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October 20, 2014

Via Facsimile and U.S. Mail
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Anita Martinez, Chair
A. Eugene Huguenin, Board Member
Eric Banks, Board Member
Priscilla Winslow, Board Member
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Re: Statement of Supplemental Authority

Dear Chair Martinez and Board Members Huguenin, Banks and Winslow:

This letter by Charging Party San Bernardino County Public Attorneys Association (hereafter, "the Association") provides supplemental authority addressing the issue presented for oral argument: whether the County of San Bernardino's unilateral implementation of the 2007 policy prohibiting deputy district attorneys ("DDAs") from representing deputy public defenders ("DPDs") in investigatory meetings was justified based on operational necessity and, if so, whether it was occasioned by circumstances beyond the employer's control and no alternative course of action was available.

1. The County's Actions Here Were an Inherently Destructive Interference with Employee Rights

At issue here are the actions and policies of the Office of Public Defender of San Bernardino County ("County"), which deny DPDs the right to be represented by Association representatives who are either (i) DDAs or (ii) private attorneys appointed by the Association to act as its designated representative unless the private attorney effectively agrees not to discuss the representational matter with the Association (ALJ Cu's decision (Cu ALJD) at pp. 12-13, fn. 9). As ALJ Cu noted in his Proposed Decision, the County's actions unlawfully interfere with the right of these employees to be represented by an "employee organization[] of their own choosing" under MMBA § 3502 by denying or limiting a fundamental statutory right in a manner that is inherently destructive of MMBA protected employee rights. (Cu ALJD at pp. 15-16.)

This finding is fully consistent with PERB decisions in the context of unilateral changes to an established negotiable policy. *E.g. Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712 (finding that the employer's unilateral decision to contract out transportation services prior to the completion of bargaining interfered with right of union to represent its members as well as its duty to meet and negotiate in good faith under EERA); *Compton Community College District* (1989) PERB Decision No. 720 (unilateral reduction in health benefit plan interfered with protected rights); *The Regents of the University of California* (1998) PERB Decision No. 1255-H (unilateral transfer of duties of bargaining unit nurses to cardiovascular technicians unlawful); *State of California, California Department of Transportation, and Governor's Office of Employee Relations* (1981) PERB Decision No. 159b-S (unilaterally imposed change in policy on limitations on use of internal mail system by employee organization violated right of employee organization to communicate with its members); *See generally County of Riverside* (2013) PERB Decision No. 2307-M ("It is well settled that a [...] pre-impasse unilateral change in an established negotiable policy [is] inherently destructive of employee rights").

The ALJs' decisions in these cases are also consistent with PERB decisions involving unlawful interference outside the unilateral change context. *E.g. Compton Unified School District* (2003) PERB Decision No. 1518 (newly hired employees were warned to leave a union meeting by a non-teaching member of the certificated bargaining unit. Finding that the employee acted as the employer's agent and that her actions were inherently destructive of employee rights, the Board held that the employer unlawfully interfered with employee rights). Indeed, the County's conduct here--seeking to determine the identity of the Association's representatives in grievance processing--is strikingly similar to the conduct of the State of California in *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, in which PERB found that the employer's interference with an SEIU steward's representation during meetings and subsequent retaliation was "inherently destructive" of SEIU's rights, since the employer "sought to control the manner in which SEIU stewards represent bargaining unit employees in meetings with [employer] supervisors and managers." The SEIU job steward was disciplined by her supervisors due to comments and gestures she made during two representational meetings. The Board reasoned that it would reach the same result even if CDCR's conduct resulted "merely in some harm to SEIU's rights" since the "operational necessity justification for [CDCR's] interference with SEIU's rights does not outweigh the harm to SEIU's rights." *Id.* at 17.

2. The County's Actions Were Not Justified by Circumstances Outside the County's Control

The County seeks to justify its actions since 2007, including its March 24, 2009 policy directive, by asserting that its actions were justified by operational needs – specifically, the necessity of protecting attorney-client confidentiality and the preservation of the attorney work product privilege. (Respondent's Supporting Brief in LA-CE-431-M at pp. 6-8.) As noted by ALJ Cu in his Proposed Decision, where, as here, the public employer's conduct is inherently destructive of rights protected by MMBA, the employer's conduct will be excused only if it was

occasioned by circumstances beyond the employer's control and no alternative course of action was available. (ALJ Cu's Decision at p. 15 (citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*)). Here, the County can show neither.

In *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S, at p. 10, the Board noted that PERB's use of the *Carlsbad* interference test draws its essence from the rule under the National Labor Relations Act (NLRA) established in *NLRB v. Great Dane Trailers* (1967) 388 U.S. 26 (*Great Dane*). For this reason, PERB may wish to look to decisions of the National Labor Relations Board ("NLRB") to see how the NLRB defines circumstances beyond an employer's control in the context of unilateral changes alleged to violate NLRA §§ 8(a)(5) and (1). In these cases, the NLRB carefully reviews the entirety of the facts and circumstances to assure that the events are extraordinary and unforeseeable. *See e.g. Bottom Line Enterprises*, 302 NLRB 373 (1991); *RBE Electronics of S.D., Inc.* 320 NLRB 80 (1995) (Exigency exception to unilateral action is limited to "extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action").

In *Harmon Auto Glass*, 352 NLRB 152 (2008), *vacated on other grounds by New Process Steel Agency, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and *aff'd on reh'g*, 355 NLRB 364 (2010), the NLRB noted that to justify unilateral action, an employer must prove that it experienced "dire and unforeseen circumstances" and determined that the employer could not meet that heavy burden. The employer contended that it faced increased health insurance costs and a decline in sales of more than \$800,000 in a year. Although there were also issues of proof, the NLRB rejected the employer's defense because neither increased health care costs nor a "decline in sales revenue over many months is...the kind of unforeseen exigency that would excuse unilateral action." *Harmon* at 154, quoting *Toma Metals, Inc.*, 342 NLRB 787 (2004).

PERB has long applied a similar approach when determining the extent to which a public employer's unilateral action which interferes with protected employee rights is justified as an unavoidable result of some sudden change of circumstances. *Calexico Unified Sch. Dist.* (1983) PERB Dec. No. 357 (*Calexico*) (unilateral action must be taken as the unavoidable result of some sudden change of circumstances; the emergency must be actual and of a type which leaves no real alternative to the action taken and allows no time for meaningful negotiations); *see also See Santa Clara County Correctional Peace Officers' Association v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1032 (quoting *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 277 (An emergency "...has long been accepted in California as an unforeseen situation calling for immediate action" and "must have a substantial likelihood that serious harm will be experienced unless immediate action is taken")). PERB's application of these principles is clearly illustrated by contrasting PERB's conclusion that there was no exigency in *Calexico* with its conclusion that there was such an unexpected, external circumstance in *The Regents of the University of California* (1998) PERB Decision No. 1255-H. In *Calexico*, the district unilaterally imposed a freeze on teachers' step and column increases in order to present a balanced budget to the superintendent by September. Testimony indicated that the district could have technically balanced its budget without implementing the freeze but declined to do so because such action would have reduced the district's reserves and, thus, would

arguably not have been financially responsible. The district further argued that it remained willing to continue to negotiate even after the decision was unilaterally made. PERB rejected all of the district's arguments and held that the district's financial problems were not the result of a sudden, unexpected change in circumstances, but rather resulted from budgetary problems which arose much earlier in the year.¹ *Accord Compton Community College District* (1989) PERB Decision No. 720 (employer's very real financial crisis and the constitutional requirement for a balanced budget as well as employer's high attrition rate, accounting errors and state imposed cap on funded enrollment failed to constitute unforeseen circumstances justifying a unilateral reduction in health benefit plan contributions because the district had known of the budget shortfall for "months, if not years" prior to the implementation of the reduced benefit plan contribution²). In contrast, PERB found in *Regents* that "an earthquake capable of closing two hospitals was not anticipated and devastating" and that the "University's responses no doubt could be called emergency responses." Nevertheless, PERB found the employer could not justify its actions (transferring duties of bargaining unit nurses to cardiovascular technicians) because there was no showing that RNs were not available for hire to meet the increased patient influx, and because cardiovascular technicians continued to be used after the impact of the earthquake had subsided.

Similarly, here, it's clear that that even if the County's concerns about confidences and work product privilege were legitimate, they are not the type of unforeseeable circumstances outside the County's control required as a predicate for unilateral action. *See Santa Clara County Correctional Peace Officers' Association v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1032 (quoting *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th at 277 "the anticipation that harm will occur if such action is not taken must have a basis firmer than simple speculation. Emergency is not synonymous with expediency, convenience, or best interests"). Thus, the County has pointed to no changes in State Bar court decisions or Rules of Professional Conduct--or, for that matter, any changed circumstance of any kind at all--warranting its action.³ Rather, the record suggests that the same rules were in force in 2007, when the County began to restrict representation rights, and in 2009, when the County promulgated its policy, as had been in effect since the Association began representing the unit many years before. In addition, over this time period the County entered into MOUs recognizing the Association's right to designate representatives which contained no limits on that authority reflecting any concerns with these issues. (Exhibit A at pp. 5-6; Exhibit B at pp. 5-6.) This is not only a stark contrast from the situation in *Regents* (a particularly devastating earthquake), but it is also a stark contrast from the situations in *Mt. Diablo Unified Sch. Dist.* (1983) PERB Dec. No. 373 and *Academic Professionals of California v. Trustees of the California State University*, 39 PERC ¶ 36 (2014), two other cases in which external law was cited by the public employer as

¹ PERB also held that the district failed to show that it had no alternative to instituting the unilateral freeze prior to the completion of bargaining.

² Additionally, PERB found that since "it may have been possible" for the district to formulate a budget without the unilateral cuts, the district had also failed to prove that unilateral action was its only alternative.

³ The only other arguable changed circumstance -- the lack of DPD representatives was not outside of the County's control since it was the County's own conduct which resulted in the resignation of the two DPD representatives. Suzy Israel, one of those DPD representatives, testified she and the other representative resigned as a representative due to the conduct of the PD's office management and she was as a result unwilling to serve in that capacity. (Tr. Vol. III, 21/2-26/12.)

a basis for unilateral action. Thus, in both *Mt. Diablo Unified Sch. Dist. and Academic Professionals of California v. Trustees of the California State University* (which, concededly, is only an ALJ decision) there was a new statute with imminent immutable effective dates.

3. The County Cannot Show that There Were No Alternatives to the Policies It Imposed Here

Even where the employer is confronted with an unforeseen and extraordinary circumstance, it must establish that it had no other alternative other than to act as it did. As discussed in footnotes 1 and 2, in both *Calexico* and *Compton Community College District*, PERB found that the employer had failed to meet its burden of showing that there was no alternative to unilateral action. Additionally, in *Compton Unified School District* (2003) PERB Decision No. 1518, the ALJ found that the absence of a close nexus between the asserted justification for the employer's action and the asserted operational need suggested that the justification was pretextual. Likewise, the County here has manifestly failed to meet its burden of showing that the County's asserted operational need of managing the inherent conflict of interest between DPDs and DPAs could only be achieved by a blanket policy against DDAs representing DPDs. (Allen ALJD at pp. 6.) As ALJ Allen noted in his Proposed Decision, the County's rationale for its unilateral implementation would prevent the bargaining unit from functioning altogether and was undermined by the County's own expert witness, who testified that a protocol addressing these issues should be worked out between the two offices rather than a blanket prohibition against DDAs representing DPDs. (Allen ALJD at p. 12.) Given that its expert witness acknowledged there were instances in which a DDA could represent a DPD and that each instance needed to be analyzed on a "case-by-case" basis (Tr. Vol. IV, 72/25-73/163) it is evident the County did not meet its burden of demonstrating that no alternative to a blanket rule existed. Nor has the County even attempted to meet its burden of establishing "there was no time for meaningful consultation." *City of Palo Alto* (2014) PERB Decision No. 2388-M, at pp. 39-40.

Moreover, where the NLRB finds that there is an extraordinary and unforeseeable circumstance justifying unilateral action, it requires bargaining over any actions or effects that are discretionary with the employer and requires the unilateral implementation to be narrowly confined to precisely what is legally or otherwise mandated under the circumstances. Anything beyond those narrow confines must be the subject of bargaining. *E.g. Hanes Corp*, 260 NLRB 557 (1982). A virtually identical approach was taken by the PERB ALJ in the previously referenced decision in *Academic Professionals of California v. Trustees of the California State University*, 39 PERC ¶ 36 (2014). There, the ALJ held that CSU failed to show that it faced an actual emergency and that there were no alternatives to unilateral action; any emergency appeared to be caused largely by CSU delaying negotiations by two months when it had roughly three months between the passage of the statutory requirement at issue and its effective date to initiate bargaining. The ALJ further reasoned that even if an emergency were present, CSU was not justified in adopting a policy that was broader than the statutory requirement it claimed to be implementing, and that there were readily available alternatives to unilateral action, such as bargaining with APC more frequently prior to implementation or accepting APC's offer for temporary implementation while the parties discussed the more complicated issues.

Here, it is clear that the County did have other readily available alternatives to unilateral implementation: it could have bargained with the Association prior to implementation, temporarily implemented the policy while continuing to bargain, required that DDA representatives recuse themselves from handling or discussing any criminal case involving a representational matter, implemented the alternative delineated by ALJ Allen in the his Proposed Decision, or, as ALJ Cu noted, allowed DPDs to obtain informed consent from clients regarding the disclosure of any confidential information pursuant to Rule 3-100(A) of the Rules of Professional Conduct. (Allen ALJD at pp. 6, 12-13; Cu ALJD at p. 19; *see Oakland Unified School District* (1994) PERB Decision No. 1045 (the choices available to the employer “may not have been easy choices for the [County], but they were, in fact, choices”).

4. The Absence of Evidence of Circumstances Beyond the County’s Control and the Failure of the County to Demonstrate that It Had No Alternative to Its Actions Fatally Undercut Any Claim of Operational Necessity

Since the County cannot demonstrate that it was faced with circumstances beyond its control or that it had no other alternative course of action, it cannot establish that its unilateral implementation was based on operational necessity. Moreover, given the fact that the County’s actions were broader than necessary to effectuate the alleged needs which purportedly prompted the County’s actions, it is appropriate to infer that the County’s assertion of operational need is, as was the case in *Compton Unified School District*, pretextual.

In these circumstances, for the reasons set forth herein and in the Association’s underlying briefs, the County’s exceptions should be rejected, a violation should be found and an appropriate remedial order should be issued.

Sincerely,

Marianne Reinhold
of REICH, ADELL & CVITAN

MR:rp

PROOF OF SERVICE
(Code Civ. Proc. § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party of the within action; my business address is 2670 North Main Street, Santa Ana, California 92705.

On October 20, 2014, I served the document described as **Letter dated October 20, 2014 providing supplemental legal authority (Case Nos. LA-CE-431-M and LA-CE-554-M)** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Anita Martinez, Chair
A. Eugene Huguenin, Board Member
Eric Banks, Board Member
Priscilla Winslow, Board Member Appeals Office
Public Employment Relations Board
Attn: Hanah E. Stuart, Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
Tel: (916) 322-8231
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Via fax and U.S. mail (original and four copies)

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12 Executed on October 20, 2014, at Santa Ana, California.

13 _____
14 RITA A. POLLARD
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Public Employment Relations Board
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cc: Kenneth C. Hardy, Deputy County Counsel
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County of San Bernardino
Fax No. (909) 387-4068

cc: Timothy G. Yeung, Partner
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FROM: Marianne Reinhold, Esq.

REGARDING: San Bernardino County Public Attorneys
Association v. County of San Bernardino
Case Nos. LA-CE-431-M and LA-CE-554-M

COMMENT

Please see the attached letter.