STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS, Charging Party, v. COUNTY OF ORANGE, Respondent.	Case No. LA-CE-1101-M PERB Decision No. 2657-M July 15, 2019

Appearances: Olins & Chaikin, by Adam Chaikin, Attorney, for Association of Orange County Deputy Sheriffs; Teri L. Maksoudian, Supervising Deputy, for County of Orange.

Before Banks, Krantz, and Paulson, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on cross exceptions by the County of Orange (County) and the Association of Orange County Deputy Sheriffs (Association) to a proposed decision by an administrative law judge (ALJ). In its exceptions, the County argues PERB lacks jurisdiction over the Association's claims because the Association's members are peace officers pursuant to Penal Code section 830.1. For its part, the Association excepts to the ALJ's conclusion that the County did not did violate the Meyers-Milias-Brown Act (MMBA)[1] when it unilaterally changed an ordinance concerning the involvement of the County's legal counsel with regard to critical incidents and allegations of employee misconduct. The proposed decision found that the specific changes at issue were outside the scope of representation.

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

The Board has reviewed the parties' exceptions and supporting briefs and the entire record in this matter in light of applicable law. Based on that review, we affirm the proposed decision for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

The parties do not dispute the relevant facts. The Association is the exclusive employee organization representing the County's Peace Officer Unit and Supervising Peace Officer Unit. At the time of the evidentiary hearing in this matter, the two units in aggregate contained approximately 1,808 employees, 1,693 of whom were peace officers pursuant to Penal Code section 830.1. The remaining 115 bargaining unit employees were not peace officers.

In 2008, the County passed an ordinance to create the Office of Independent Review (OIR). The ordinance requires that OIR have an executive director, who must be an attorney, staff attorneys, and administrative support staff. It provides that OIR will have an attorney-client relationship with the County and the Sheriff-Coroner. The ordinance directs OIR to advise the Sheriff-Coroner regarding in-custody incidents involving death or serious injury and complaints against law enforcement personnel concerning specified topics. It provides specific direction about how OIR will access confidential information and how it will advise County personnel. The ordinance prohibits OIR from using subpoenas, incurring expenses without the authorization of the Board of Supervisors, or releasing any confidential or privileged information unless specifically required by the ordinance or a court order.

On October 16, 2015, the County notified the Association that it was contemplating changes to the OIR, including extending its authority to include the District Attorney's Office. On October 23, the Association sent the County a letter asserting that the decision and effects

of having OIR cover the District Attorney's Office, as well as changes to oversight of the Sheriff's Department, were matters within the scope of representation.

On December 8, 2015, the County recommended the Board of Supervisors adopt specific changes to the OIR ordinance. Those changes included expanding its authority to include the District Attorney's Office and other County departments, requiring OIR staff to be County employees instead of contractors, giving OIR the same access to confidential records as County Counsel, changing how the County selects OIR's executive director, and changing how OIR staff advise County personnel. The changes to the ordinance also provided that "no review or critique by the OIR of a completed internal affairs investigation or the conclusions of an internal investigation may be used as the basis for taking punitive action against an employee," and that "OIR is not authorized to affect the wages, hours, or working conditions of any County employee represented by a recognized employee organization." The County adopted the proposed changes on December 15, 2015. The County adopted and implemented the changes without meeting and conferring with the Association over the decision or its effects.

The Association filed an unfair practice charge on June 2, 2016, and the Office of the General Counsel issued a complaint against the County on July 19. The complaint alleged the County changed the ordinance without giving the Association an opportunity to meet and confer over the decision or its effects. On November 17, the ALJ issued a subpoena duces tecum for documents reflecting OIR recommendations or critiques made to the Sheriff's department or District Attorney's office regarding investigations of employee misconduct. On November 21, the County filed a petition to revoke the subpoena on the grounds of attorney-

client privilege and work product. On December 6, the County filed a motion to dismiss on the grounds PERB lacked jurisdiction pursuant to MMBA section 3511.

On December 12, the ALJ held a hearing at which the parties entered a joint stipulation and exhibits into evidence. The ALJ conducted an in camera review of the documents responsive to the disputed subpoena and concluded they were subject to attorney-client privilege. Accordingly, he granted the petition to revoke the subpoena. The ALJ deferred ruling on the motion to dismiss until after briefing.

The proposed decision found that PERB has jurisdiction over this dispute, relying on *County of Santa Clara* (2015) PERB Decision No. 2431-M (*Santa Clara*), in which the Board found it has authority to resolve charges brought by employee organizations representing or seeking to represent bargaining units that include, in whole or in part, persons who are peace officers. (*Id.*, p. 15.) On the merits, the ALJ relied in part on *City of Pittsburg* (2003) PERB Decision No. 1563-M, to find the County had no legal obligation to meet and confer with the Association about the disputed changes to the OIR ordinance.[2]

DISCUSSION

Jurisdiction

The Legislature expanded PERB's jurisdiction in 2000 by passing Senate Bill 739 (SB 739), which enacted Government Code section 3509. (Stats. 2000, ch. 901, § 8; *Paulsen v. Local No. 856 of Internat. Bhd. of Teamsters* (2011) 193 Cal.App.4th 823, 829 (*Paulsen*).)

[2] On November 29, 2017, the Association filed a motion to augment the record to include a December 3, 2015 memorandum and the County filed opposition on December 15, 2017. We deny the motion because the supporting declarations do not establish that the evidence was not previously available, that it could not have been discovered prior to the hearing with the exercise of due diligence, or that the memorandum was submitted within a reasonable time of discovery; and also because we find the memorandum would not impact or alter the decision. (See *County of Riverside* (2010) PERB Decision No. 2132-M, p. 6.)

Section 3509 provides in part, "A complaint alleging any violation of [the MMBA] . . . shall be processed as an unfair practice charge by [PERB]. 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 [B]oard." "This enactment removed 'from the courts their initial jurisdiction over MMBA unfair practice charges' [] and vested such jurisdiction in PERB." (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 605 quoting in part *Coachella Valley Mosquito & Vector Control Dist. v. California PERB* (2005) 35 Cal.4th 1072, 1089 (*Coachella*).)

SB 739 also made exceptions to this expansion of PERB's authority, including enacting section 3511, which reads, "[t]he 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." In *Coachella*, the Supreme Court acknowledged that "[e]xempt from the PERB's jurisdiction under the MMBA are peace officers, management employees, the City of Los Angeles, and the County of Los Angeles." (*Coachella*, *supra*, 35 Cal.4th at p. 1077, fn. 1, *citing* Gov. Code, §§ 3509, subds. (d)-(e), 3511.) The Court did not mention employee organizations representing peace officers as exempt. Likewise, in *Paulsen*, the court treated section 3511 as exempting from PERB jurisdiction peace officers themselves, not their employee organizations. The Court of Appeal explained: "Plaintiffs are not exempt from PERB jurisdiction pursuant to Government Code [section] 3511, because they are defined as 'peace officers' in Penal Code [section] 830.5[, subdivision] (a), not Penal Code [section] 830.1." (*Paulsen*, *supra*, 193 Cal.App.4th at p. 828.)

In *Santa Clara*, we held that PERB has authority to hear charges brought by employee organizations, "including employee organizations representing or seeking to represent units including persons who are peace officers." (*Santa Clara*, *supra*, PERB Decision No. 2431-M, p. 15.) We explained that "MMBA section 3511 precludes jurisdiction only with respect to charges brought by peace officers, not employee organizations." (*Ibid*.)

The County argues that PERB lacks jurisdiction because, in the County's view, Government Code section 3511 deprives PERB of jurisdiction over claims "impacting" Penal Code section 830.1 peace officers. The County attempts to buttress its position by parsing the relative impacts of the change at issue to the Association's peace officer and non-peace officer members. But this inquiry into relative impact is not supported by the plain language of the statute, the context of the statutory framework as a whole, or the circumstances, history, and background surrounding the enactment of section 3511. Instead, for the reasons set forth below, we reaffirm and further explain the statutory interpretation the Board adopted in *Santa Clara*: While Government Code section 3511 excludes from PERB's jurisdiction claims brought by Penal Code section 830.1 peace officers, PERB has jurisdiction over claims brought by employee organizations covered by the MMBA, including those that represent or seek to represent bargaining units composed partially or entirely of Penal Code 830.1 peace officers.

In interpreting the statute, we apply our expertise in the field of labor relations and the established rules of statutory interpretation. (*Cumero v. PERB* (1989) 49 Cal.3d 575, 586-87; *San Mateo City Sch. Dist. v. PERB* (1983) 33 Cal.3d 850, 856.) The fundamental task is to ascertain the Legislature's intent to effectuate the statute's purpose. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) We must first consider the language of the statute itself, giving the

words used their ordinary meaning and construing the text in the context of the statute as a whole and the overall statutory scheme, giving significance to every word, phrase, sentence, and part of the statute. (*Ibid*.) We must give effect and meaning to all parts of the law if possible and avoid an interpretation that renders statutory language superfluous. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330; *Sampson v. Parking Serv. 2000 Com, Inc*. (2004) 117 Cal.App.4th 212, 226.)

If statutory language is ambiguous, "we consider a variety of extrinsic aids, including the statutory context and the circumstances of the statute's enactment" and "other evidence of the Legislature's intent, such as the history and background of the [provision]." (*Weiss v. People ex rel. Dep't of Transportation* (2018) 20 Cal.App.5th 1156, 1168; *Huntington Continental Townhouse Assn., Inc., supra*, 230 Cal.App.4th at pp. 598-99.) But we do not "countenance efforts to *create* an ambiguity by reference to extrinsic evidence; outside sources simply do not come into play when the language of a statute is clear and unambiguous." (*People v. Dunbar* (2012) 209 Cal.App.4th 114, 117.)

The plain language of section 3511 exempts from PERB's jurisdiction only natural persons who are peace officers. "[P]ersons who are peace officers as defined in Section 830.1 of the Penal Code" refers only to natural persons, not employee organizations, because only natural persons are capable of being peace officers. Penal Code section 830.1 lists peace officers by classification or title, such as "deputy sheriff" and "police officer." Since section 3511 refers to section 830.1, it follows that section 3511 applies to the natural persons listed in that section, not employee organizations.

The overall statutory scheme of the MMBA supports this interpretation of section 3511. The MMBA's distinction between public employees, who are natural persons, and other parties

is central to how the statute governs labor relations. The MMBA provides for different roles, rights, and relationships by and between public employees,[3] employee organizations,[4] and public agencies.[5] Some sections govern relationships between public employees and public agencies even absent an employee organization. For example, section 3502 provides that public employees may "represent themselves individually in their employment relations with the public agency." (Gov. Code, § 3502 [unchanged since added by Stats. 1961, ch. 1964, p. 4,142, § 1]; *Relyea v. Ventura Cty. Fire Protection Dist.* (1992) 2 Cal.App.4th 875, 883 [finding section 3502 confers on public employees a right to raise personal concerns with their employer through an existing procedure].) Other sections apply to the relationship between employee organizations and public agencies, or between public employees and employee organizations. (See, e.g., section 3505 (". . . a public agency. . . shall meet and confer in good faith . . . with representatives of" "employee organizations"); section 3506 (". . . employee

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[3] "'Public employee' means any person employed by any public agency, including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state." (Gov. Code, § 3501, subd. (d).)

[4] (a) "'Employee organization' means either of the following: (1) Any organization that includes employees of a public agency and that has as one of its primary purposes representing those employees in their relations with that public agency. (2) Any organization that seeks to represent employees of a public agency in their relations with that public agency." (Gov. Code, § 3501, subd. (a).)

[5] "Except as otherwise provided in this subdivision, 'public agency' means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, 'public agency' does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California." (Gov. Code, § 3501, subd. (c).)

organizations shall not . . . discriminate against public employees because of their exercise of their rights under Section 3502.").)

The Legislature acknowledged these differences in the drafting history of section 3511. In an early draft of section 3511, the bill proposed excluding from PERB's jurisdiction, "any recognized employee organization representing persons who are peace officers[.]" (Assem. Amend. to Sen. Bill No. 739 (1999-2000 Reg. Sess.) August 30, 1999, § 3511.) But in the version ultimately enacted, the Legislature struck the reference to "any recognized employee organization representing persons who are peace officers" and replaced it with "persons who are peace officers. . . ." (Compare Assem. Amend. to Sen. Bill No. 739 (1999-2000 Reg. Sess.) August 30, 1999, § 3511 with Stats. (2000) ch. 901, § 3511.) This change demonstrates the Legislature was aware of the difference between employee organizations that represent peace officers and the peace officers themselves and chose to limit the language in section 3511 to the latter in the final version of the statute.

It was well-established before the advent of section 3511 that persons who are peace officers employed by local agencies were "public employees" within the meaning of the MMBA and could bring individual claims against employee organizations and public agencies in superior courts. (See. e.g., *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 760 (*Cranston*); *Anderson v. Los Angeles County Employee Relations Com.* (1991) 229 Cal.App.3d 817, 819.) Thus, it was meaningful for the Legislature to select the word "persons" in section 3511: "Persons" corresponds to the MMBA's definition of public employee, but not the definitions of public agency or employee organization. (*Compare* Gov. Code, § 3501, subd. (d) ("'Public employee' means any *person*. . .") *with* Gov. Code, § 3501, subd. (a) ("'Employee organization' means. . . any *organization*. . .") *and* Gov. Code, § 3501, subd. (c)

("'public agency' means every *governmental subdivision*. . .) (emphasis added).) Had the Legislature intended to exclude both persons who are peace officers and employee organizations representing peace officers, it could have done so. (*Santa Clara, supra,* PERB Decision No. 2431-M, p. 16.)

It was also well established that whether a party was a public employee, employee organization, or public agency determined that party's standing to bring different claims at PERB. In *Oxnard School District (Gorcey and Tripp)* (1988) PERB Decision No. 667, the Board held employees lack standing to bring a claim alleging an employer did not bargain in good faith with an employee organization. (*Id.* at pp. 11-12.) Likewise, in *State of California (Department of Corrections)* (1993) PERB Decision No. 972-S, the Board held individual state employees lack standing to pursue violations of sections of the Dills Act[6] that protect the collective bargaining rights of employee organizations. (*Id.* at pp. 3-4.) But public employees themselves can bring claims against public employers for retaliation or discrimination on account of their exercise of protected rights, as well as against employee organizations for violating the duty of fair representation. (*Hacienda La Puente Unified School District* (1988) PERB Decision No. 685, pp. 13-14; *Service Employees International Union, Local 99 (Vercher)* (1997) PERB Decision No. 1196, adopted warning letter, p. 2.) Thus, the Legislature's decision to exclude from PERB's jurisdiction the claims of natural persons who are peace officers is congruent with the statutory scheme.

Having peace officers file their individual MMBA claims in court, while their labor organizations and employers file MMBA claims with PERB, aligns with the Legislature's specialized treatment of peace officers' individually-held employment rights and obligations.

[6] The Dills Act is codified at Government Code section 3512 et seq.

For instance, at the time of the 1999–2000 legislative session, the Public Safety Procedural Bill of Rights Act (POBR) provided individual employment rights for peace officers. Peace officers themselves have standing to enforce their rights under POBR and superior courts have initial jurisdiction over such claims. (Gov. Code, § 3309.5 subd. (c).) Employees' claims deriving from POBR and the MMBA, while distinct, often concern closely related topics. (See *Cranston, supra*, 40 Cal.3d at p. 774 [discussing peace officer employees' right to a representative under POBR and the MMBA]; *Henneberque v. City of Culver City* (1983) 147 Cal.App.3d 250, 253–54 [discussing concurrent violations of POBR and the MMBA with regard to employee discipline].) Within this context, section 3511 rationally aligned the forum for alleged violations of peace officers' rights under the MMBA with those for their claims arising under POBR.

Subsequent amendments to the MMBA also support our interpretation of section 3511. In 2011, the Legislature enacted a procedure for the use of factfinding panels to aid in the resolution of bargaining disputes between employee organizations and public agencies not subject to binding arbitration. (Stats. 2011, ch. 680, § 3505.4.) Newly added section 3505.4 requires PERB to select a chairperson for these factfinding panels without regard to whether the employee organization represents peace officers. By the County's interpretation of section 3511, the Legislature curiously requires PERB's involvement in factfinding panels for employee organizations representing peace officers, but otherwise excludes them from PERB's jurisdiction. Rather, section 3505.4 is consistent with both the Legislature's understanding of the distinction between persons who are peace officers and employee organizations whose members are peace officers; and PERB's jurisdiction over the latter.

The County is misplaced in its emphasis on a portion of the Legislative Counsel's Digest accompanying SB 739. During its movement through the Legislature, SB 739 and its accompanying Digest went through 10 series of amendments. The last edited version of the Digest provides in part, "The provisions of this bill would not apply to any recognized employee organization representing peace officers. . ." (Legis. Counsel's Dig., Sen. Bill No. 739 (1999-2000 Reg. Sess.).) The County argues this language shows a legislative intent for section 3511 to exclude claims by peace officers as well their employee organizations. We note, however, that this language first appeared in the Digest accompanying the August 30, 1999 amendments to SB 739, the sixth series of amendments. (Legis. Counsel's Dig., Assem. Amends. to Sen. Bill No. 739 (1999-2000 Reg. Sess.) August 30, 1999, p. 4.) Those amendments proposed a very different section 3511 that would have read,

> The changes made to Sections 3501, 3502.5, 3505.2, 3505.4, 3507.1, 3508.5 and 3509 of the Government Code by legislation enacted during the 1999 portion of the 1999-2000 Regular Session of the Legislature shall not apply to any recognized employee organization representing persons who are peace officers as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code.

(Assem. Amend. to Sen. Bill No. 739 (1999-2000 Reg. Sess.) August 30, 1999, § 3511.)

The same Digest description and proposed statutory language appeared in the September 10, 1999 amended version of the bill. (Assem. Amend. to Sen. Bill No. 739 (1999-2000 Reg. Sess.) September 10, 1999, § 3511; Legis. Counsel's Dig., Assem. Amend. to Sen. Bill No. 739 (1999-2000 Reg. Sess.) September 10, 1999, p. 4.) The next activity on the bill took place several months later on June 6, 2000. (Assem. Amend. to Sen. Bill No. 739 (1999-2000 Reg. Sess.) June 6, 2000, § 3511.) That amendment introduced the version of section 3511 the Legislature ultimately adopted, striking the reference to "any recognized employee

organization representing persons who are peace officers" and replacing it with "persons who are peace officers. . ." (*Id.*) But the Legislative Counsel's Digest that accompanied this amendment did not actually reflect the amendment and still used the language "recognized employee organization representing peace officers." (Legis. Counsel's Dig., Assem. Amend. to Sen. Bill No. 739 (1999-2000 Reg. Sess.) June 6, 2000, pp. 4-5.) The Legislature did not revisit section 3511 again before adopting SB 739. (Stats. (2000), ch. 901, § 3511.)

In light of this legislative history, we view the holdover Legislative Counsel's Digest language as being of dubious value. Legislative Counsel's Digests do not have the force of law. (*City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 795.) In *California Teachers' Assn v. Governing Board* (1983) 141 Cal.App.3d 606, the Court of Appeal was "confronted with a statute which was enacted with an inaccurate Legislative Counsel's Digest." (*Id.* at p. 613.) The court explained that where the language of the statute cannot be reconciled with the Digest's interpretation, the statutory language prevails. Thus, where Digests are inaccurate, we are not bound by the misinformation delivered to the Legislature. (*People v. Cruz* (1996) 13 Cal.4th 764, 780.) We note the language in the original Digest directly mirrored the language in proposed statutory text as it existed at that time. Thus, the failure of the Digest to account for the June 30, 2000, change in the proposed statutory text appears more likely an oversight than instructive for legislative analysis. Moreover, the Digest's description of section 3511 cannot be reconciled with the use of the term "persons who are peace officers," which, as discussed above, can only refer to natural persons.[7]

[7] In the years that followed the enactment of section 3511, this holdover language from the Digest confused certain parties. For example, *El Dorado County Deputy Sheriff's*

The Court of Appeal's footnote in *El Dorado* does not change our analysis. There, the Court of Appeal noted, "The Public Employment Relations Board (PERB) is an independent state administrative agency created by the Educational Employment Relations Act. (Gov. Code, §§ 3540–3548.) But labor disputes *relating to* peace officers, such as this dispute, are not subject to PERB jurisdiction. (Gov. Code, § 3511.) Nevertheless, we may look to PERB authority for guidance in addressing the issues in this case." (*El Dorado*, *supra*, 244 Cal.App.4th at p. 953, fn. 1 (emphasis added.) The County takes this footnote to mean jurisdiction under this section turns on whether a dispute *relates to* or *impacts* peace officers.

The County reads too much into the court's passing comment. The single sentence in the court's footnote mentioning section 3511 is dicta because it was an unnecessary explanatory comment. "Only statements necessary to the decision are binding precedents. . . ." (*Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61.) "The doctrine of precedent, or stare decisis, extends only to the ratio decidendi of a decision, not to supplementary or explanatory comments which might be included in an opinion. To determine the precedential value of a statement in an opinion, the language of that statement must be compared with the facts of the case and the issues raised." (*Ibid*.) Thus, "[a] decision is

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Association v. County of El Dorado (2016) 244 Cal.App.4th 950 (*El Dorado*) reached the appellate court after a union brought its claim in court, and the employer-defendant apparently did not contest jurisdiction. Various attempts have been made to resolve the confusion. (See Sen. Bill No. 656, vetoed by Governor, Oct. 11, 2009, Sen. Final Hist. (2009-2010 Reg. Sess.), p. 470; Assem. Bill No. 2305, vetoed by Governor, Sep. 28, 2018, Assem. Weekly Hist. (2017-2018 Reg. Sess.), p. 762.) In *City of Lompoc*, we heard oral arguments related to peace officers and section 3511, but the parties reached a settlement before we issued a decision on the merits. (*City of Lompoc* (2013) PERB Decision No. 2328-M, pp. 2-3.) However, at least since PERB clarified the matter in *Santa Clara*, both unions and employers have filed cases with PERB, even though parties have occasionally engaged in forum shopping. (See, e.g. *County of Riverside* (2018) PERB Decision No. 2596-M, pp. 4-5, fn. 5 [referencing one employer that filed an affirmative charge with PERB, while still contesting jurisdiction in one filed against it].)

authority only for the point actually passed on by the court and directly involved in the case." (*Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 985.) The court's footnote appears at the end of the second paragraph of the decision, where the court begins to lay out the procedural background. Its purpose was to acknowledge it is appropriate for courts to look to PERB decisions for guidance, not to change the law regarding PERB's jurisdiction, which was not at issue in *El Dorado*. It is quite doubtful the court would have broken with the Supreme Court's characterization of section 3511 in *Coachella* as exempting "peace officers," and not their employee organizations, from PERB jurisdiction without mentioning that case. Thus, the Court's brief mention of section 3511 is not informative in interpreting section 3511.[8]

We put little weight on the fact that courts have heard disputes brought by employee organizations that represent peace officers, where no party briefed jurisdictional issues and the courts did not address jurisdiction. It is axiomatic that cases are not authority for propositions not considered. (*Riverside Cty. Sheriff's Dep't v. Stiglitz* (2014) 60 Cal.4th 624, 641.) The County draws attention in particular to *Claremont Police Officers Association. v. City of Claremont* (2006) 39 Cal.4th 623 (*Claremont*), where the Supreme Court considered whether actions by the City violated the MMBA. The County emphasizes the decision observes that the plaintiff—an employee organization—initiated the case by way of writ of mandate in a superior court. (*Claremont*, *supra*, 39 Cal.4th at p. 629.) But the decision does not discuss this procedural detail any further, nor would it have had much reason to do so, as there is no

[8] We likewise give little weight to the similar footnote in the Attorney General's Opinion granting leave to challenge a local initiative in quo warranto, because it is brief dicta and also because the relationship between PERB and quo warranto proceedings had yet to be clarified by the Court of Appeal. (96 Cal. Op. Att'y Gen. 1 (2013); see *City of Palo Alto v. Pub. Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1318-20.)

indication it was raised by either party and it does not concern the jurisdiction of the Supreme Court or Court of Appeal, which are unaffected by section 3511. (See Gov. Code, § 3509.5.) Instead, we find that the plain language of section 3511, the context of the statutory framework as a whole, and the circumstances, history, and background surrounding the enactment of SB 739, compel our conclusion that section 3511 exempts from our jurisdiction only charges brought by natural persons who are peace officers.

Changes to OIR Ordinance[9]

The Complaint alleges the County made three unilateral changes to the OIR statute in violation of the MMBA. Specifically, the amended ordinance adopted recommendations to:

> (a) Amend the jurisdiction of the OIR to additionally include oversight and review of the . . . Office of the District Attorney.
> (b) Authorize the OIR to . . . work with County Counsel, County Risk Management and relevant Department heads to review specific incidents implicating significant risk and/or liability to the County and participate in corrective actions."
> (c) Authorize the OIR to . . . in connection with the relevant County Department heads, provide ongoing legal counsel and advise [sic] for internal inquiries and investigations into alleged performance issues and/or misconduct of employees.

To establish a prima facie case for an unlawful unilateral change, a charging party must show that: (1) the employer took action to change existing policy; (2) the policy change concerned a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the

[9] The Association also excepts to the ALJ's decision to revoke the subpoena duces tecum based on his in camera review and determination the documents sought were protected by the attorney-client privilege. We affirm the ALJ's determination because no party has caused the disputed documents to be lodged with the Board and we rely on the ALJ's description of the documents as advisory communications from an attorney to his client.

change has a generalized effect or continuing impact on terms and conditions of employment. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13.)

This dispute centers on the second element, i.e., whether the change concerned a matter within the scope of representation. Under the MMBA, the scope of representation includes all matters relating to employment conditions and employer-employee relations, including wages, hours, and other terms and conditions of employment. (MMBA, § 3504.) Fundamental managerial decisions regarding the merits, necessity, or organization of public services, however, are outside the scope of representation and therefore not subject to the MMBA's meet-and-confer requirement. (*Ibid*.)

In its exceptions, the Association argues the changes to the OIR ordinance affect the discipline process because OIR attorneys can "shape" discipline by giving County leaders legal advice, thus changing the disciplinary procedure. We disagree. Rather, we find the disputed changes to the ordinance concern only management's direction to its legal counsel for the performance of legal services and are thus outside the scope of representation.

In *City of Pittsburg*, a union alleged the City committed an unlawful unilateral change when it hired a professional consultant to advise it about how to respond to grievances filed by the union. (*City of Pittsburg*, *supra*, PERB Decision No. 1563-M adopting warning letter, pp. 1-2.) The union argued the City's action changed the parties' grievance processing procedure. (*Id.* at p. 1.) We found the City's decision to "employ[] a consultant is a matter of managerial prerogative that is not negotiable. Therefore, no unilateral change has taken place." (*Id.* at p. 2, adopting warning letter at p. 3.)

The citizen review board cases cited by the Association are inapposite because legal advice is of a different character than the recommendations or findings of a quasi-judicial

body. (Cf. *Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223 [holding that initiative ordinance purporting to empower a review board to recommend disciplinary action conflicted with the charter's requirement that the city manager perform that function]; *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209 [holding that under POBR, sheriff's deputies were entitled to an administrative appeal of decision of citizen review board that could itself sustain misconduct and prepare a written report summarizing its investigation and findings].)

We conclude that the directions an employer gives its legal counsel about how to provide it with legal advice is so attenuated from the employment relationship that it is outside the scope of representation. It is immaterial that the County chose to memorialize its direction to counsel in an ordinance or to create a legal office separate from its county counsel. Ultimately, the OIR ordinance functions much like a contract for legal services and concerns only how OIR attorneys and staff will provide the County with legal advice; it does not change or have effects on the disciplinary procedure.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-1101-M are DISMISSED.

Members Krantz and Paulson joined in this Decision.