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BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD
STATE OF CALIFORNIA

CITY OF LOMPOC, Employer, and LOMPOC POLICE OFFICERS' ASSOCIATION, Exclusive Representative (Appellant)	Unfair Practice Case Nos.: LA-CO-100-M, LA-CE-555-M, LA-CE-564-M, LA-CE-585-M Before Thomas J. Allen, Administrative Law Judge **STATEMENT OF EXCEPTIONS TO PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE, BRIEF IN SUPPORT THEREOF, AND REQUEST FOR ORAL ARGUMENT** Proposed Decision: May 9, 2012

This Statement of Exceptions is filed with the Public Employment Relations Board ("PERB") pursuant to PERB Regulation 32300, in reference to the Board ALJ's Proposed Decision ("PD", attached hereto as **Exhibit A**) in the above entitled matter on behalf of the Lompoc Police Officers' Association (hereinafter referred to as "Appellant" or "LPOA"). The Statement is filed concurrently with a supporting Brief and Request for Oral Argument pursuant to PERB Regulation 32315.

I. ISSUE

The issue to be decided by the Board in this matter is whether the PERB has authority to award "make whole" relief to all members of a bargaining unit, a unit over which PERB has jurisdiction, to remedy a Meyers-Milias-Brown Act ("MMBA") violation suffered by the unit in its representative capacity.

The Identified Exceptions take issue with the Hearing Officer's finding that PERB does not have authority to award "make whole" relief to particular members of the LPOA, members who are peace officers under Penal Code section 830.1, despite finding a violation of the LPOA's MMBA rights under sections 3503, 3506, and 3509(b), and despite directing the employing City to "cease and desist" from unilaterally implementing a salary reduction. (PD p. 20).

II. IDENTIFIED EXCEPTIONS

Exception is taken with the ALJ's finding that the "make whole" remedy that PERB can order does not extend to unit members who are peace officers as defined in Section 830.1 of the Penal Code. (PD p. 20).

III. ARGUMENT

The ALJ's decision that PERB has authority to award "cease and desist" relief, but not "make whole" relief, to particular members of a bargaining unit to remedy an employer's MMBA violations is a distinction without a difference. It is also a decision that has no basis in PERB precedent, misconstrues PERB's jurisdiction over mixed units under the Meyers-Milias-Brown Act, and improperly applies PERB's remedial authority for violations of that Act. Also, parsing out relief among members of a single unit for the same MMBA violation is an approach that leads to undesirable practical results.

A. Government Code section 3511 Contemplates Charges by Individual Peace Officers and Bargaining Units Comprised Solely of Peace Officers, Not Charges Brought By Mixed Units.

Government Code section 3511 exempts, "*persons* who are peace officers as defined in section 830.1 of the Penal Code," from PERB's jurisdiction under the MMBA. (Cal.Gov. Code

section 3511, emphasis added.) This exemption, by its express terms, application, and understanding by the legislature, contemplates charges brought by individual 830.1 peace officers and bargaining units comprised solely of such peace officers. It does not contemplate, nor exclude from PERB's jurisdiction, charges brought by "mixed" units such as the LPOA here. As such, section 3511 does not work to exclude any remedy for particular individual members of a mixed unit.

The LPOA is comprised of both members defined as peace officers under Penal Code section 830.1, and members that are not. This composition has come to be known as a "mixed-unit." (*See* discussion in *SEIU Local 1021 v. County of Calaveras,* PERB Decision No. 2252-M, April 18, 2012, p. 3-4.) There is nothing in section 3511 itself or the MMBA statutory scheme suggesting that mixed units cannot seek to remedy MMBA violations on behalf of their peace officer members before PERB.

Section 3511 refers expressly to "persons," and makes no mention of these employees' representative bargaining units, whether "mixed" or not. The legislative history of Senate Bill 739 of 2000, which enacted section 3511, also makes no mention of mixed units or anything similar. As such, a reasonable reading of section 3511 understands it as applying to units comprised solely of 830.1 peace officers or to charges brought by those individual members, not charges brought by mixed units comprised only partly of these excluded peace officers.

This Board has reasonably read section 3511 this way, as it has asserted jurisdiction over MMBA charges brought by mixed units. (See, *Sonoma County Law Enforcement Association v. County of Sonoma,* (2010) PERB Decision No. 2100-M; the Board asserted jurisdiction over the SCLEA, a mixed unit which included Penal Code section 830.1 peace officers.)

Indeed, PERB's proper jurisdiction over these mixed units makes policy sense. If the inclusion of Penal Code section 830.1 peace officers within a unit over which PERB would normally have jurisdiction brought that unit out of PERB's jurisdiction, it is difficult to determine what forum would in fact have jurisdiction over such units. This is so because the exact same argument would be available in superior court to deprive that forum of jurisdiction over the unit, since the unit would include employees over which PERB has exclusive original

jurisdiction.[1] Thus, if section 3511 is read to exclude *any* unit having 830.1 peace officers as members, there would be no forum to adjudicate MMBA violations for these mixed bargaining units, a clearly unacceptable result.

This reading of section 3511 is also bolstered by the legislative history of SB 656 of 2009, a bill that failed to pass into law. (Enrolled version of SB 656 of 2009 is attached hereto as **Exhibit B**.) This bill's discussion, and ultimate failure to pass, demonstrates both that the legislature understands PERB as currently having jurisdiction over mixed units, and that section 3511 speaks *only* to charges brought by individual 830.1 peace officers and representative organizations comprised solely of these peace officers, and not to mixed units that represent only some 830.1 peace officers.

SB 656 was the legislature's first attempt to address PERB's jurisdiction over mixed units. The bill's intent was to clarify that, "'mixed units', those bargaining units comprised of both peace officer and miscellaneous employees, shall be exempted from PERB's jurisdiction ..." (Senate Third Reading of SB 656 of 2009, p. 2, attached hereto as **Exhibit C**.) That the bill was defeated shows that the legislature understood, and intended, that a peace officer's mere inclusion in a bargaining unit didn't foreclose PERB's jurisdiction over that unit. Further, the bill demonstrated the Legislature's understanding of section 3511 as applying only to peace officer-only units and, "*individual* police officers," who, if a member of a mixed unit, must bring their <u>individual</u> charge to the superior courts. (Senate Third Reading of SB 656, p. 2, emphasis added.)

That the above language uses the term "individual" and section 3511 uses the term "persons" is telling, for the MMBA provides standing for two different types of charges; individual charges to be brought by the individual, and unit-wide charges to be brought by the unit as an entity. Notably, a "unilateral change" charge, the charge brought by the LPOA here, may only be brought by units and not the individual employees themselves. Thus, the charge brought by the LPOA in this case was brought to address a unit-wide MMBA violation, not an individual peace officer grievance for which section 3511 states must be brought to the superior courts.

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[1] Employees not falling under Penal Code section 830.1.

A reasonable reading of these statements, and the language used to describe the legislature's understanding, implies that mixed units may bring unit-wide violations, such as "unilateral change" charges, to PERB for resolution, and that individual peace officers must bring their individual charges to the superior courts. Here, the LPOA properly brought before PERB a unit-wide charge on behalf of all its members. These charges were not individual MMBA charges brought by individual peace officers.

Section 3511's exclusion of peace officer-only unit and individual charges simply does not apply here. As such, section 3511 does not exclude from PERB's jurisdiction any relief designed to remedy the unit-wide "unilateral change" charge brought by the LPOA.

B. PERB Has Recognized that Penal Code section 830.1 Peace Officers Have the Right to Join and Be Represented By Mixed Units.

In addition to the demonstrated proper jurisdiction over mixed units, the Board has expressly recognized peace officers' rights to join and be represented by mixed units. In *SEIU Local 1021 v. County of Calaveras,* (2012) PERB Decision No. 2252-M, the Board stated that nothing in the MMBA "prohibits (peace officers) from being in mixed units if they so choose." (*Id.* at p. 4.) More pointedly, the Decision states that the MMBA grants, "peace officers the right to select representation in a mixed unit with non-peace officer employees..." (*Id.*)

This right to be represented by a mixed unit, together with PERB's proper jurisdiction over these mixed units, quite clearly illustrates that PERB has the authority to hear unit-wide charges brought by mixed-units.

C. There is No Basis in Law, Precedent, or Policy to Parse Out Relief For Unit-Wide MMBA Violations Among Particular Individual Members of a Bargaining Unit.

There is no legal authority restricting PERB's authority to grant full relief to remedy a unit-wide MMBA violation. Likewise, there is no legal authority allowing only some members of a bargaining unit relief from a decided violation of a unit-wide right under the MMBA. Appellant has been unable to locate any statute, regulation, or precedent suggesting any authority

to limit the scope of relief within a single unit. The authority that does exist does not suggest any such selective power.

Where a bargaining unit, as an entity, has suffered a violation, relief is granted as necessary to remedy that violation consistent with the Board's remedial powers under 8 CCR section 32325. This authority allows the Board to issue "cease and desist" and "affirmative action," as "will effectuate the policies of the applicable statute." The standard remedy for an unlawful unilateral change is restoration of the status quo and back pay for employees who lost wages. (See, *California School Employees Association & Its Chapter 802 v. Lost Hills Union Elementary School District,* (2004) PERB Decision No. 1652.)

The ALJ in this case found that the City violated the LPOA's rights under sections 3503, 3506, and 3509(b) of the MMBA, by implementing a unilateral salary reduction. Yet, the ALJ decided to withhold "make whole" relief from some members, but forced the City to "cease and desist" its unilateral implementation as to all unit members. The ALJ provides no explanation as to how the peace officer members of the LPOA are entitled to "cease and desist" relief, but not "make whole" relief. There was no suggestion that the LPOA was not properly before the ALJ, the ALJ considered the LPOA a peace officer-only unit, or that the "unilateral change" charge was anything but a unit-wide MMBA violation.

To the extent the ALJ withheld "make whole" relief from some members of the LPOA based solely on section 3511, this foundation was misplaced because, again, the unfair practice charge here was not brought by a peace officer-only bargaining unit or a peace officer in her individual capacity. Because these were not the circumstances present here, section 3511 simply does not apply, and it surely cannot stand for the proposition that peace officer members of a mixed unit properly before PERB are entitled to some forms of relief but not others.

Moreover, interpreting and applying section 3511 in the way the ALJ has done here will disrupt common policy goals. Considering that PERB has interpreted section 3511 as <u>not</u> excluding from jurisdiction any group that has peace officer members, and has expressly stated that peace officers have the right to join mixed bargaining units, concluding that "make whole" relief cannot be granted to such members imposes upon these units and the superior courts the

undesirable necessity of having to prosecute and consider two separate yet duplicative proceedings to remedy the very same MMBA violation for the very same bargaining unit.

Mixed units and their member employees will thus be forced, in fulfilling both the unit's right to represent its members under section 3503[2], and the employees' rights to have unit representation under section 3502[3], to seek "make whole" relief in both PERB and the superior courts simultaneously. This results in either, (a) wasted resources for both the courts and the public employees, or (b) the risk of inconsistent MMBA jurisprudence for members of the same bargaining unit regarding the same alleged violation, *or both*. The statutory scheme set up by the legislature in enacting 3511 cannot have been intended to force a single unit to break apart its members and pursue a unit-wide MMBA violation remedy in two different venues. A reasonable reading of the section cannot lead to this result either.

These undesirable outcomes can be avoided simply by reading section 3511 consistent with its express language, legislative understanding, and common sense application; allowing a bargaining unit to prosecute and PERB to remedy a determined MMBA violation for the entire membership of a unit properly within PERB's jurisdiction.

IV. CONCLUSION

For all the reasons stated above, Appellant respectfully requests that the Board award "make whole" relief to all members of the LPOA to remedy the City's violations of MMBA sections 3503, 3506, and 3509(b).

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[2] MMBA section 3503 provides in part: "Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies."

[3] MMBA section 3502 provides in part: "...public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

Date: May 29, 2012

By: LACKIE, DAMMEIER, & McGILL APC

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Appellant

REQUEST FOR ORAL ARGUMENT

Pursuant to PERB Regulation 32315, Appellant requests oral argument before the Board on this matter, to more fully present the arguments contained in the Brief in Support of the Statement of Exceptions.

Date: May 29, 2012

By: LACKIE, DAMMEIER, & McGILL APC

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Michael A. McGill, Esq.
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Appellant

EXHIBIT A

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY OF LOMPOC, Charging Party, v. LOMPOC POLICE OFFICERS ASSOCIATION, Respondent.	UNFAIR PRACTICE CASE NO. LA-CO-100-M
LOMPOC POLICE OFFICERS ASSOCIATION, Charging Party, v. CITY OF LOMPOC, Respondent.	UNFAIR PRACTICE CASES NOS. LA-CE-555-M, LA-CE-564-M, LA-CE-585-M PROPOSED DECISION (May 9, 2012)

Appearances: Liebert Cassidy Whitmore by Adrianna E. Guzman, Attorney, for City of Lompoc; Lackie, Dammeier & McGill by Michael A. McGill, Attorney, for Lompoc Police Officers Association.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In these consolidated cases, an employer and a union exchange allegations of bad faith bargaining in alleged violation of the Meyers-Milias-Brown Act (MMBA).[1] Each party denies any violation of law on its own part.

In Unfair Practice Case No. LA-CO-100-M (LA-CO-100-M), the City of Lompoc (City) filed an unfair practice charge against the Lompoc Police Officers Association (Association) on August 6, 2009. The City filed an amended charge on December 14, 2009.

[1] The MMBA is codified at Government Code section 3500 et seq.

The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against the Association on August 5, 2010. The Association filed an answer on August 25, 2010.

In Unfair Practice Case No. LA-CE-555-M (LA-CE-555-M), the Association filed an unfair practice charge against the City on August 19, 2009. PERB issued a complaint against the City on August 5, 2010. The City filed an answer on August 25, 2010.

In Unfair Practice Case No. LA-CE-564-M (LA-CE-564-M), the Association filed an unfair practice charge against the City on October 7, 2009. PERB issued a complaint on August 16, 2010, and the City filed an answer on August 25, 2010.

In Unfair Practice Case No. LA-CE-585-M (LA-CE-585-M), the Association filed an unfair practice charge against the City on December 23, 2009. PERB issued a complaint on August 13, 2010, and the City filed an answer on August 25, 2010.

PERB held an informal settlement conference covering all four cases on October 12, 2010, but none of the cases were settled. PERB held a formal hearing on February 22-24, 2011. With the receipt of the final post-hearing brief on May 24, 2011, the cases were submitted for decision.

FINDINGS OF FACT

Background

The City is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a).[2] The Association is an exclusive representative within the meaning of PERB Regulation 32016(b) of an appropriate unit of employees. Under MMBA sections 3509

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

and 3511, PERB has jurisdiction over the City, the Association, and the unit, except with regard to persons who are peace officers as defined in Penal Code section 830.1.

In 2008 and 2009, the City and the Association found themselves in a difficult situation. The Association's members were relatively underpaid, but the City was underfunded. The Association felt the need to increase compensation, while the City felt the need to cut compensation costs. This made for difficult bargaining.

LA-CE-555-M

Although the charge in LA-CE-555-M was not the earliest one to be filed, it covers the earliest period of time. The complaint alleges in part:

> 3. In or around October and November 2008, Charging Party [the Association] requested to commence negotiations with Respondent [the City] over a successor Memorandum of Understanding.
>
> 4. Respondent refused Charging Party's requests to commence negotiations in October and November 2008.
>
> 5. On or about December 30, 2008, Charging Party and Respondent began negotiating pursuant to Government Code section 3505.
>
> 6. During the parties' negotiations, Respondent refused to schedule negotiation sessions from February 5, 2009 to April 16, 2009, refused to discuss Charging Party's initial bargaining proposal; stated that it would never discuss Charging Party's initial bargaining proposal with Charging Party; and declared impasse when Charging Party insisted that Respondent discuss its initial bargaining proposal with Charging Party.

The complaint further alleges that by its conduct the City failed and refused to meet and confer in good faith.

The evidence at hearing showed that on October 18, 2008, the Association's chief negotiator, Ken George (George), contacted the City's chief negotiator, William Yanonis (Yanonis), and asked that they meet "prior to any negotiations." Yanonis agreed, and the two

met on October 23, 2008. During their discussion, Yanonis expressed uncertainty as to whether and to what extent the State of California (State) might withhold funds from the City. The two also discussed possible dates for negotiations.

On December 16, 2008, the Association's president, Chip Arias (Arias), contacted Yanonis and asked to begin negotiations "at your earliest convenience." Yanonis responded that he thought he should continue to deal with George on negotiation dates. He never refused to negotiate with the Association.

Negotiations began on December 30, 2009. The Association made its initial proposal, every item of which involved a significant increase in compensation. The base salary for non-sworn positions was proposed to increase by 3 percent twice a year for two years and then by 4 percent twice a year for two years. Even without compounding, this would represent an increase of 28 percent over four years. The City did not respond in detail to the Association's proposal but let it be known that it wanted no increases at all. The City encouraged the Association to get "creative" in other ways.

The parties met again on January 15, 2009. The City's management services director made a presentation on the City's deteriorating financial situation. What the State might do was still unknown. The City made no proposal.

The parties next met on February 5, 2009. Yanonis informed the Association that the City Council's direction was that there would be no wage increases. Yanonis also informed the Association that he would be on vacation for the month of March. The Association did not object.

The parties next met on April 16, 2006. The City's financial condition had continued to deteriorate. The City made its first comprehensive proposal, every item of which involved cost savings, including the following:

> Eliminate holidays and effectuate one (1) furlough (unpaid day), or an equivalent number of unpaid furlough days.

The City informed the Association that this item was intended to provide a 5 percent annual cost savings.

In an exchange of e-mail messages later that month, Yanonis asked George for a list of all Association bargaining issues. George responded in part:

> The only [proposal] we had on the table I guess would be our original proposal, which was never discussed. I'm thinking that it is dead according to your last counter.

Yanonis replied that the City's financial presentation on January 15, 2009, had been its response to the Association's proposal.

When the parties met again on May 1, 2009, the Association presented a proposal that was essentially the same as its initial proposal of December 30, 2009. The City rejected every item of the proposal and declared impasse. The Association caucused and returned with a more modest proposal, and the City withdrew its declaration of impasse. Both sides made concessions, and negotiations appeared to be on track toward agreement.

LA-CO-100-M

The complaint in LA-CO-100-M alleges in part:

> 3. During the period from October 18, 2008 to October 30, 2009, Respondent [the Association] and Charging Party [the City] were meeting and conferring pursuant to Government Code section 3505.
>
> 4. During this period of time, Respondent engaged in the following conduct: Respondent delayed scheduling negotiation sessions with Charging Party from May 14, 2009 until August 28, 2009 and then again from August 28, 2009 until October 30, 2009. Respondent made a regressive bargaining proposal on August 28, 2009; Respondent attended the October 30, 2009 negotiation session without sufficient authority to reach an agreement.

The complaint further alleges that by its conduct the Association failed and refused to meet and confer in good faith.

The evidence at hearing showed that on May 14, 2009, progress toward an agreement was derailed. The City presented to the Association a comprehensive package proposal that was different from its previous proposals. For one thing, the package proposal specified a two-year term. Moreover, in the first year employees were to be "assigned thirteen (13) unpaid vacation days and/or unpaid holidays." The Association found the unpaid vacation provision unacceptable. In fact, as the City later learned, it would have been illegal to implement the provision.

The Association decided to retain legal counsel. On June 11, 2009, George informed Yanonis that attorney Michael McGill (McGill) would be "handling negotiations from this point forward." On June 12, 16 and 23, 2009, Yanonis attempted to contact McGill to schedule further negotiations. On June 24, 2009, McGill made an information request, to which Yanonis responded on July 8, 2009. On August 7, 2009, McGill and Yanonis agreed to schedule negotiations for August 27 and 28, 2009.

On August 27, 2009, the City presented a revised two-year package proposal. In both years, employees were to "receive a five percent (5%) wage offset or; [sic] thirteen (13) unpaid vacation days." The City apparently still did not know that the unpaid vacation provision would be illegal.

On August 28, 2009, the Association made a two-year proposal of its own, stating for the first time that it "will accept furloughs of 104 work hours for each year." The Association also proposed binding arbitration, layoff protection, and time for donning and doffing uniforms, all for the first time.

On September 3, 2009, Yanonis sent McGill an e-mail message with another revised package proposal, this one with a term of two-and-a-half years (December 19, 2008, through June 17, 2011). For the first time, the City proposed furlough hours, not unpaid vacation or unpaid holidays. The City did not offer binding arbitration, layoff protect, or time for donning and doffing uniforms. The parties met again on September 10, 2009, but there were no new proposals. When the parties met again on September 29, 2009, the City made what it called its "Last/Best/Final Offer" (LBFO), which was the same as its proposal of September 3, 2009.

The Association agreed to take the LBFO to its members for a vote, and proceeded to do so. At some point, the parties agreed to meet again on October 30, 2009. On October 28, 2009, McGill sent Yanonis a letter stating:

> As you know, I called you yesterday and left a message stating that due to unforeseen issues, I would have to cancel contract negotiations scheduled for October 30, 2009. As I said, I do have some availability next week if you are free.
>
> Since that time, I have been informed that the POA [Association] negotiation team remains free to meet with you and receive any information the City needs to pass along. As I informed you in my message, the POA voted unanimously to reject the City's impasse procedure and any further information.
>
> Unless I hear that the meeting is unnecessary, I will advise the negotiation team to attend the meeting as previously agreed on October 30, 2009 at 9:00 a.m.

At the meeting on October 30, 2009, the Association was represented by its president, Bryan Dillard (Dillard), instead of McGill. Dillard hand-delivered McGill's letter of October 28, 2009, to Yanonis, who had not previously received the letter or the phone message referenced in it. Yanonis in turn hand-delivered a letter initiating impasse procedures. Yanonis scheduled an impasse meeting for November 6, 2009, but asked the Association to waive the impasse meeting and proceed to mediation. Dillard declined to waive the impasse meeting in McGill's absence, but McGill later waived it on the Association's behalf.

LA-CE-564-M

The complaint in LA-CE-564-M alleges in part:

> 3. On or about September 29, 2009, Respondent [the City] acting through its agent Chief Negotiator and Human Resources Director William Yanonis, advised Charging Party's [the Association's] bargaining team that it was in Charging Party's best interests to immediately agree to Respondent's last, best and final contract proposal because all terms, including Respondent's proposed 5% pay cut to employees' wages, would be retroactive to the commencement of contract negotiations.

The complaint further alleges that by its conduct the City interfered with the Association's rights.

Association President Dillard was questioned and testified as follows about the end of negotiations on September 29, 2009, after the City made its LBFO:

> Q Now at the conclusion of that meeting there was some discussion and statements made by Mr. Yanonis. Do you recall what he said?
>
> A Yes, I do.
>
> Q What was it?
>
> A We [the Association's bargaining team] were actually just getting up to walk out. I had actually just stood up or was standing up when he made a comment to the effect of the longer this takes, the more damaging this is going to be to your employees. I remember sitting immediately – I remember it was just very vivid that we, just because of what happened next. You [McGill] were standing up and had your papers in your hand and turned and sat right back down, which left us standing, those of us who were still standing looking at each other, so we quickly sat down following your lead, and I remember you asked him to explain what he meant by that.
>
> Q And what did he say?
>
> A He went into, again the longer this process takes to come to an agreement for the MOU [Memorandum of Understanding] and turn into a contract, and he did state something to the effect the narrower the window became for the City to recover its cost savings that it was trying to get.

> Q And what did you understand that to mean?
>
> A My understanding was the two year agreement that it would narrow that window, I understood that as their frustration in trying to get this done. But he never really was specific as to how it would be more damaging, other than it would be more costly. And he didn't say how. He didn't specify. It was kind of vague and ambiguous as far as he just left it open for us. It was almost like let your mind run riot over what's going to happen next.
>
> Q Did he indicate one way or another whether the time spent negotiating, the months it had taken to negotiate, that the City was going to recoup their savings from that period of time?
>
> A I understood that - - He didn't say that, no, not specifically. He didn't give a specified time limit either, so there was no percentage given. I guess it was going to be more costly.

The testimony of Yanonis himself, while less vivid, was generally consistent with Dillard's testimony on this point.

Yanonis had made similar statements in e-mail messages to Association representatives. In a message to George dated May 28, 2009, he stated:

> Also, I have notified the other bargaining units that as holidays pass, and the time frame for effectuating unpaid leave shrinks, the initial impact to the bargaining unit may be greater, i.e., instead of the reduction(s) being spread out over a longer period of time, it may be necessary to attain these savings in a shorter time frame which will result a greater one-time effect on the employees involved.

Yanonis made essentially the same statement in a message to George dated June 5, 2009. In a message to McGill dated September 4, 2009, Yanonis stated:

> As for the 5% wage offset remaining, at this time the option would be with the LPOA. However, as I mentioned at our last negotiating session, as the window of opportunity for effectuating furlough days closes, the City is reserving the right to shift back to a 5% wage offset. I mentioned to the prior LPOA Rep (Ken George) that I am concerned the longer this negotiation goes on,

> the probability employees will experience a greater one time economic impact increases.

Yanonis was not more specific about the possible "greater one-time effect" or "greater one time economic impact" on employees.

LA-CE-585-M

The complaint in LA-CE-585-M alleges in part:

> 3. During the period of time from October 23, 2009 through August 27, 2009, Respondent [the City] and Charging Party [the Association] were meeting and conferring pursuant to Government Code section 3505.
>
> 4. While the parties were meeting and conferring pursuant to Government Code section 3505, Respondent presented Charging Party with a last, best, and final offer, which provided in relevant part:
>
>> In the first year period of this [Memorandum of Understanding] (December 19, 2008 through June 30, 2010) an employee will receive a five percent (5%) salary offset or; an employee shall be assigned the total equivalent of one hundred and four (104) furlough work hours. Prior to February 1, 2010, and with two weeks notice to their immediate supervisor, employees may request unpaid furlough hours. Requests must be made in a minimum of four (4) hour increments and shall be granted based on the operational need of the department. An employee who fails to schedule off the required amount of furlough hours by February 1, 2010, shall be unilaterally assigned such remaining furlough hours by the department prior to June 18, 2010.
>>
>> In the second period of this agreement (July 1, 2010 th[r]ough June 17, 2011) an employee will receive a five percent (5%) salary offset or; an employee shall be assigned the total equivalent of one hundred and four (104) furlough work hours. Prior to February 1, 2011, and with two weeks notice to their immediate supervisor, employees may request unpaid furlough hours. Requests must be made in four (4) hour increments and shall be granted based on the operational need of the department. An employee who fails to schedule off the required amount of furlough hours by February 1, 2011, shall be

> unilaterally assigned such days by the department prior to June 17, 2011.
>
> 5. On or about December 18, 2009, Charging Party and Respondent participated in impasse procedures pursuant to Respondent's local rules.
>
> 6. While Charging Party and Respondent were participating in impasse procedures, Respondent presented Charging Party with a revised last, best, and final offer, which provided in relevant part:
>
>> A one-year salary reduction of 5% (which will result in a salary cost savings of $249,365[)]. The City originally proposed that this reduction be effective beginning June 20, 2009 through June 20, 2010. However, as the parties were not able to reach agreement prior to June 20, 2009, the City proposes modifying the terms of the reduction to account for the passage of time.
>>
>> The City now proposes a 10.769% reduction for 12 consecutive pay-periods (effective for the pay period paid on January 22, 2010 through June 18, 2010). This change in percentage over a shorter period of time still results in the same cost savings of $249,365.

The complaint further alleges that by its conduct the City failed and refused to participate in impasse procedures in good faith and also retaliated against the Association.

The complaint accurately quotes from the City's LBFO of September 29, 2009. That LBFO remained unchanged until December 18, 2009, when the parties went to mediation. The mediator was unable to bring the parties to agreement. At the end of mediation, the City gave the mediator what it called its "Revised Last/Best/Final Offer" (Revised LBFO) to give to the Association. There was no further mediation or negotiation.

The complaint accurately quotes from the City's Revised LBFO, which proposed for the first time a 10.769 percent salary reduction. On January 5, 2010, the City implemented its Revised LBFO, including the 10.769 percent reduction.

ISSUES

1. Did the City make an unlawful unilateral change?
2. Did the City retaliate against the Association?
3. Did the City threaten the Association?
4. Did the City bargain in bad faith?
5. Did the Association bargain in bad faith?

CONCLUSIONS OF LAW

Unilateral change

At the center of this case is what happened at the end: the City's unilateral implementation of a salary reduction of 10.769 percent for the 12 pay periods paid on January 22, 2010, through June 18, 2010. The Association alleges that this was an unlawful unilateral change.

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

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

PERB Decision No. 196; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

At all times relevant to this case, MMBA section 3505.4 stated:

> If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

In the present case, the City unilaterally implemented, after impasse, a salary reduction of 10.769 percent for the 12 pay periods paid on January 22, 2010, through June 18, 2010.

As the City's Revised LBFO acknowledged, the City had previously proposed a 5 percent salary reduction to be effective June 20, 2009, through June 20, 2010. That was the proposal that was negotiated to impasse and went through mediation. The Revised LBFO with its 10.769 percent reduction was never subject to negotiation or mediation. The Revised LBFO was presented only when all negotiation and mediation had ended. At that point, it was not even a "take it or leave it" proposal. It was simply a matter of "take it."

In its post-hearing brief, the Association points to the similar case of *Laguna Salada Union High School District* (1995) PERB Decision No. 1103 (*Laguna Salada*). In that case, the employer had negotiated to impasse a proposal to reduce salaries by 1.76 percent for ten months, effective July 1, 1992. On June 15, 1993, after impasse procedures were completed, the employer implemented a one-month salary reduction of 17.6 percent. PERB held: (1) that the methodology used to made adjustments in employee wages is a negotiable subject, just as is the level to which wages are to be adjusted; (2) the employer's salary reduction proposal did

not reasonably comprehend the salary reduction methodology it implemented; and (3) the implementation therefore constituted an unlawful unilateral change. I reach all the same conclusions here.

Retaliation

The Association alleges that the 10.769 percent salary reduction was not only an unlawful unilateral change but was also an act of retaliation for the Association's participation in bargaining and impasse procedures. To demonstrate that an employer retaliated against employees in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employees exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employees; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210; *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416; *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553.)

In its post-hearing brief, the Association argues that even if the 10.769 percent salary reduction had been comprehended by the City's unrevised LBFO, it would have been unlawfully retaliatory, because it took into account the passage of time while the Association exercised its rights to negotiation and mediation. This argument goes too far.

If the Association's argument were correct, an employer's last, best, and final offer could never legally comprehend a salary reduction methodology that takes account of the passage of time during negotiations and impasse procedures. If this were true, PERB's analysis of what was comprehended in the employer's salary proposal in *Laguna Salada, supra*, PERB Decision No. 1103 would have been pointless, and PERB's holding that salary

reduction methodology is a negotiable subject would not have its plain and ordinary meaning. I reject the argument and dismiss the allegation of retaliation.

Threat

The Association alleges that the City interfered with the Association by making an unlawful threat. To demonstrate a prima facie case of interference, a charging party must show that the respondent's conduct tends to or does result in some harm to employee rights guaranteed by the Act. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 at p. 10.) In *Chula Vista City School District* (1990) PERB Decision No. 834, at pp. 10-13, the Board stated:

> As more fully explained below, employer speech causes no cognizable harm to employee rights granted under EERA unless it contains "threats of reprisal or force or promise of a benefit." Therefore, a prima facie case of interference cannot be based on speech that contains no "threats of reprisal or force or promise of a benefit."
>
> . . . .
>
> In *Rio Hondo Community College District* (1980) PERB Decision No. 128, pages 18-20, this Board looked to the National Labor Relations Act (NLRA) for guidance in formulating a test for determining when employer communications will be considered violative of the provisions of EERA. Specifically, the Board examined section 8(c) of the NLRA which provides:
>
>> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit. [Fn. omitted.]
>
> Noting that EERA contains no provision parallel to section 8(c), the Board nevertheless found that "a public school employer is entitled to express its views on employment-related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate" and set forth the test to be applied as follows:

> [T]he Board finds that an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA. (*Id.* at p. 20.)

> Whether the employer's speech is protected or constitutes a proscribed threat or promise is determined by applying an objective rather than a subjective standard. (*California State University* (1989) PERB Decision No. 777-H, P.D., p. 8.) Thus, "the charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights." The fact, "That [sic] employees may interpret statements, which are otherwise protected, as coercive does not necessarily render those statements unlawful." (*Regents of the University of California* (1983) PERB Decision No. 366-H, fn. 9, pp. 15-16; *BMC Manufacturing Corporation* (1955) 113 NLRB 823 [36 LRRM 1397].)
>
> The Board has also held that statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. (*Los Angeles Unified School District* (1988) PERB Decision No. 659, p. 9, and cases cited therein.)
>
> Additionally, the Board has placed considerable weight on the accuracy of the content of the speech in determining whether the communication constitutes an unfair labor practice. (*Alhambra City and High School Districts* (1986) PERB Decision No. 560, p. 16; *Muroc Unified School District* (1978) PERB Decision No. 80, pp. 19-20.) Thus, where employer speech accurately describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, the Board will not find the speech unlawful.

In the present case, the Association alleges that Yanonis made an unlawful threat on September 29, 2009, after the City made its LBFO.

The PERB complaint alleges that Yanonis told the Association's bargaining team that the LBFO, including the proposed 5 percent salary reduction, "would be retroactive to the commencement of contract negotiations." The evidence did not show that Yanonis made such

a statement. The evidence did show that Yanonis said that the longer the negotiations took, the narrower the window for cost savings would be, and the greater the damage to the employees would be.

I note that Yanonis made his statements in the context of bargaining, and only to the Association's bargaining representatives. Under *Laguna Salada, supra,* PERB Decision No. 1103, as I understand it, Yanonis could have proposed in bargaining a salary reduction methodology that concentrated the impact of a salary reduction into a shorter period of time the later the implementation occurred. Yanonis seems to have been suggesting such a methodology.

The problem with what Yanonis did is that he failed to turn his suggestions into a specific proposal on salary reduction methodology, which would then have been subject to bargaining and impasse procedures. This failure turned the implementation of a specific salary reduction methodology into an unlawful unilateral change, but I do not believe it also turned the suggestions into unlawful threats.

Bad faith

Each party alleges that the other engaged in bad faith surface bargaining. Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 (*Placentia Fire Fighters*).) PERB has held it is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the

negotiating process or is merely a legitimate position adamantly maintained." (*Oakland Unified School District* (1982) PERB Decision No. 275; *Placentia Fire Fighters*, at p. 25.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (*Oakland Unified School District* (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (*Ibid.*) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (*Stockton Unified School District, supra*, PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134); and reneging on tentative agreements the parties already have made (*Charter Oak Unified School District* (1991) PERB Decision No. 873; *Stockton Unified School District, supra*; *Placerville Union School District* (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (*Placentia Fire Fighters, supra*, 57 Cal.App.3d 9, 25; *Oakland Unified School District, supra*, PERB Decision No. 275.) "The

obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229.)

In the present case, the allegations of surface bargaining were often not proven and were generally insufficient to establish bad faith. The City did not refuse to commence negotiations in October and November 2008, as alleged. The City's chief negotiator did take a vacation in March 2009, but the Association did not object. The City did not respond in detail to the Association's initial proposal, but it did clearly communicate and explain a position that applied to every aspect of that proposal: that the City could not agree to increases in compensation. The City did declare impasse on May 1, 2009, but it withdrew the declaration the same day when the Association made a more modest proposal.

For its part, the Association did delay scheduling negotiation sessions from May 14, 2009, to August 28, 2009, but this was because the Association needed to retain legal counsel, at least in part because the City had unexpectedly proposed an illegal unpaid vacation provision. The Association did raise new issues in its proposal of August 28, 2009, but that proposal also accepted 104 hours of furloughs for the first time. The Association did not delay scheduling negotiation sessions from August 28, 2009, until October 30, 2009; in fact the parties met twice in that time period, on September 10 and 29, 2009. The Association's chief negotiator did miss the meeting of October 30, 2009, but by then negotiations had ended in impasse, and the chief negotiator later waived the impasse meeting as the City had requested.

I conclude that all allegations of bad faith surface bargaining must be dismissed.

REMEDY

MMBA section 3509(b) states in part:

> The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board [PERB].

In the present case, the City has been found to have violated the MMBA by unilaterally implementing a salary reduction without negotiating the salary reduction methodology. It is therefore appropriate to order the City to cease and desist from such conduct.

In *Laguna Salada, supra*, PERB Decision No., 1103, the parties had stipulated in part:

> The parties further STIPULATE that the Charging Party shall not request, [n]or shall PERB order, "make whole" relief in this case; provided that, all other remedies customarily available to PERB shall be available in this case.

PERB stated in response:

> The Board's statutory remedial powers cannot be limited or constrained by stipulation of the parties. Therefore, this section of the stipulation has no effect on PERB's authority.
>
> However, the main purpose of EERA section 3541.5 (c) is to empower the Board to take what actions it deems necessary to effectuate the policies of EERA. A primary purpose of EERA is to enhance stability in employer-employee relations and promote the collective resolution of issues and disputes. Since the parties appear to have reached agreement with regard to the issue of any make whole remedy in this case, the Board concludes that it is appropriate to give deference to that agreement. Therefore, the Board will not include a make whole order as part of its remedy in this case.

It thus appears that in a case involving a *Laguna Salada* violation, a make whole remedy is appropriate, unless the parties agree otherwise.

MMBA section 3511 states:

> The changes made to Sections 3501, 3507.1, and 3509 of the Government Code by legislation enacted during the 1999-2000 Regular Session of the Legislature shall not apply to persons who are peace officers as defined in Section 830.1 of the Penal Code.

PERB's remedial authority under MMBA section 3509 thus does not extend to persons who are peace officers. The make whole remedy that PERB can order therefore does not extend to unit members who are peace officers as defined in Section 830.1 of the Penal Code.

It is also appropriate to order the City to post a notice incorporating the terms of the order in this case. (*Placerville Union School District*, *supra*, PERB Decision No. 69.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaints and the underlying unfair practice charges in Case No. LA-CO-100-M, *City of Lompoc v. Lompoc Police Officers Association*, and Cases Nos. LA-CE-555-M and LA-CE-564-M, *Lompoc Police Officers Association v. City of Lompoc*, are hereby DISMISSED.

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found in Case No. LA-CE-585-M, *Lompoc Police Officers Association v. City of Lompoc*, that the City of Lompoc (City) violated the Meyers-Milias-Brown Act (Act), Government Code sections 3503, 3506 and 3509(b), by unilaterally implementing a salary reduction without negotiating the salary reduction methodology with the Lompoc Police Officers Association (Association). All other allegations are hereby DISMISSED.

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

A. CEASE AND DESIST FROM:

Unilaterally implementing a salary reduction without negotiating the salary reduction methodology with the Association.

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

1. Make whole those unit members who are not peace officers as defined in Section 830.1 of the Penal Code and who suffered a salary reduction of 10.769 percent for the 12 pay periods paid on January 22, 2010, through June 18, 2010, unless the City and the Association agree otherwise.

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

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

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

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

Thomas J. Allen
Administrative Law Judge

EXHIBIT B

Senate Bill No. 656

Passed the Senate September 8, 2009

_____

Secretary of the Senate

Passed the Assembly September 2, 2009

_____

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day of _____, 2009, at _____ o'clock ____M.

_____

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 3511 of the Government Code, relating to public employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 656, DeSaulnier. Public employment: collective bargaining: peace officers.

Existing law establishes the Public Employment Relations Board (PERB) in state government as a means of resolving disputes and enforcing the statutory duties and rights of employers and employees under the Educational Employment Relations Act, the Higher Education Employer-Employee Relations Act, the Ralph C. Dills Act, and the Meyers-Milias-Brown Act. Existing law includes within PERB's jurisdiction resolving disputes alleging violation of rules and regulations adopted by a public agency, as defined, concerning unit determinations, representations, recognition, and elections, as specified.

Existing law requires bargaining unit determinations and representation elections to be determined and processed in accordance with rules adopted by a public agency, as specified. Existing law requires, in a representation election, a majority of the votes cast by the employees in the appropriate bargaining unit.

Existing law requires PERB to enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections. Existing law also requires specified complaints to be processed as an unfair practice charge by PERB.

Existing law does not apply the above provisions to persons who are peace officers, as defined.

This bill would also exclude from those provisions a bargaining unit which is comprised of a majority of persons who are peace officers, as defined.

The people of the State of California do enact as follows:

SECTION 1. Section 3511 of the Government Code is amended to read:

3511. The changes made to Sections 3501, 3507.1, and 3509 of the Government Code by legislation enacted during the 1999–2000 Regular Session of the Legislature shall not apply to persons who are peace officers, as defined in Section 830.1 of the Penal Code, or a bargaining unit which is comprised of a majority of persons who are peace officers, as defined in Section 830.1 of the Penal Code.

Approved _____, 2009

_____

Governor

EXHIBIT C

BILL ANALYSIS

SENATE RULES COMMITTEE | SB 656
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 651-1520 Fax: (916)
327-4478

VETO

Bill No: SB 656
Author: DeSaulnier (D)
Amended: 8/17/09
Vote: 21

SENATE PUBLIC EMP. & RET. COMMITTEE : 5-2, 4/27/09
AYES: Correa, Ducheny, Liu, Padilla, Wiggins
NOES: Ashburn, Benoit

SENATE APPROPRIATIONS COMMITTEE : 11-0, 5/11/09
AYES: Kehoe, Cox, Corbett, Denham, DeSaulnier, Hancock, Leno, Oropeza, Runner, Wolk, Wyland
NO VOTE RECORDED: Walters, Yee

SENATE FLOOR : 30-8, 5/26/09
AYES: Alquist, Calderon, Cedillo, Corbett, Correa, Denham, DeSaulnier, Dutton, Florez, Hancock, Harman, Kehoe, Leno, Liu, Lowenthal, Maldonado, Negrete McLeod, Oropeza, Padilla, Pavley, Romero, Runner, Simitian, Steinberg, Strickland, Wiggins, Wolk, Wright, Wyland, Yee
NOES: Aanestad, Ashburn, Benoit, Cogdill, Cox, Hollingsworth, Huff, Walters
NO VOTE RECORDED: Ducheny, Vacancy

SENATE FLOOR : 33-7, 9/8/09
AYES: Alquist, Calderon, Cedillo, Cogdill, Corbett, Correa, Denham, DeSaulnier, Ducheny, Dutton, Florez, Hancock, Harman, Kehoe, Leno, Liu, Lowenthal, Maldonado, Negrete McLeod, Oropeza, Padilla, Pavley, Price, Romero, Runner, Simitian, Steinberg, Strickland, Wiggins, Wolk, Wright, Wyland, Yee
NOES: Aanestad, Ashburn, Benoit, Cox, Hollingsworth, Huff,

CONTINUED

Walters

ASSEMBLY FLOOR : 76-0, 9/2/09 - See last page for vote

SUBJECT : Public employment: collective bargaining: peace officers

SOURCE : Peace Officers Research Association of California

DIGEST : This bill provides that a local bargaining unit which is comprised of a majority of persons who are peace officers will be excluded from the jurisdiction of the Public Employment Relations Board for purposes of dispute resolutions.

Assembly Amendments make a clarifying change.

ANALYSIS : The Public Employment Relations Board (PERB) resolves disputes and enforces the statutory duties and rights of employers and employees under the Educational Employment Relations Act, the Higher Education Employer-Employee Relations Act, the Ralph C. Dills Act, and the Meyers-Milias-Brown Act.

Currently, PERB has jurisdiction over unfair labor disputes of all miscellaneous employees, however, pursuant to SB 739 (Solis), Chapter 910 of 2000, law enforcement agencies are excluded from PERB and therefore, are under the direct jurisdiction of the courts. However, it has been noted that there are certain bargaining units which are comprised of both miscellaneous employees and employees with peace officer status, and the existing statute is not clear as to the jurisdiction of those employees' disputes. In those units, PERB has asserted jurisdiction over cases that

affected the entire unit, whereby, an individual peace officer under a mixed bargaining unit may file grievances directly with the California Supreme Courts.

This bill provides that "mixed units", those bargaining units comprised of both peace officer and miscellaneous employees, shall be exempted from PERB's jurisdiction if

the majority of the unit is comprised of peace officers.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: No

According to the Senate Appropriations Committee, the Judicial Council has indicated that this bill will not result in any increase in costs to the courts, and PERB may experience very minor savings.

SUPPORT : (Verified 9/3/09)

Peace Officers Research Association of California (source)
Orange County Employees' Association

OPPOSITION : (Verified 9/3/09)

California State Association of Counties
Regional Council of Rural Counties

ARGUMENTS IN SUPPORT : In their sponsor letter, PORAC states, "Currently, Government Code Section 3511 exempts "persons who are peace officers as defined in Section 830.1 of the Penal Code" from the Jurisdiction of the Public Employee Relation Board (PERB). The wording of this statute is authority over dispute resolution. Public employees, whom are not peace officers, are required to go to PERB with their labor disputes. Peace officers are exempted from this; thereby requiring they go to the California Supreme Court for resolution. A problem arises when a peace officer is a part of a "mixed unit", comprised of both peace officers and miscellaneous employees (such as Dispatchers, Community Services Officers and Crime Scene Investigators). It is unclear in the writing of this law who would have jurisdiction over these disputes. This creates substantial risk of jurisdiction being challenged, either in PERB or the Superior Court. SB 656 seeks to remedy the uncertainty of the statute by clarifying that these mixed units, should the unit be comprised of a majority of peace officers, will be excluded from PERB jurisdiction. This will enable the disputes of these peace officers to remain in the Superior Court, thereby ending the confusion. In addition, by providing certainly as to jurisdiction, SB 656 will reduce costs associated with

challenging jurisdiction of mixed units."

ARGUMENTS IN OPPOSITION : In their letter of opposition, the California State Association of Counties and the Regional Council of Rural Counties state, "SB 656 seeks to exempt all employees in a mixed bargaining unit from the jurisdiction of the Public Employment Relations Board (PERB) if the bargaining unit includes a majority of peace officers. Counties believe that it is inappropriate to extend what is now a narrow exemption from PERB for peace officers to a large group of miscellaneous employees. Counties do not see a significant problem with the current structure where peace officer members of a mixed bargaining unit resolve their disputes in court while miscellaneous employees go before PERB. If a problem exists in a particular bargaining unit, existing law provides peace offices with the right to establish a separate bargaining unit. SB 656 would treat all employees in mixed bargaining units the same and we see no reason to do so. In face, this change could have the unintended result of having similar bargaining units with a majority of peace officers.

GOVERNOR'S VETO MESSAGE:

"I am returning Senate Bill 656 without my signature. While I am supportive of employee rights, this bill would create an inconsistent treatment of non-peace

officer employees in unions with peace officer majorities and similar non-peace officer employees that are in unions without a peace officer majority. I do not believe a sufficient case can be made why one group should circumvent the existing dispute resolution process that currently exists through the Public Employment Relations Board. For these reasons, I am unable to sign this bill."

ASSEMBLY FLOOR :
AYES: Adams, Ammiano, Anderson, Arambula, Beall, Bill Berryhill, Tom Berryhill, Blakeslee, Block, Blumenfield, Brownley, Caballero, Charles Calderon, Carter, Chesbro, Conway, Cook, Coto, Davis, De La Torre, De Leon, DeVore, Duvall, Emmerson, Eng, Evans, Feuer, Fletcher, Fong, Fuentes, Fuller, Furutani, Gaines, Calgiani, Garrick,

Gilmore, Hagman, Harkey, Hayashi, Hernandez, Hill, Huber, Huffman, Jeffries, Jones, Knight, Krekorian, Lieu, Logue, Bonnie Lowenthal, Ma, Mendoza, Miller, Monning, Nava, Nestande, Niello, Nielsen, John A. Perez, V. Manuel Perez, Portantino, Ruskin, Salas, Saldana, Silva, Skinner, Smyth, Solorio, Audra Strickland, Swanson, Torlakson, Torres, Torrico, Tran, Villines, Bass
NO VOTE RECORDED: Buchanan, Hall, Yamada, Vacancy

DLW:do 1/6/10 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of San Bernardino, State of California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Lackie, Dammeier & McGill, APC 367 N. Second Ave., Upland, CA 91786.

On May 29, 2012 (Date), I served the Statement of Exceptions to Proposed Decision (describe document(s) of Administrative Law Judge, Brief in Support thereof, and Request for Oral Argument on the parties listed below (include name, address and, where applicable, fax number) by (check the applicable method or methods):

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

☐ personal delivery;

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

Adrianna E. Guzman, Bar No. 188812
LIEBERT CASSIDY WHITMORE
6033 West Century Boulevard, Suite 500
Los Angeles, California 90045

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 29, 2012, at Upland.

Patricia Gonzales
(Type or print name)

(Signature)