ryan Gates (Gates), did not testify about any involvement with the Government Code section 19286 issue.⁴

After the denial of the motion to disqualify, SPPOAC representatives announced that they would seek to disqualify Messing by filing a motion in the County of Sacramento Superior Court. No notice of such filing was received.

⁴ The declarations from SPPOAC members Bergstresser and Gates did not include any reference to communications with Messing or CB&M, or state that "confidential information" was obtained by Messing in his former representation of SPPOAC Supervisors. Both Bergstresser and Gates are rank-and-file employees.

Amendments to the Proposed Unit

On the third day of hearing, February 26, 2009, POC moved to amend the proposed unit to delete the classes of Museum Security Officer and Supervising Museum Security Officer as they were not peace officer classes under the Penal Code. Neither the State nor CSLEA objected to the amendment. The ALJ granted the amendment pursuant to PERB Regulation 40240(c).⁵

On August 10, 2009, the same date its reply brief was filed, POC requested to delete the class of Coordinator (Fire and Rescue Services) from the proposed unit pursuant to PERB Regulation 40240(c), relying on a list of peace officers provided by Rodrigues which included the Coordinator (Fire and Rescue Services) class, in March/April 2008. CSLEA opposed the motion on the ground that the motion was filed on the same day that the reply brief was due and POC had ample opportunity to delete the class because it discovered the class was non-sworn on March 24, 2009, during William Bondshu's testimony. CSLEA argued that POC should not be rewarded for its conduct.

PERB Regulation 40240(c) provides:

Amendments to correct technical errors, add or delete job classifications or positions from a party's proposed unit which are requested after the issuance of the notice of hearing are subject to approval by the hearing officer. The hearing officer may grant the requested amendment, so long as it will not serve to unduly impede the hearing, and provided that sufficient proof of support is evidenced to support any request for addition of job classifications. . . .

(Emphasis added).

In *State of California (Department of Personnel Administration)* (1989) PERB Decision No. 773-S (*CSPOA/CAUSE*), PERB analyzed Regulation 40240(c):

⁵ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The fact that a severance petition may be amended during a hearing provides for some flexibility based upon the evidence produced at the hearing and should avoid, in most cases, the necessity of dismissing a severance petition based solely on the erroneous inclusion or exclusion of a few positions or classifications.

(*CSPOA/CAUSE*, *supra*, PERB Decision No. 773-S, p. 14, fn. 8; emphasis added.)

Under PERB Regulation 40240(c) and *CSPOA/CAUSE*, *supra*, PERB Decision No. 773-S, the Board encourages flexibility in its amendment process rather than the harsh result of dismissing a petition based upon an error. Therefore the class of Coordinator (Fire and Rescue Services) is deleted from the proposed unit.

Sealing of Transcripts/Exhibits from Public Inspection

On the third and fourth day of hearing (February 26 and 27, 2009), POC presented testimony from a CSLEA peace officer and member who complained about CSLEA's representation in her complaint(s) against other peace officer(s). All parties agreed that because of the peace officer(s)' privacy, the testimony and the exhibits surrounding the testimony should be sealed from public inspection. The ALJ therefore sealed portions of the February 26 and 27, 2009 transcripts as well as Petitioner's Exhibit T and Exclusive Representative's Exhibits I and J pursuant to Government Code section 11425.40 and Penal Code sections 832.7 and 832.8. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272 and *Berkeley Police Assn. v. City of Berkeley* (2008) 167 Cal.App.4th 385.)

Request to Take Official Notice of Amended Version of Senate Bill 839

On July 20, 2009, POC requested PERB to take official notice of a document obtained from the California State Archives concerning Senate Bill 839 (Stats. 1977, ch. 1159)⁶ which included Government Code section 3521.7, a provision regarding law enforcement units. The

⁶ This legislation was known as the State Employer-Employee Relations Act (SEERA).

document is a September 6, 1977 amended version of the bill with typewritten summations of parts of the legislation in capital letters. Next to the proposed legislation for Government Code section 3521.7 was:

GEORGE BROWN ACT LANGUAGE. WE ALLOW SEPARATE LAW ENFORCEMENT UNITS. DO NOT REQUIRE THEM TO BE MEMBER OF SEPARATE ORGANIZATION.

(Capitalization and underlining included in original.)

A POC declaration states that the document contained “[e]xcerpts from the contents of the legislative bill file of California Senator Ralph C. Dills for Senate Bill 839 in year 1977, consisting of the Legislative Counsel’s Digest (25 pages).” The “Legislative Counsel’s Digest” of the September 6, 1977 version of the bill did not mention this language. CSLEA opposed the request for official notice as POC had ample opportunity to submit the document and it was incomplete. Official notice is not taken as it cannot be determined whether the Legislative Counsel prepared these summary statements. Official notice of the Brown Act, the predecessor labor relations statute, which included a section concerning peace officer employee organizations, is taken.⁷

FINDINGS OF FACT

History of Unit 7

In *Unit Determination for the State of California* (1979) PERB Decision No. 110-S (*Unit Determination*), PERB created 20 state bargaining units, including Unit 7 (Protective Services and Public Safety Unit). Prior to deciding the composition of Unit 7, PERB

⁷ The Brown Act section covering peace officer employee organizations was former Government Code section 3535. (Stats. 1971, ch. 254, § 6, p. 405.) This section was repealed by SEERA (Stats. 1977, ch. 1159). SEERA was later renamed the Ralph C. Dills Act (Dills Act) (Stats. 1986, ch. 103). (The Dills Act is codified at Gov. Code, § 3512 et seq.)

established Unit 5 (Highway Patrol) and Unit 6 (Corrections) containing mostly peace officer employees.⁸ The Unit 7 determination provided:

The protective services and public safety unit is composed of 269 classifications including approximately 5,700 employees who provide various regulatory, law enforcement, and public safety and protection services. The activities performed by the employees in this unit include protecting state land and buildings, furnishing emergency services, issuing licenses or permits, arresting individuals violating penal or administrative laws, and protecting the public from various fraudulent practices and schemes. It is common for a single classification of employees to have responsibilities in several of these areas of activity. For example, fish and game wardens perform almost all of the above functions.

Employment classes within this unit include special agents employed by the Department of Justice, state police, state park rangers, various categories of persons involved in the provision of emergency services, fish and game personnel, security officers, intelligence and investigative personnel, as well as various inspectors and examiners. This unit also includes those fire service personnel not included in the firefighting unit. The performance of the job functions of these employees involves, to varying degrees, an element of personal danger to those providing the services. It is common for state park rangers, fish and game personnel, state police, fire personnel, and various other inspectors and investigators included in this unit to provide mutual aid and assistance under various circumstances.

Typically, the employees included in this unit perform their respective job functions away from an office environment and are frequently required to travel. While the on-the-job training, work experience, and general qualifications of many of the classifications included in this unit vary, several classifications receive common training, such as that provided under the Peace Officers Standards Training Program which includes instruction in the rules of evidence, firearms, citation procedures, and the laws of arrest and detention.

Employees in this unit share common concerns including hours of work, uniform allowance, holiday pay, scheduling and days off,

⁸ The only non-peace officer class now in Unit 5 is the Highway Patrol Cadet. The only other classification in the Unit is Officer, California Highway Patrol (CHP). The only non-peace officer class in Unit 6 is the Parole Service Associate.

safety equipment and procedures, standby pay and compensation for court appearances, vacation scheduling, mileage allowances, special health insurance and retirement benefits, and physical examinations.

Employees included in this unit have a mixed history of representation. While organizations such as the California State Police Association, the California Fish and Game Wardens' Protective Association, the Fire Marshals Local S-9, and the Association of Criminalists-California Department of Justice have represented their respective occupational classifications in the meet and confer process under the George Brown Act (sec. 3525 et seq.), many employees represented by these organizations have at the same time been members of other associations or organizations. This historical intermixture of representation leads the Board to conclude that past patterns of representation should be given little weight here. All of the other aforementioned common factors serve to establish a strong community of interest among the employees included in this unit which unites them for purposes of meeting and conferring.

(Unit Determination, supra, PERB Decision No. 110-S, pp. 29-31; emphasis added.)

After formulating Unit 7, PERB configured Unit 8 (Firefighter). Three classes in that unit, Forester I (Nonsupervisory), Fire Captain, and Battalion Chief, have employees who are peace officers.⁹

After establishing Unit 7, a representation election was held. On July 13, 1981, the Coalition of Associations and Unions of State Employees, Peace Officers Research Association of California (PORAC) became the exclusive representative of Unit 7.¹⁰ On March 3, 1983, PERB acknowledged that the Coalition of Associations and Unions of State Employees changed its name to the California Union of Safety Employees (CAUSE). CAUSE

⁹ The fire captain and the battalion chief classes contain peace officers and non-peace officers.

¹⁰ Official notice of the PERB Unit 7 file was taken.

changed its name again to the California Statewide Law Enforcement Association¹¹ (CSLEA) which PERB acknowledged on April 26, 2007.

A number of classes have moved in and out of the unit since the original PERB unit determination decision: Deputy Labor Commissioner I transferred from Unit 2 to Unit 7 on May 1, 1985; Firefighter (Correctional Institution) transferred from Unit 7 to Unit 6 on June 1, 1986; Weights and Measures Technician I and II were transferred from Unit 11 to Unit 7 on July 7, 1989; California State Police Officers and Sergeants were merged into the CHP and deleted as separate classes on July 1, 1995;¹² and Examiner in Barbering, Cosmetology Examiner I, Associate Insurance Compliance Officer, Insurance Compliance Officer and Senior Insurance Compliance Officer (Specialist) were transferred from Unit 7 to Unit 1 on November 27, 2007.

Unit 7 has had two decertification elections. On May 2, 1991, CAUSE was challenged by California State Safety Employees Council/California State Peace Officers Association/Laborers' International Union of North America and a rerun of that election was held on August 11, 1993. On November 21, 2005, CAUSE was challenged by Teamsters Local 228. CAUSE won all of these elections.

A previous severance petition in Unit 7 resulted in a PERB decision. (*CSPOA/CAUSE, supra*, PERB Decision No. 773-S). In that case, the California State Peace Officers Association (CSPOA) sought to sever a group of uniformed peace officers who patrolled a set geographic region.¹³ PERB declined to exercise its statutory discretion to designate "law

¹¹ At one time, CSLEA stood for CAUSE Statewide Law Enforcement Association.

¹² *State of California (Department of Personnel Administration)* (1996) PERB Decision No. 1145-S, warning letter at p. 4.

¹³ That proposed unit included some of the classifications which are included in the proposed unit in this case including: Fish and Game Lieutenant (Specialist); Fish and Game

enforcement” positions pursuant to Dills Act section 3521.7 as the bargaining history did not justify a departure from the initial unit determination. CSPOA failed to present convincing evidence that the proposed unit had not been adequately represented by CAUSE during negotiations, nor were the interests of these proposed unit’s employees “trampled upon or ignored.” Instead, the relationship between CAUSE and DPA was stable and had “produced successful agreements for Unit 7 over the last several years.” (*CSPOA/CAUSE, supra*, PERB Decision No. 773-S, p. 16.) Secondly, PERB found the proposed unit to be underinclusive as it excluded “large numbers of classifications that we find would fit within the statutory definition of ‘having duties consisting primarily of the enforcement of state laws.’” (*Id.* at p. 16.)

In *CSPOA/CAUSE, supra*, PERB Decision No. 773-S, PERB adopted the ALJ’s proposed decision findings of fact and conclusions of law. Specifically, the ALJ found:

The bargaining history between CAUSE and the DPA also supports the dismissal of the severance petition. Almost all large bargaining units have some diversity of interests. Unit 7, when it was created by the Board, was no exception. The record indicates[,] however, that the exclusive representative took specific organizational steps to accommodate pre-existing differences. It organized special sub-units to insure representation of the individual concerns of all unit employees. Although no one group of employees could expect to achieve all its bargaining goals, issues of primary concern to the uniformed employees’ sub-unit were addressed in negotiations.

There has been no showing that the interests of the petitioned-for employees have been trampled upon or ignored, or that their representational rights have been abrogated because of the existing unit structure. What emerges instead is a picture of a stable bargaining relationship. Since the unit was established successful agreements have been negotiated in 1982, 1983, 1984, 1985 and 1987. Such stability is an important factor and should

Warden; Hospital Police Officer; Security Officer I, Department of Justice; Sergeant, State Fair Police; State Fair Police Officer; State Fair Police Officer (Seasonal); State Park Peace Officer (Lifeguard); State Park Peace Officer (Ranger); and Warden-Pilot, Department of Fish and Game.

not be disturbed lightly. *Livermore Valley Joint Unified School District* (1981) PERB Decision No. 165.

(*CSPOA/CAUSE, supra*, PERB Decision No. 773-S, adopted proposed decision at pp. 16-17; emphasis added.)

The following peace officer classes have been created and added to Unit 7 since the *CSPOA/CAUSE* decision: Fraud Investigator, Department of Insurance (DOI) (1990); Senior Investigator, Department of Consumer Affairs (DCA) (1991); Peace Officer I, Developmental Center (DDS) (1994); Investigation Specialist II (Technical), Franchise Tax Board (FTB) (1994); Special Investigator I, Department of Mental Health and Developmental Services (DMH and DDS) (1995); Senior Special Investigator, DMH and DDS (1995); Investigator, Department of Motor Vehicles (DMV) (1999); Fraud Investigator, Department of Health Services (DHS) (2000); Criminal Investigator, Employment Development Department (EDD) (2000); and Criminal Investigator, Department of Toxic Substances Control (DTSC) (2000).

Additionally, in 2001, the Unit 7 series specification of Licensing Representative I and II, Alcoholic Beverage Control (ABC), non-peace officer class, was established, and the series specification of Investigator I and II, ABC, peace officer class, was revised so that licensing duties would be primarily assigned to the licensing representatives, and the investigators could concentrate on criminal enforcement.

Proposed Unit for POC's Severance Petition

After the amendments, the proposed unit of 53 classes sought to be severed by POC were:

- Arson and Bomb Investigator
- Arson and Bomb Investigator Assistant
- Associate Corporations Investigator
- Captain Firefighter/Security Officer
- Coordinator (Law Enforcement), Office of Emergency Services
- Corporations Investigator
- Criminal Investigator, DTSC

Criminal Investigator, EDD
Deputy State Fire Marshal
Deputy State Fire Marshal III (Specialist)
District Representative I, Division of Codes and Standards
District Representative II, Division of Codes and Standards
Enforcement Representative I, Contractors State License Board (CSLB)
Enforcement Representative II, CSLB
Firefighter/Security Officer
Fire Service Training Specialist
Fire Service Training Specialist III
Fish and Game Lieutenant (Specialist)
Fish and Game Warden
Food and Drug Investigator
Food and Drug Program Specialist
Fraud Investigator, DHS
Fraud Investigator, DOI
Hospital Police Officer
Investigation Specialist I, FTB
Investigation Specialist II (Technical), FTB
Investigator Assistant
Investigator I, ABC
Investigator II, ABC
Investigator Trainee, ABC
Investigator, DCA
Investigator, DMV
Labor Standards Investigator
Lottery Agent
Peace Officer I, DDS
Pipeline Safety Engineer
Security Officer I, Department of Justice (DOJ)
Senior Food and Drug Investigator
Senior Investigator, DCA
Senior Special Investigator, DMH and DDS
Senior Special Investigator
Sergeant, State Fair Police
Special Agent Supervisor, DOJ
Special Agent Trainee, DOJ
Special Agent, DOJ
Special Investigator I
Special Investigator I, DMH and DDS
State Fair Police Officer
State Fair Police Officer (Seasonal)
State Fire Marshal Trainee
State Park Peace Officer (Lifeguard)
State Park Peace Officer (Ranger)
Warden-Pilot, Department of Fish and Game (DFG)

Internal CSLEA Structure

CSLEA's current structure has 19 affiliates divided into three units: Unit A, Unit B and Unit C. These affiliates are:

Unit A

Association of Motor Vehicles Investigators of California (AMVIC)
Association of Special Agents, Department of Justice (ASA-DOJ)
California Association of Criminal Investigators (CACI)
California Food and Drug Investigators (CAFDI)
California Association of Fraud Investigators (CAFI)
California Association of State Investigators, Alcoholic Beverage Control (CASI)
California Fish & Game Warden Association (CFGWA)
Hospital Police Association of California (HPAC)
State Park Peace Officer Association (SPPOAC)

Unit B

Association of Deputy Commissioners (ADC)
Association of Motor Carrier Operations Specialists (AMCOS)
California Association of Regulatory Investigators and Inspectors (CARII)
California Organization of Licensing Registration Examiners (COLRE)
Fire Marshals and Emergency Services Association (FMESA)

Unit C

Association of Conservation Employees (ACE)
Association of Criminalists, Department of Justice (AC-DOJ)
California Highway Patrol Public Safety Dispatcher Association (CHP-PSDA)
State Employed Fire Fighters Association (SEFFA)
California Association of Law Enforcement Employees (CALEE)

Each affiliate, with the approval of the CSLEA Board, can change the classes in it. The majority of Unit 7 peace officers are members of the Unit A affiliates, but peace officers are also in affiliates in Unit B (ADC, CARII and FMESA) and Unit C (SEFFA and CALEE).

Bargaining History since the CSPOA/CAUSE Decision

CSLEA and the State have negotiated MOU's in 1988, 1992, 1999, 2001, 2005 and 2006.

As of the hearing, the following salary comparisons can be made between Units 7, 6 and 5:¹⁴

Unit 7 (CSLEA)	Unit 6 (CCPOA)	Unit 5 (CAHP)
Spec. Agent Supervisor, DOJ \$5,925-\$8,069	Parole Agent II, Adult/Youth \$7,020-\$8,527	Officer, CHP \$5,680-\$6,901
Special Agent, DOJ \$5,397-\$7,341	Parole Agent I, Adult/Youth \$6,400-\$7,772	
Investigation Spec. II, FTB \$5,753-\$7,293	Correctional Officer Youth Correctional Officer \$5,055-\$6,144	
Investigation Spec. I, FTB \$5,239-\$6,637		
Arson and Bomb Investigator Dist. Rep. II, Div. Codes \$5,000-\$6,332		
Crim. Investigator, EDD Crim. Investigator, DTSC Fraud Investigator, DHS Investigator, DMV Investigator II, ABC Senior Special Investigator Senior Investigator, DCA \$4,888-\$6,194		
Enforcement Rep. II, CSLB \$4,748--\$6,020		
Lottery Agent \$4,677-\$5,914		
Fish and Game Warden \$4,271-\$5,642		
Fraud Investigator, DOI Investigator I, ABC Investigator, DCA Sp. Investigator I Sp. Investigator I, DMH/DDS \$4,454-\$5,631		
Enforcement Rep. I, CSLB \$4,321-\$5,469		
State Park Peace Officer (Ranger)(Lifeguard) \$3,981-\$5,265		
State Fair Police Officer \$3,797-\$4,578		
Hospital Police Officer Peace Officer I, DDS \$3,455-\$4,360		

¹⁴ The highest salary range of each classification is used for case of comparison. Not every CSLEA and California Correctional Peace Officer Association (CCPOA) classification is listed. CCPOA is the exclusive representative of Unit 6 and the California Association of Highway Patrolmen (CAHP) is the exclusive representative of Unit 5.

As of the hearing, the following peace officer benefits among the units were:

Unit 7 (CSLEA)	Unit 6 (CCPOA)	Unit 5 (CAHP)
Retirement formula 3% at 50 years ¹⁵	Retirement formula 3% at 50 years	Retirement formula 3% at 50 years
Longevity Pay 17 years – 1% of base salary 19 years – 2% of base salary 20 years – 3% of base salary 21 years – 4% of base salary 22 years – 5% of base salary 25 years – 7% of base salary	Longevity Pay 17 years – 1% of base salary 18 years – 2% of base salary 19 years – 3% of base salary 20 years – 4% of base salary 21 years – 5% of base salary 22 years – 6% of base salary 25 years – 8% of base salary	Longevity Pay 18 years – 2% of base salary 19 years – 3% of base salary 20 years – 4% of base salary 21 years – 5% of base salary 22 years – 6% of base salary 25 years – 8% of base salary
Bilingual Pay Differential \$100 per month	Bilingual/Sign Language Pay \$100 per month.	Bilingual Pay Differential \$100 per month
Educational Incentive Pay 1) Intermediate Post Certificate or AA Degree ¹⁶ \$50 a month 2) Advanced POST Certificate or BA Degree ¹⁷ \$100 a month	Educational Incentive Pay AA Degree or BA Degree \$100 or 2.2% of top step Correctional Officer salary	Educational Incentive Pay 1) Intermediate Post Certificate or AA Degree 2.5% of base salary or no less than \$120 a month 2) Advanced POST Certificate or BA Degree 5% of base salary or no less than \$240 a month
Night Shift Differential State Park Ranger Security Officer I State Security Officer Hospital Peace Officer \$.50 per hour	Night Shift Differential/ Weekend Shift Differential (all classes, except Parole Agent) \$.50 per hour night shift \$.65 per hour weekend shift	Night Shift Pay Swing Shift -- \$1.00 per hour Graveyard -- \$1.50 per hour
Uniform Allowance \$640/year Boot allowance -- Depending on class no cost for initial purchase of boots	Uniform Allowance \$530/year	Uniform Allowance Up to \$920/year \$25 per month for maintenance and cleaning Boot allowance (motorcycle) Initial \$255, Subsequent \$85

¹⁵ In June 2002, Governor Gray Davis signed Senate Bill No. 183 (2002-2003 Reg. Sess.) which gave peace officers/firefighters in Unit 7 a 3 percent at age 50 formula for those who retired after July 1, 2004. The same bill gave the same retirement benefit to Unit 6 peace officer/firefighters, except that it was not effective until January 1, 2006.

¹⁶ Associate of Arts degree.

¹⁷ Bachelor of Arts degree.

Unit 7 (CSLEA)	Unit 6 (CCPOA)	Unit 5 (CAHP)
Physical Fitness Incentive \$65 per month	Physical Fitness Incentive Less than 60 months service \$65 per month 60 or more months service \$130 per month	Physical Fitness Incentive Less than 60 months service \$65 per month 60 or more months service \$130 per month
Canine Differential for Maintenance and Care DPR Peace officers \$189 per month DMH Peace Officer 5% per month	Canine Expenses Reimbursed and allowing 16 hours for maintenance of dog	Canine Pay for Maintenance and Care of Dog \$156.65 per month
Training Officer Differential DOJ Special Agent or Special Agent Supervisor DFG classes DPR State Park Rangers DOI Fraud Investigator One step ¹⁸ above pay rate DPR Cadet FTO for Peace Officers Two step above pay rate		Field Training Officer Pay 5% of daily rate pay
Special Operations Unit Differential – DFG One step above their hourly rate		Investigator Pay (assigned Vehicle Theft Investigator or Fraud Investigator) \$50 per month
Motorcycle/ATV Pay One step above the monthly equivalent hour rate		Motorcycle Pay 4% of base salary or no less than \$175 per month
Task Force Commander DOJ Special Agent Supervisor \$250 per pay period		Officer in Charge Pay 5% of the daily rate of base pay
Recruitment and Retention Differential for Classes State Park Peace Officer (Ranger and Lifeguard) Warden-Pilot DFG Fish and Game Patrol Lieutenant (Specialist) Fish and Game Warden \$175 per month	Recruitment Incentive Housing Stipend San Quentin State Prison Correctional Training Facility Salinas Valley State Prison \$175 a month	

¹⁸ One step is a 5 percent increase.

Unit 7 (CSLEA)	Unit 6 (CCPOA)	Unit 5 (CAHP)
Recruitment and Retention Differential, DPR and DFG for Relocation to Specific Geographic Areas Warden-Pilot Fish and Game Patrol Lt. Up to \$350 per month Warden, Range B State Park Peace Officer (Ranger/Lifeguard) Range B Lifeguard, Range B Up to \$300 per month Warden, Range A State Park Peace Officer (Ranger/Lifeguard) Range A Up to \$220 per month	Recruitment and Retention Differential (Geographic for Desert Prisons) for Avenal, Ironwood, Chuckawalla Valley, Calipatria and Centinela State Prison \$2,400 annual	
Flight Time Differential (Pilot) Special Agent, Special Agent Supervisor, DPR peace officer Two steps for each pay period		Flight Differential Approx. 11.8%
Mounted Patrol (Cal Expo) \$20 per day		
Arduous Pay Differential (for FLSA exempt employees for up to four months per fiscal year)		
	Flight Pay (flying on noncommercial aircraft of four hours per month) \$165 or 3.6% of top step for Correctional Officer salary whichever is greater	
		Paramedic Pay (assigned full time to perform duties of paramedic) \$50 per month

1. Alleged Bargaining Conflict(s) between Peace Officers and Non-Peace Officers

POC contends that there is an actual or inherent conflict that exists in representing peace officer and non-peace officer employees and cites a number of bargaining incidents as support.

a. 1998 Negotiations with Governor Wilson

Pete Wilson was Governor of the State of California from 1991 to 1998. Craig Brown (Brown) was Governor Wilson's Director of Finance from March 1996 to December 30, 1998.

Alan Barcelona (Barcelona) became President of CAUSE in 1998. John Miller (Miller) was the CAUSE Vice-President and Director of Governmental Relations.

In 1998, Governor Wilson attempted to negotiate a number of civil service reforms with all exclusive representatives, including pay for performance¹⁹ (performance salary adjustments (PSA's)); limited hearings for minor disciplinary actions (suspensions of less than five days); no appeals of official reprimands or rejections during probation; longer probationary periods; limited appeal rights in layoffs and lesser notice periods before layoffs; restrictions on DPA statutory appeals hearings; and broadbanding (lesser number of civil service classes with broader definitions).

CAHP and CCPOA had already accepted tentative agreements including a five percent increase in salary, and some civil service reforms. CAHP accepted limited hearings for minor discipline and PSA's, and CCPOA accepted PSA's and restrictions on appeals from rejections during probation.

In August 1998, near the end of the legislative session, Brown and Miller spoke about CAUSE and the State reaching a tentative agreement. Brown stated that the Governor would offer CAUSE a five percent increase in salary for peace officer classes and three percent for non-peace officer classes if it agreed to the Governor's proposed civil service reforms.

According to Barcelona and Miller, CAUSE was amenable to the salary increases, including the differential between peace officer and non-peace officer classes, but was against the Governor's civil service reforms which they believed were against the interests of its

¹⁹ Pay for performance was proposed to replace the merit salary adjustment (MSA) criteria set forth in California Code of Regulations, title 2, section 599.683. Employees received a step increase in salary of 5 percent if the supervisor did not take an affirmative action to deny the MSA. MSA's were viewed as automatic increases in salary. Pay for performance increases would be granted only after the employee demonstrated successful performance in the job.

members. Barcelona and Miller took the offer to the CAUSE Board which unanimously rejected the offer because of the reforms. The CFGWA and SPPOAC affiliates voted against the offer.

Legislative Advocate Patricia Hunter (Hunter) was contacted by CAUSE to assist in negotiating the salary component of a tentative agreement near the end of the 1998 legislative session. Hunter testified she telephoned Jeff Randle (Randle) of the Governor's staff to discuss the issue.²⁰ Although Hunter's memory about some of the details was vague,²¹ she remembered that the Governor had offered a pay raise for non-peace officers and a higher rate for the peace officers. It was the same proposal for peace officers that Governor Wilson had offered the CAHP and CCPOA, which also included the civil service reforms. Hunter informed Miller of the offer, and Miller told her that they would not take the offer because it divided the members. Contrary to Hunter, Barcelona and Miller testified that they did not take the offer because of the civil service reforms.

After the close of the 1998 legislative session, DPA and CAUSE met on October 2, 1998, to attempt to reach an agreement. CAUSE and DPA agreed to a modified version of the pay for performance proposal and the minor discipline hearing reforms, but DPA only offered the modified minor discipline hearing reforms to peace officers and firefighters. DPA insisted that CAUSE agree to all of the civil service reforms to get the salary increases. No agreement was reached. CAUSE waited until the next Governor to begin negotiations.

²⁰ Randle does not remember speaking with Hunter about these issues and left employment with Governor Wilson in April of 1998, before Hunter testified she telephoned Randle.

²¹ Hunter admitted that she was not familiar with all the negotiations as she was only asked to make a telephone call about the salary component.

A document entitled, "Contract Discussion Points" in the 1999 DPA Bargaining Notes stated:

CAUSE (Unit 7) is the only public safety unit without an agreement. CAHP signed an agreement during the last week of Wilson's administration, with Forestry and CCPOA signing last October. CAHP had accepted Wilson's reform proposals in 1995 when it obtained a contract and the other units did not. Forestry and CCPOA accepted some modified versions of the reforms. CAUSE did not accept the reforms and did not get a contract. CAUSE offered to accept the same modified versions as Forestry and CCPOA, but still could not get a contract.

(Emphasis added.)

b. Pay parity with CHP Officers

Gray Davis became Governor in January 1999. After Brown retired as Director of Finance, he joined a governmental relations firm. CAUSE eventually retained Brown as its primary legislative advocate.

In late 2001, in an unpublished sideletter, CCPOA negotiated a pay parity methodology with the State where the total compensation package for Unit 6 would be \$666 less than the total compensation package received by CHP officers. The MOU covered the time period of 2002 to July 2006. The MOU bill (Sen. Bill No. 65 (2001-2002 Reg. Sess.) § 2) was passed by the Legislature and signed by Governor Davis on January 15, 2002. (Stats. 2002, ch. 1.)

In 2003, CAUSE negotiated a tentative agreement with Governor Davis which had a salary component of the weighted total compensation average of five of CAUSE's peace officer classes to be within \$777 of the total compensation received by CHP officers. The entire CAUSE Board was in favor of this pay parity. The tentative agreement was forwarded to the Legislature for approval (Sen. Bill No. 348 (2003-2004 Reg. Sess.)). As the legislative session was ending, the recall movement against Governor Davis gained momentum, and legislative support for the CAUSE MOU bill began to wane for fear that they would be

approving something connected with Governor Davis. During one of the last days of the legislative session, Barcelona was waiting in the hallway of the Capitol to obtain some indication of how the MOU bill was faring from Senate Pro Tem John Burton (Senator Burton). During a break, Senator Burton stepped into the hall, looked at Barcelona, and turned his thumb downward. As a result, the CAUSE leadership decided that they would not bring the MOU bill to the floor and risk a “no” vote. CAUSE also feared that the next Governor would believe that CAUSE was forcing a Governor Davis MOU down his throat. After Governor Arnold Schwarzenegger was elected, Brown approached him about the MOU pay parity methodology. The Governor was totally opposed to it.

c. Fish and Game Warden Recruitment and Retention

The CFGWA affiliate has been concerned about the ability of a decreasing number of wardens to serve the growing population of California and protect its natural resources. DFG had not been able to recruit wardens because of the inadequate salary level, when compared to CHP officers.²²

In 2003, DFG eliminated 50 warden positions because of budgetary cuts. This left approximately 231 wardens to enforce laws to protect California’s natural resources. In 2005, the Legislature approved the addition of 40 warden positions, but Governor Schwarzenegger eliminated this augmentation, leaving 203 wardens. CSLEA successfully negotiated a successor MOU from July 2005 to June 2006 which gave its peace officer/firefighter employees a five percent step increase in January 2007 while giving selected non-peace officer classes a 5 percent step increase in 2006 (Program Representatives, Criminalists, Photo Electronic Specialists, Latent Print Analysts and Questioned Document Examiners) and a

²² The CHP officer has been the highest paid uniformed peace officer employed by the State and has been the benchmark for all other uniformed peace officers to achieve pay parity.

10 percent step increase in July 2005 for CHP Public Safety Dispatchers and Communication Operators. CSLEA was not able to get a better salary package because of the economy, but it obtained the State's informal agreement to reopen the 2005 agreement if the state's fiscal condition improved. The tentative agreement was ratified by 90 percent of CSLEA's membership.

In 2006, Brown approached DPA Director David Gilb (Gilb) about reopening the 2005 agreement based upon the state's improved fiscal condition. At the same time, the Attorney General's Office approached DPA to discuss compensation issues concerning its employees.

In early 2006, CFGWA activists Jerry Karnow (Karnow), Bob Orange (Orange) and Jake Bushey (Bushey) sought to inform the Legislature during deliberations over the 2006/2007 Budget Act of the plight of the wardens and the protection of California's natural resources. Karnow, Orange and Bushey handed out informational documents to the Legislature and testified at budgetary hearings concerning DFG. Karnow and Orange also met with the Governor's Chief of Staff Susan Kennedy, DPA, and the Department of Finance on these issues.

Karnow, Orange and Bushey were successful in their efforts. The Legislature approved a \$30 million augmentation to the DFG budget to address recruitment and retention issues for DFG wardens. Karnow understood that the amount approved would be equivalent to a 43 percent salary increase for the wardens which would provide parity with the CHP officers.

During the Budget Joint Conference Committee meetings, the Governor's office did not support the augmentation to the DFG budget unless the Legislature made the funds available in the Budget's employee compensation item. Brown, familiar with this process as the former Director of Finance, believed the augmentation to the DFG budget would be eliminated by the

Governor as it undermined his authority to collectively bargain employee compensation.²³ The Budget Joint Conference Committee moved the augmentation to the employee compensation item.

In an August 14, 2006 letter to DPA Director Gilb, three State Senators on the Budget Joint Conference Committee stated that the funds were “to address the recruitment and retention issues in employee compensation” and that DPA needed to “describe the problem that the funds aim to address and identify the departments to which the funds will be allocated.” The letter strongly urged DPA to “devote the budget monies to resolving the issues of game warden retention, recruitment and compensation.” At the same time, Brown was discussing the augmentation with DPA, and DPA stated it would use the money to provide additional increases to overcome recruitment and retention problems caused by inadequate compensation.²⁴

When CSLEA met and conferred regarding the budgeted money, DPA emphasized that the money would go to solve recruitment and retention issues. CFGWA President Joe Mello was at the CSLEA bargaining table, and did not voice any objection to DPA’s compensation offer made to the peace officers.

A tentative agreement was reached in August 2006. The following additional salary increases were provided for peace officer/firefighter classes:

²³ Brown had never recalled seeing an augmentation survive the budget process.

²⁴ CSLEA General Manager/Chief Counsel Kasey Clark (Clark) testified that under Governor Schwarzenegger, DPA used a market-driven methodology in determining the amount of salary a class should receive based upon evidence of ongoing recruitment and retention problems despite the agency’s best efforts.

Classes	July 2006	July 2007	July 2008	July 2009	Total
Special Agent DOJ State Park Peace Officer (Ranger) Fish and Game Warden	3.5% Cost of Living Adjustment 6.5% Equity Adjustment		5% Step Increase	5% Step Increase	20% ²⁵
All other Peace Officer/Firefighter Classes	3.5% Cost of Living Adjustment	2-4% Cost of Living Adjustment	5% Step Increase		10.5% to 12.5%

Non-peace officer/firefighter classes such as the CHP Public Safety Dispatcher and Communications Operator received a 25 percent salary increase;²⁶ the Criminalist, Photo Electronic Specialist, Latent Print Analyst and Questioned Document Examiner received a 10.5 percent to 12.5 percent increase; the Program Representatives received a 5.5 percent to 7.5 percent increase and all other non-peace officer/firefighter classes received a 5.5 percent to 7.5 percent increase.

Rodrigues, who has been assigned to Unit 7 from November 2005, testified that in the negotiations, CSLEA did not trade money from sworn to non-sworn classes. Barcelona stated that CSLEA always negotiated two separate deals in every agreement, and pay and benefits for the sworn employees had always been greater than the non-sworn. Barcelona believes that CSLEA has represented unit members well, although it has not done as well as CAHP. CAHP is the most visible law enforcement state agency association and had unmatched access to the Governor as its members provided protection for him, while CSLEA represents a diverse number of small peace officer groups competing for budget money to perform various law enforcement functions, according to Barcelona.

²⁵ These increases would not be fully realized until the employees attained the top step of their salary range for the class.

²⁶ CHP and the Department of Parks and Recreation (DPR) had difficulty retaining staff dispatchers/communications operators (dispatchers) as dispatchers obtained higher paid positions with local agencies after training with the CHP and DPR.

d. CFGWA's Further Efforts to Achieve Pay Parity

Karnow, Orange, and Bushey did not believe that CSLEA's 2006/2007 budget negotiations solved the warden recruitment and retention problems, so they began a second educational campaign for the Legislature in 2007. On February 23, 2007, Senators Patricia A. Wiggins and David Cogdill introduced Senate Bill 695 stating that recent pay increases were insufficient to ease recruitment and retention problems for wardens, which could be solved only by paying wardens comparable to other state law enforcement agencies. On March 6, 2007, Barcelona wrote a letter to the authors stating that CSLEA opposed the bill unless it broadened its parity focus to cover all CSLEA-represented public safety personnel. The bill later linked warden's salaries with the estimated total compensation average of the sheriff's departments of five coastal counties. The bill did not pass.²⁷

2. DOJ Special Agents' Salary Disparity

DOJ Special Agents/Special Agent Supervisors expressed concerns that their salaries are not in parity with CDCR Special Agents and Special Agent Supervisors, classes excluded from representation. Rodrigues, who represented DOJ labor relations in 1999, testified that the issue of DOJ and CDCR Special Agent parity came up many times. The Attorney General recommended that DPA grant DOJ Special Agent salary increases equivalent to the CDCR Special Agent. The request was forwarded to DPA and was denied.

In July 2005, CSLEA representative Messing wrote a letter to DPA Director Gilb seeking pay parity for DOJ Special Agents Supervisors with CDCR, stating that "like pay"

²⁷ In May 2007, the Legislative Analyst's Office (LAO) issued a report entitled, "Fish and Game Warden Staffing and Compensation," where it reported the wardens' vacancy rate as 14 percent and acknowledged that other classes within Unit 7 such as DOJ Special Agents, State Park Peace Officers, ABC Investigators, and DOI Investigators have vacancy rates of "well over 20 percent." Karnow disputed the 14 percent vacancy rate as it did not include the 50 lost positions in 2003. The LAO also recommended against linking warden pay with CHP officers.

should be paid for comparable duties and responsibilities. Rodrigues, now with DPA, responded that DPA would be conducting its own salary survey on salary inequities.

3. CSLEA Affiliates under Trusteeship

Around October 2007, CSLEA placed both CFGWA and SPPOAC in trusteeship, and appointed Sanchez as the affiliates' trustee. In February 2008, CSLEA and DPA met to negotiate a successor MOU. The bargaining team included Clark, one peace officer from CSLEA Unit A and one non-peace officer from Units B and C each. The team reviewed hundreds of proposals from the membership including those from members of CFGWA and SPPOAC.²⁸ Sanchez solicited proposals from the two affiliates and arranged for the former SPPOAC president to attend some negotiating sessions to discuss proposals put forth by State Park Peace Officers (Rangers/Lifeguards). The former SPPOAC president sent Sanchez an electronic mail (e-mail) thanking him for efforts on behalf of SPPOAC.

4. Converting Non-Peace Officer Positions to Peace Officer Positions

CSLEA has sought to increase salaries and benefits for its members by obtaining peace officer status for non-peace officer positions. In 1997, CSLEA sponsored legislation (Stats. 1997, ch. 670, § 1.5) which made FTB investigators peace officers under Penal Code section 830.3(s). As a result, the classes of FTB Investigation Specialist I and II eventually received better salaries and a peace officer retirement.

²⁸ The issue is whether CSLEA provided adequate representation after it placed the CFGWA and SPPOAC affiliates into trusteeship. Both CSLEA and POC sought to litigate the appropriateness of the trusteeship, but PERB does not have jurisdiction over internal union matters (*Service Employees International Union, Local 99 (Kimmitt)* (1979) PERB Decision No. 106).

DOI has two investigator classes: the non-peace officer class, Insurance Investigator,²⁹ investigates applicants for insurance licenses and insurance licensees; the peace officer class, Fraud Investigator, investigates criminal violations of insurance fraud and white-collar crime. In 2005, CSLEA sought legislation to obtain peace officer status for Insurance Investigators in Assembly Bill No. 994 (2005-2006, Reg. Sess.). Peace officer status would make Insurance Investigator duties comparable to Fraud Investigator duties, and would result in increased salary and retirement benefits for these employees. The bill was vetoed by Governor Schwarzenegger.

In August 2006, Barcelona pursued converting the Insurance Investigator to a peace officer position, and sought support from DOI managers. Barcelona was concerned that he would not be able to complete the conversion before Insurance Commissioner John Garamendi left office. In November 2006, Steve Poizner (Poizner) was elected as Insurance Commissioner. Before Poizner took office, Barcelona met with him to discuss the Insurance Investigator becoming a peace officer class. While Barcelona was not able to convert the class to peace officer, in 2007, CSLEA supported legislation sponsored by DOI (Assembly Bill No. 1401 (2007-2008, Reg. Sess.)) which provided more funds to the DOI fraud unit by increasing assessments to insurance companies so DOI could hire more Fraud Investigators. Commissioner Poizner later approved a multi-year transition plan to convert all Insurance Investigators to Fraud Investigators.

5. Other Representation Provided to Peace Officer Classes

CSLEA cited to numerous instances of its representation of its membership, including those related to Hospital Peace Officers. When Hospital Police Officers were not allowed to

²⁹ Although Insurance Investigators were not peace officers, they could exercise peace officer powers of arrest and serve warrants if trained in the exercise of those powers under Penal Code section 832.

carry guns, CSLEA sponsored legislation which allowed them to have firearms on duty in 2005 (Assem. Bill No. 458 (2005-2006 Reg. Sess.)), but it did not become law. CSLEA also filed a grievance that patrol vehicles be provided for Hospital Police Officers and eight vehicles were added to the Metropolitan State Hospital automobile fleet. After batons and pepper spray were prohibited from use by Hospital Police Officers, CSLEA invoked the grievance/arbitration process which restored them.

Change in Duties of Unit 7 Peace Officers

POC claimed that peace officer positions within Unit 7 have increased their criminal enforcement duties compared with their regulatory non-peace officer counterparts. While this change certainly applied to some classes, it was not universal for all Unit 7 peace officer classes and/or all geographic locations within an individual class.

Warden Karnow testified that 95 percent of his duties relate to criminal enforcement, although that percentage varies among wardens depending on the location of the worksite. Some change was caused by the transfer of non-enforcement warden duties to DFG biologists. The Warden Pilot assists in both criminal enforcement and resource preservation/protection duties.

Depending on the work location and philosophical bent of a State Park Peace Officer (Ranger), law enforcement duties have increased because there are less rangers while the number of park visitors is increasing.³⁰ This trend is not department-wide as DPR recently studied the ranger's duties to determine whether they were enforcement or resource management oriented. The study showed that DPR embraced the ranger as a "generalist" who must perform both duties.

³⁰ Rangers employed in the Los Angeles area spend more time on law enforcement duties than in other areas.

The State Park Peace Officer (Lifeguard) performs 85 percent law enforcement related duties during the summer, and the night shift peace officer performs 95 percent law enforcement duties. Some of these peace officers are concerned that their aquatic-related duties are diminishing.

The DOI Fraud Investigator performs criminal law enforcement duties 100 percent of the time. The DOI is now implementing a plan to phase out the non-peace officer Insurance Investigators and hire Fraud Investigators to use peace officer authority to perform their enforcement duties.

The ABC Investigator now performs more criminal enforcement duties than previously. This change began with creation of the Licensing Representative I and II series class in 2001 to absorb administrative licensing duties. ABC investigators now focus more on undercover enforcement activities. ABC investigators continue to perform a small amount of administrative enforcement work.

After a recent reorganization, the DTSC Criminal Investigator performs 100 percent criminal investigations, and sends civil and administrative investigations to the department's biologists. The DDS/DMH Special Investigator spends 90 percent of the time performing criminal investigations, and 10 percent performing civil/administrative investigations. The Corporations Investigator conducts mostly criminal investigations; after the investigation, the department may decide to pursue the matter civilly or administratively.

No significant changes of duties were related by the State Fair Police Officers, the DMH Hospital Police Officers, and the DDS Peace Officer I's. Much of their time is spent monitoring or patrolling activities in the areas of their assignments and they address issues when they arise. Some duties include conducting criminal investigations. No significant changes as to duties were recounted by DMV Investigators who enforce criminal, civil and

administrative laws and regulations other than Supervising Investigators supervise only DMV Investigators and not non-peace officer DMV Inspectors.³¹

Some of the classes such as Firefighter/Security Officer (FF/SO) and Captain Firefighter/Security Officer (CFF/SO) have different duties depending on three work locations: Department of Veterans Affairs (DVA) (Yountville), DPR (San Simeon) and Department of Military (DOM) (Camp Roberts). FF/SO's and CFF/SO's with the DPR and DOM are peace officers, but at DVA they are not. At DPR, the CFF/SO and FF/SO perform 30 percent security duties with the remainder of fire prevention or health and safety duties. At DOM, since September 11, 2001, the CFF/SO and FF/SO perform 40 percent security duties and 60 percent fire protection duties. The DOM and DPR FF/SO wear firearms and the DVA FF/SO's do not. The DVA FF/SO perform 100 percent security and law enforcement duties.

The Lottery Agent's emphasis on criminal enforcement depends on work location. A field agent may perform 75 percent criminal enforcement duties while an agent at Lottery headquarters would perform substantially less.

Split Classes (Peace Officer/Non-Peace Officer)

As a result of reopener negotiations in 2006, certain salary and/or step increases were targeted specifically for peace officer/firefighter employees. Seven classes receiving these increases had both peace officers and non-peace officers. As a result, many non-peace officers received the January 2007 increases which were targeted for peace officer classes. CSLEA would not agree to amend the reopener agreement to exclude these non-peace officers from receiving increases because the agreement specifically listed these classes and was ratified by the membership. DPA proposed the creation of seven additional classes with a specific non-peace officer designation so the non-peace officers would not receive the January 2008

³¹ The DMV Inspector is a Unit 7 class.

increase which was designated for peace officers. The State Personnel Board (SPB) approved DPA's recommendation and created these classes in November 2007. Those split classes were

District Representative I and II, Division of Codes and Standards,
(Class Codes 8960 and 8958)

District Representative I and II, Division of Codes and Standards
(Non-Peace Officer), (Class Codes 8959 and 8961)

Enforcement Representative I and II, Contractors State License
Board, (Class Codes 8793 and 8795)

Enforcement Representative I and II, Contractors State License
Board (Non-Peace Officer), (Class Codes 8791 and 8800)

Investigator Assistant, (Class Code 8554)

Investigator Assistant (Non-Peace Officer), (Class Code 8555)

Special Investigator I, (Class Code 8553)

Special Investigator I (Non-Peace Officer), (Class Code 8563)

Senior Special Investigator, (Class Code 8550)

Senior Special Investigator (Non-Peace Officer), (Class Code
8551)

There are three peace officer and 120 non-peace officer enforcement representatives working for the DCA Contractor's State Licensing Board (CSLB). The peace officers have the same duties as non-peace officers except that the peace officers may arrest and serve search warrants. If a peace officer enforcement representative is not available to make an arrest or serve a search warrant, the non-peace officer contacts a local police officer or deputy sheriff to do it.

The District Representative, Division of Codes and Standards class for the Department of Housing and Community Development (HCD) is a split class. The peace officer district representatives interview witnesses, write subpoenas, and take administrative action against those HCD regulates, while the non-peace officers conduct inspections of manufactured homes and commercial modules and issue notices of correction. Both classes can work together to investigate the unlicensed sale of manufactured homes.

Individual Member Representation

Since Clark came to CSLEA as Chief Counsel in 2004, and later became General Manager/Chief Counsel, CSLEA staff have transformed from a non-attorney labor representative staff to an attorney representative staff. These legal representatives in the headquarters office in Sacramento and the southern office in Westminster represent individual affiliates.

While some Unit 7 employees may have had issues about CSLEA's timely response to inquiries before Clark arrived, the prevailing opinion is that CSLEA staff is now more responsive to the member's inquiries.³²

1. Legal Division Representation

The CSLEA Legal Division represents Unit 7 members in grievances, arbitrations, investigatory interviews, *Skelly*³³ hearings, SPB disciplinary actions, and DPA statutory appeals. Representation surveys have been sent to those who used the legal services. While there was criticism, the majority of responses indicated that the member was very satisfied about the quality of representation provided. Additionally, witnesses testified about the quality of representation and prompt response from CSLEA staff. Among those witnesses was a SPPOAC member while the affiliate was in trusteeship.

2. Legal Defense Fund

The CSLEA Legal Defense Fund (LDF) is a "member only" benefit which provides legal representation to the member in civil and criminal matters arising out of the course or scope of employment. It is patterned after the LDF administered by PORAC. The LDF

³² One peace officer complained that she telephoned CSLEA on a Friday in September/October 2007 and was told that everybody was at training. The phone call was not returned and the member solved the issue on her own.

³³ *Skelly v. SPB* (1975) 15 Cal.3d 194.

contracts with panel attorneys experienced in public safety employees issues, and provides representation on officer-involved shootings and the Public Safety Officers Procedural Bill of Rights (POBOR),³⁴ among other things. The majority of representation is provided to peace officers. Representation surveys were also distributed to those represented by a panel attorney with very positive feedback. The affiliate leadership also received positive comments for the representation provided by the LDF attorney panel.

One witness testified that CSLEA did not pursue a POBOR action against her supervisor when notice was not provided before she was asked about one of her investigations. The witness did not ask for a representative at the time of the questioning, the merits of the claim were debatable,³⁵ and no subsequent harm incurred. CSLEA authorized this member to speak to a LDF panel attorney about protesting a subsequent involuntary transfer, but she was not diligent in doing so. On a different complaint by the same individual, Clark informed her that it did not represent members in actions against other members, but only defended members against actions by the employer.

One peace officer member complained that a CSLEA job steward reported that his use of the DMV e-mail in an unauthorized fashion when he replied to a CSLEA e-mail that was sent to his DMV e-mail account. This member asked about CSLEA LDF coverage when the problem was caused by a CSLEA job steward. The member was told that it was a conflict of interest issue which would be considered on a case-by-case basis.

³⁴ POBOR is codified at Government Code section 3300 et seq.

³⁵ The witness was an internal affairs investigator who was asked by her supervisor about a witness statement from one of her interviewees. The question could have easily been asked by the supervisor in the normal course of his supervisory duties. (Gov. Code, § 3301(i) and *Steinert v. City of Covina* (2006) 146 Cal.App.4th 458.)

Underinclusiveness of the Proposed Unit

On the third day of hearing, February 26, 2009, POC moved to amend the proposed unit to delete the classes of Museum Security Officer (MSO) and Supervising Museum Security Officer (SMSO) as they were not peace officer classes under the Penal Code. CSLEA argues that POC's proposed unit since the deletion is underinclusive.

The MSO and SMSO are not peace officers, but pursuant to Penal Code section 830.7(g) they may exercise peace officer powers of arrest within the course and scope of their employment if they have completed peace officer training on the exercise of these powers under Penal Code section 832. They wear a uniform;³⁶ are armed with a Glock 22 pistol; conduct patrols of the California Science Center 24 hours a day and seven days a week; make arrests; book suspects into the Los Angeles Police Department substation; and issue release from custody citations. CSLEA has attempted to obtain peace officer status by legislation for these classes, but has not been successful to date. The MSO receives retirement benefits under the peace officer/firefighter formula,³⁷ but the SMSO does not.

Proliferation of Bargaining Units

DPA opposes any severance from Unit 7. Rodrigues considers the bargaining relationship between the State and CSLEA to be mature and stable, and opposes the addition of a peace officer only unit, given the finite fiscal and personnel resources available to the State, and the possibility of further unit proliferation.

³⁶ The uniform is similar to Los Angeles County Sheriff's Department deputies and includes a full Sam Brown belt, a gun with gun holster, pepper spray and a baton. They wear a badge on the shirt and have a patch on each shoulder.

³⁷ Government Code section 20392.

ISSUES

1. Do peace officers under the Dills Act have the right to a separate peace officer only unit?
2. Whether a separate unit consisting of peace officers should be severed from the current Protective Services and Public Safety Unit?

CONCLUSIONS OF LAW

Statutory Right to Peace Officer Only Unit

POC argues that Bargaining Unit 7 peace officers have a right to a separate unit. It points to the legislative history of Dills Act section 3521.7 and the predecessor statute, the Brown Act.

The Brown Act was enacted in 1961 to cover state and local public employees and their organizational rights. In 1971, the Brown Act applied only to state employees' organizational rights (Stats. 1971, ch. 254, § 6). Specifically, former Government Code section 3535 provided:

The state may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws, and may by resolution adopted after a public hearing, limit or prohibit the right of employees in such positions or classes of positions to form, join or participate in employee organizations where it is in the public interest to do so; however, the state may not prohibit the right of its employees who are full-time "peace officers," as that term is defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, to join or participate in employee organizations which are composed solely of such peace officers, which concern themselves solely and exclusively with the wages, hours, working conditions, welfare programs, and advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization.

The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by the

state on any other grounds other than those set forth in this section.^[38]

(Emphasis added.)

Dills Act section 3521.7 provides:

The board may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws. Employees so designated shall not be denied the right to be in a unit composed solely of such employees.

(Emphasis added.)

Dills Act section 3521.7 does not contain the prohibitory language of the Brown Act or the MMBA which gives peace officers the right to belong to an employee organization “composed solely of such peace officers.” The omission of this language plainly implies that PERB is not compelled by law to form “peace officer only” units, and that peace officer classes do not have the right to belong to a peace officer only unit if PERB has not designated positions which have state law enforcement duties.

Shortly after the passage of SEERA, including Government Code section 3521.7, Senator H.L. Richardson asked the Attorney General of California to render an opinion as to whether peace officers under sections 830 through 830.11 of the Penal Code are “given an absolute right to be placed in a unit or units comprised solely of peace officers?” The opinion answered that if the Board did not designate positions or classes as consisting primarily of the enforcement of state laws, “no rights are conferred by that section.” Even if PERB had designated as law enforcement positions or classes, it would not be “constrained by the definition of ‘peace officer’ in the Penal Code.” (61 Ops.Cal.Atty.Gen. 405, 410 (1978).)

³⁸ MMBA section 3508 is almost identical to former Government Code section 3535.

In *Unit Determination, supra*, PERB Decision No. 110-S, the initial unit determination proceedings, the Board discussed whether to designate positions or classes of positions as having primarily duties of enforcing state laws:

The Board chooses, at this juncture, not to designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws. Rather, we believe that the unit criteria specified in section 3521, apart from section 3521.7, provide ample basis for the Board to make unit determinations. Thus, the Board declines to exercise the discretionary authority conferred on us by section 3521.7[,] but reserves the right to do so at some future date.

In *CSPOA/CAUSE, supra*, PERB Decision No. 773-S, while PERB declined to exercise its statutory discretion to designate positions or classes of positions in a unit which primarily had law enforcement duties, it stated in a footnote that the Board “could exercise its authority in a severance context should the Board find that the classifications in the proposed unit include all ‘law enforcement’ positions.” (*CSPOA/CAUSE, supra*, PERB Decision No. 773-S, p. 17, fn. 10.)

Clearly, as gleaned from the unambiguous language found in the Dills Act and its deviation from the predecessor language of the Brown Act, state-employed peace officers do not have a right to a separate peace officer only unit until PERB “designate[s] positions or classes of positions which have duties primarily of the enforcement of state laws,” which it has not yet done. POC does not have a right to a separate unit until PERB makes such an affirmative designation.

Should the Proposed Unit of Peace Officers be Severed from Unit 7

In determining whether PERB should sever a proposed unit from the original unit, the severance petitioner must prove that the proposed unit is “more appropriate” than the Unit 7 formed in the original unit determination, because a rebuttable presumption exists in favor of the original 20 bargaining units created by the Board. (*State of California (Department of*

Personnel Administration) PERB Decision No. 794-S (*DPA*), adopted proposed decision at p. 24; and *State of California (Department of Personnel Administration)* PERB Decision No. 988-S (*AFSCME/SPPS*), adopted proposed decision at p. 20; and, *State of California (Department of Personnel Administration)* (1993) PERB Decision No. 1025-S (*AFSCME/GPP*), adopted proposed decision at p. 27 and 28). In attempting to overcome this rebuttable presumption, petitioners have presented evidence that was not given to the Board in the original unit determination (*DPA, supra*, PERB Decision No. 794, p. 5, fn. 5), and/or demonstrated that a change of circumstances has occurred which divided the commonality of interest between the proposed unit and the established unit that would justify dividing the unit. (*DPA, supra*, PERB Decision No. 794, adopted proposed decision at pp. 28-30.)

Peace officers have unique occupational characteristics. When PERB made its original unit determination of Unit 7, however, it was well aware of this uniqueness, yet still combined peace officers with non-peace officer public safety employees. Subsequently, in *CSPOA/CAUSE, supra*, PERB Decision No. 773-S, the Board was also aware of the peace officer/non-peace officer mixture in Unit 7, but found that the bargaining history did not justify severing the unit. Prior unit determinations of the Board remain binding “to the extent that circumstances and Board precedent remain the same.” (*Regents of the University of California* (1986) PERB Decision No. 586-H.)³⁹

The questions are what “dramatic change in circumstances” occurred (*AFSCME/GPP, supra*, PERB Decision No. 1025-S, adopted proposed decision at p. 4), which did not exist

³⁹ See also *Los Angeles Unified School District* (1993) PERB Order No. Ad-250, where the Board upheld a Board agent’s dismissal of a severance petition without providing a formal hearing. Petitioner attempted to sever bus drivers from a presumptively appropriate operations and support unit. The petitioner did not allege a “change of circumstances sufficient to justify a variation of an established unit” as it did not allege any changes in the bus drivers duties, responsibilities or working conditions since the original unit was established and a subsequent decision whether to sever the unit was dismissed. (*Id.* at pp. 6-7.)

during the original unit determination decision and PERB's decision in *CSPOA/CAUSE*, to rebut the presumption in favor of the original unit and compel the severance of a "peace officer only" unit from Unit 7, and whether "issues of primary concern" of Unit 7 peace officers "were addressed in negotiations" (*CSPOA/CAUSE, supra*, PERB Decision No. 773-S, adopted proposed decision at p. 16). The only PERB decision upholding a division of a state unit was where the differences in the classes at issue led to such turmoil that the bargaining relationship between the exclusive representative and the employer was impacted, including the bargaining position(s) taken by the exclusive representative. (*DPA, supra*, PERB Decision No. 794, adopted proposed decision at p. 29.)

A comparison of the salaries of Units 5, 6 and 7 show that the Special Agent, DOJ is within 5.9 percent of the top step of the Parole Agent I and the Special Agent Supervisor is within 5.7 percent of top step of the Parole Agent II. The highest compensated Unit 7 uniformed officer class, the Fish and Game Warden, is within 8.9 percent of the top step of the Correctional Officer, and 22.3 percent of the CHP Officer (top step).⁴⁰ The benefits negotiated for Units 5, 6 and 7 are comparable overall, although certain Unit 5 benefits (Uniform Allowance and Physical Fitness Incentive) are richer. Using pay parity as a determination of whether the rights of a proposed group have been trampled upon or ignored is unwarranted, especially when the comparison is with a class which is dissimilar in enforcement duties, and the exclusive representative has made genuine efforts to rectify such pay issues.

Even if bargaining success was not achieved in areas of concern of Unit 7 peace officers, especially in relation to parity with Unit 5 peace officers, POC must show that this lack of success was due to CSLEA's failure to adequately represent or assert the interests of

⁴⁰ The Correctional Officer (top step) was within 12.3 percent of the salary of the CHP Officer.

Unit 7 peace officers in relation to its non-peace officers. If Unit 6's exclusive representative, a predominantly peace officer unit, could not obtain parity with Unit 5, it is difficult to conclude that Unit 7's failure to do so translates into a failure to adequately represent its members or that its members rights were trampled upon.

To buttress its case of inadequate representation, POC alleges there existed actual conflicts between the CSLEA peace officer and non-peace officer contingents. A closer look at these incidents do not show a conflict, but rather reveal issues that cut across both contingents. In 1998, POC contends, based on Hunter's testimony, that CSLEA refused a salary increase because the Unit 7 non-peace officers were not offered as much as the peace officers. However, Barcelona's and Miller's testimony and the State's bargaining notes all agree that CSLEA refused the offer because of the alleged civil service reforms.⁴¹ Indeed, the entire CSLEA Board, including peace officer affiliates, unanimously refused the offer based on the civil service reforms. In October 1998, CSLEA attempted to negotiate a modified version of the reforms, but the State insisted that CSLEA agree to all of the civil service reforms. It cannot be stated that the Unit 7 peace officers' interests were "trampled upon or ignored" by CSLEA during this period of time. The real issue was civil service reform and not differential salary increases between peace officers and non-peace officers.

CCPOA negotiated pay parity within \$666 of CHP Officer total compensation in late 2001 which was signed by Governor Davis on January 15, 2002. CSLEA was able to negotiate pay parity also, except that its bill was submitted for legislative approval many months later, when the tentative agreement fell victim to the recall. CSLEA made the strategic decision to not bring the bill up to a possible defeat, and renegotiate with the new Governor who

⁴¹ Because Barcelona's and Miller's testimony was supported by the State's bargaining notes, Barcelona's and Miller's testimony is credited over Hunter's where they conflict.

ultimately opposed the pay parity methodology. The failure of the tentative agreement did not result from CSLEA's inadequate representation which trampled upon the rights of peace officers. All CSLEA affiliates were supportive of the pay parity for the peace officers, and CSLEA exerted genuine efforts to improve peace officer interests.

In 2006, the Legislature approved a \$30 million augmentation to the employee compensation budget item to focus on recruitment and retention for wardens. When DPA negotiated with CSLEA, other recruitment and retention issues with specific peace officer and non-peace officer classes were addressed. The classes which received most of the salary adjustments were peace officer classes. The wardens did not achieve the desired pay parity, but other classes (Special Agents and State Park Peace Officers (Rangers)) also received needed increases. CSLEA's negotiations during the time period did not trample upon or ignore the Unit 7 peace officers, but rather achieved some success in achieving their salary concerns. In 2007, when the wardens again tried to achieve parity with deputy sheriff departments by legislation, Barcelona did not trample upon Unit 7 peace officers by trying to obtain parity for other public safety personnel in Unit 7, rather than agreeing to parity for only one Unit 7 class.

Although DOJ Special Agents may not have achieved parity with CDCR Special Agents, CSLEA has advocated for such parity and the special agents are within 6 percent of the Unit 6 Parole Agents. It cannot be concluded that the interests of Unit 7 peace officers were trampled upon or ignored.

One of the ways in which CSLEA represented its members was to convert non-peace officer classes such as the FTB Investigation Specialist into peace officers, as well as support the conversion of Insurance Investigators to DOI Fraud Investigators. If the unit was severed, such advocacy could not continue. A non-peace officer unit would have no interest in seeing that its members become peace officers with better salaries and benefits and leave the

bargaining unit. In this sense, the members are better served having a mixed unit of peace officers and non-peace officers. Additionally, the split classes created by the State in November 2007 have many duties which are very similar in nature, and militate toward a mixed unit to avoid confusion between them.

While it may be true that a number of the peace officer classes have increased criminal enforcement duties, these changes have not occurred in all classes and some changes are geographically driven. It can also be argued that this difference between peace officers with mostly criminal enforcement duties and peace officers with regulatory enforcement duties could only lead to further proliferation within the proposed peace officers' unit.

The individual representation provided to CSLEA peace officer members overall was satisfactory, if not better. CSLEA also has a LDF, which was primarily of greater interest to peace officers than non-peace officers, and was used more by Unit 7 peace officers.

POC must show that the interests of Unit 7 peace officers were "trampled upon or ignored." (*AFSCME/SPPS, supra*, PERB Decision No. 988-S, p. 25, and *CSPOA/CAUSE*, PERB Decision No. 773-S, p. 16.) Overall, it has failed to show that the different interests of sworn and non-sworn classes have created an unstable bargaining situation.

CLSEA also claims that POC's proposed unit is underinclusive. It seems that the MSO's and SMSO's more appropriately belong to a peace officer unit than a non-peace officer unit. Their uniform is similar to a sheriff's department, they carry firearms and other peace officer accoutrements. They have peace officer powers. They appear to belong to classes for which an exclusive representative would work toward obtaining peace officer status and retirement benefits in the future.

In light of all of the factors presented, POC has not rebutted the presumption that the existing unit is more appropriate than the proposed unit and the severance petition filed by POC should be dismissed.

PROPOSED ORDER

Based upon the foregoing and the entire record in this case it is ordered that the severance petition filed by the Peace Officers of California is DISMISSED.

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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 California Code of Regulations, title 8, section 32135, subdivision (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).)

Shawn P. Cloughesy
Administrative Law Judge