

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



SANTA CRUZ CENTRAL FIRE PROTECTION
DISTRICT,

Employer,

and

PROFESSIONAL FIREFIGHTERS, IAFF LOCAL
3605,

Exclusive Representative.

Case No. SF-IM-160-M

Administrative Appeal

PERB Order No. Ad-436-M

April 26, 2016

Appearances: Wylie, McBride, Platten & Renner by Carol L. Koenig, Attorney, for Professional Firefighters, IAFF Local 3605; Liebert Cassidy Whitmore by Jack W. Hughes and Adrianna E. Guzman, Attorneys, for Santa Cruz Central Fire Protection District.

Before Winslow, Banks and Gregersen, Members.

DECISION

GREGERSEN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Professional Firefighters, IAFF Local 3605 (Local 3605) of the PERB Office of the General Counsel's (OGC) administrative determination (attached) that Local 3605's request for factfinding was untimely pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA)¹ and PERB Regulation 32802.²

We have reviewed the case file in its entirety in light of the issues raised by Local 3605's appeal. We find the administrative determination to be well-reasoned and in

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

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

accordance with applicable law. We deny Local 3605's appeal and adopt the administrative determination as the decision of the Board itself, as supplemented below.

FACTUAL AND PROCEDURAL HISTORY

The Santa Cruz Central Fire Protection District (District) and Local 3605 had a memorandum of understanding (MOU) for the term January 1, 2013, to December 31, 2014. On July 30, 2014, the parties started negotiations for a successor MOU. The parties met numerous times between July 30, 2014, and May 15, 2015, but were unable to reach agreement.

On May 29, 2015, Local 3605 gave written notice of its declaration of impasse. Included in the declaration was a request that the parties participate in the impasse procedure described in the District's Employer-Employee Organization Relations Resolution (Resolution). Article IV, Impasse Procedures, provides:

Section 16. Initiation of Impasse Procedures

If the meet and confer process has reached impasse as defined in Section 2 of this Resolution, either party may initiate the impasse procedures by filing with the other party a written request for an impasse meeting, together with a statement of its position on all issues. Once impasse is declared, a meeting between the parties shall then be scheduled promptly by the Employee Relations Officer. . . .

On June 1, 2015, Local 3605 sent the District Board of Directors a follow-up letter expressing its willingness to either return to the table to "break the impasse," or enlist the services of a mediator. Should the District decline either option, Local 3605 advised that it would exercise its right to make a factfinding request to PERB.

On June 18, 2015, the District responded by stating that it agreed the parties had reached impasse and confirming the impasse meeting scheduled for June 30, 2015. In response

to Local 3605's request for mediation, the District stated it was "willing to discuss that possibility but hopes that the Parties will be able to break their impasse or reach agreement on an MOU at the June 30 meeting."

On June 25, 2015, Local 3605 sent an e-mail message to the District. In the message, Local 3605 confirmed the scheduled impasse meeting and the District's willingness to "discuss" the "possibility" of mediation. The message also stated:

It had been the Local's intent to file a Request for Fact-Finding form with PERB if the District did not agree to mediation. However, given the District's positions as stated in your letter, the Local has determined that it would be premature to submit a Request for Fact-finding for at this time. Accordingly, the Local is adopting the District's apparent view that the Declaration of Impasse does not become operative until after the Impasse meeting required by the District's local rules.

If you disagree with this position, please notify me immediately so that the Local can file the Request in a timely manner.

The District did not respond to Local 3605's June 25 e-mail message.

On June 30, 2015, the parties held the scheduled impasse meeting and the District presented its last, best and final offer. Local 3605 also presented the District with a modified version of a "supposal" that it previously presented in April. According to Local 3605, the District also agreed to participate in mediation during the meeting.

The parties then met again on August 1, 2015 to discuss the "supposal" and other proposals. At the end of the meeting, the District stated that it was no longer interested in mediation.

On August 18, 2015, Local 3605 sent the District a letter asserting that the parties' impasse had been broken on June 30 and that Local 3605 was providing a new declaration of impasse.

On September 3, 2015, Local 3605 filed its factfinding request with PERB. On September 10, 2015, the District filed its opposition, and on September 11, 2015, Local 3605 filed its reply. On September 11, 2015, the OGC denied Local 3605's request as untimely, and on September 25, 2015, the OGC issued an administrative determination denying Local 3605's factfinding request.

On appeal, Local 3605 disputes the OGC's determination that its request for factfinding was untimely.

DISCUSSION

MMBA Section 3505.4, subdivision (a), provides as follows:

The employee organization may request that the parties' differences be submitted to a factfinding panel not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. . . .

PERB Regulation 32802 provides as follows:

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

These factfinding timelines provided for in both MMBA section 3505.4, subdivision (a) and PERB Regulation 32802, subdivision (a), are clear and unambiguous. Two events trigger the factfinding timelines: a written declaration of impasse from either party, or the appointment or selection of a mediator. Here, the parties did not submit their bargaining dispute to mediation or select a mediator. Instead, Local 3605 provided a written declaration of impasse on May 29. The declaration of impasse was clear and specifically requested an impasse meeting pursuant to Article IV of the District's Resolution. Therefore, the 30-day period for Local 3605 to request factfinding was triggered by "the date that either party provided the other with a written notice of a declaration of impasse." Local 3605, however, did not file its request for factfinding until September 3, 2015. Because the request was made well outside the 30-day window period, the OGC properly determined the request to be untimely filed.

On appeal, Local 3605 argues that the District initially agreed to mediation and that agreement forced Local 3605 to wait until a mediator was either selected or appointed in order to follow the timelines provided for under the mediation prong of MMBA section 3505.4, subdivision (a) and PERB Regulation 32802. However, no evidence has been provided to show that the District agreed to participate in mediation during the initial 30-day window period. While the District indicated in its letter dated June 18, 2015, that it would be "willing to discuss" the "possibility" of mediation, such statement does not evidence an agreement to mediate. Without an agreement to mediate, it was incumbent on Local 3605 to file its request for factfinding during the initial 30-day window in order to avoid the risk of forfeiting its opportunity to do so. It chose not to do so. As we noted in both *City of Redondo Beach* (2014) PERB Order No. Ad-409-M and *Lassen County In-Home Supportive Services Public Authority*

(2015) PERB Order No. Ad-426-M, it is up to the union to keep track of the statutory window period and to file its request for factfinding within that period.

Local 3605 also states that during the June 30, 2015 meeting, the District “again” agreed to mediation. The District disputes this fact and regardless, any subsequent agreement to mediate would have come after the initial window period for filing a request for factfinding. And such subsequent agreement does not alleviate Local 3605’s responsibility to meet the statutory and regulatory deadline to request factfinding, particularly when it was Local 3605’s own declaration of impasse that triggered that deadline.

Local 3605 also argues that it “undeclared” impasse two separate times. The first time with its June 4, 2015, correspondence in which Local 3605 informed the District’s Board of Directors that it was declaring impasse and proceeding to factfinding only if the District declined both the invitation to return to the table and the request to utilize a mediator. The second time was with its June 25, 2015, correspondence in which it stated that it believed it would be premature to submit a request for factfinding and that its declaration of impasse did not become operative until after the impasse meeting required by the District’s local rules. Despite what Local 3605 contends the intent of the each letter was, neither letter contained a clear withdrawal of Local 3605’s declaration of impasse. If Local 3605 believed the parties were no longer at impasse, it was incumbent on Local 3605 to clearly withdraw its declaration of impasse.

Lastly, Local 3605 argues that impasse was “broken” with the presentation of its “supposal” on June 30, 2015 and the parties’ subsequent resumption of negotiations. According to Local 3605, these actions served to break impasse sufficient to “nullify” its May 29 declaration of impasse. PERB, however, has a limited role under the MMBA in

determining the bona fides of an impasse declaration in the context of a factfinding request. (*City & County of San Francisco* (2014) PERB Order No. Ad-419-M.) PERB must accept a declaration of impasse at face value, as the statutory and regulatory factfinding process under the MMBA does not authorize PERB to independently determine at this state of the proceedings whether an impasse exists. (*Id.*) The MMBA and PERB regulations only condition factfinding on a declaration of impasse by one of the parties. (*Id.*) That occurred on May 29, 2015, when Local 3605 issued its written declaration of impasse. If Local 3605 believed that circumstances subsequently broke the parties' impasse, it was incumbent on Local 3605 to clearly withdraw its declaration. It did not do so.

Local 3506 failed to make a timely request under MMBA 3505.4, subdivision (a), and PERB Regulation 32802 and as a result, its appeal is denied.

ORDER

Local 3605's appeal from the administrative determination in Case No. SF-IM-160-M is hereby DENIED.

Members Winslow and Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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September 25, 2015

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Re: Santa Cruz Central Fire Protection District
Case No. SF-IM-160-M
ADMINISTRATIVE DETERMINATION

Dear Interested Parties:

On September 3, 2015,¹ & ² the Professional Firefighters, IAFF Local 3605 (Local 3605 or Union) filed a request for factfinding with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.³ Local 3605 asserts that it and the Santa Cruz Central Fire Protection District (District) have been unable to effect a settlement in their negotiations for a successor contract. Local 3605 gave the District written notice of its declaration of impasse by letter dated May 29 and the parties thereafter continued to discuss their differences and the

¹ All subsequent references are to the year 2015 unless otherwise stated.

² Local 3605 asserts it filed the instant factfinding request on August 28 and further states “[t]he Union mailed its Request on August 28, but for some inexplicable reason it appears that PERB did not receive it on August 31 as anticipated but on September 3.” PERB Regulation 32135 provides that “All documents shall be considered ‘filed’ when the originals . . . are actually received by the appropriate PERB office during a regular PERB business day. . . . [¶] All documents . . . shall also be considered ‘filed’ when received during a regular PERB business day by facsimile transmission at the appropriate PERB office together with a Facsimile Transmission Cover Sheet, or when received by electronic mail in accordance with Section 32091.” The instant factfinding request was received by PERB solely by regular mail on September 3 and filed that same day.

³ The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

possibility of voluntary mediation. The parties also exchanged and/or considered proposals through August 1.

As discussed in greater detail below, Local 3605 asserts that the parties' continued discussions served to "break" the impasse and/or "served to at least temporarily withdraw the declaration of impasse," and that the instant factfinding request was timely filed after Local 3605 declared impasse a second time on August 18.

On September 10, the District provided its position statement opposing Local 3605's factfinding request, solely based on its assertion that the request was untimely filed. On September 11, Local 3605 provided its reply in support of its factfinding request.

From the evidence submitted, it is clear that the request for factfinding was not made within 30 days following the date that either party provided the other with a written notice of a declaration of impasse. It is also clear that the request was not made 30 to 45 days following the appointment or selection of a mediator. Therefore, as more fully explained below, this request is found to be untimely filed and must be denied.

Factual Background

Local 3605 is the exclusive representative of the full-time Battalion Chiefs, Fire Captains, Fire Captain Specialists, Firefighter/Paramedics and Firefighters employed by the District. The Memorandum of Understanding between the parties expired on December 31, 2014. It appears that the parties began negotiations for a successor contract in the summer of 2014. By letter dated May 29 (2015), Local 3605 gave the District written notice of its declaration of impasse.⁴ Specifically, the letter states "the purpose of this correspondence is to request an impasse meeting as called for in: Article IV, Impasse Procedure, Section 16. Initiation of Impasse Procedure of the District's Employer-Employee Relations Resolution [EERR]."⁵

EERR Article IV, Impasse Procedure, provides:

Section 16. Initiation of Impasse Procedures

If the meet and confer process has reached impasse as defined in Section 2 of this Resolution, either party may initiate the impasse procedures by filing with the other party a written request for an impasse meeting, together with a statement of its position on all issues. Once impasse is declared, a meeting between the parties

⁴ Local 3605 asserts in its September 11 reply that it gave notice to the District on June 4, however, Local 3605's May 29 and June 1 letters each refer to May 29 as the date Local 3605 provided notice "declaring that the Local believes the parties are at impasse."

⁵ It appears that the EERR was adopted pursuant to MMBA section 3507.

shall then be scheduled promptly by the Employee Relations Officer. The purpose of this meeting shall be:

- a. To review the position of the parties in a final effort to reach agreement on a Memorandum of Understanding; and
- b. If the impasse is not resolved, to discuss arrangements for the utilization of the impasse procedures provided herein.

Section 17. Impasse Procedures

Alternatives to Mediation:

Nothing herein prevents the parties from utilizing any other dispute resolving procedures to which the parties mutually agree or which is set forth in the Memorandum of Understanding between the parties.

Impasse procedures are as follows:

- a. If the parties agree to submit the dispute to mediation, and agree on the selection of a mediator, the dispute shall be submitted to mediation. All mediation proceedings shall be private. The mediator shall make no public recommendation, nor take any public position at any time concerning the issues.
- b. If the parties fail to agree to submit the dispute to mediation then the Board of Directors may take such action regarding the failure as it, in its discretion, deems appropriate as in the public interest. Any legislative action by the Board of Directors shall be binding. The parties will resume negotiations within 15 days of legislative action by the Board of Directors.

Section 18. Costs of Impasse Procedures

The costs for the services of a mediator and other mutually incurred costs of mediation, shall be borne equally by the District and the Exclusively Recognized Employee Organization. The cost for other separately incurred costs, including costs for representation during the impasse process, shall be borne by each party.

By letter dated June 1, Local 3605 expressed its willingness to return to the table and “break the impasse” or proceed with mediation, otherwise, Local 3605 would make a request to PERB for factfinding.

By letter dated June 18, the District agreed that the parties had reached impasse. The District also expressed its understanding that Local 3605 “would like to discuss submitting the impasse to mediation if the parties are unable to reach agreement on June 30. The District is willing to discuss that possibility but hopes that the Parties will be able to break their impasse or reach agreement on an MOU at the June 30 meeting.”

In a June 25 e-mail message to the District, Local 3605 stated “It had been the Local’s intent to file a request for factfinding form with PERB if the District did not agree to mediation. However, given the District’s positions as stated in your letter, the Local has determined that it would be premature to submit a request for factfinding at this time. Accordingly, the Local is adopting the District’s apparent view that the Declaration of Impasse does not become operative until after the impasse meeting required by the District’s local rules. [¶] If you disagree with this position, please notify me immediately so that the Local can file the Request in a timely manner.”

On June 30, the parties met and the District presented its last, best, and final proposals. According to Local 3605, “[t]he District also stated that it was willing to utilize mediation in an attempt to reach agreement.” Also during the meeting, Local 3605 made a concession by offering a salary enhancement of 12% over five years instead of 17% over five years.

On August 1, the parties met and discussed proposals. At the end of the meeting, the District stated it was no longer interested in mediation.

On August 21, Local 3605 sent an e-mail message to the District containing a letter dated August 18 and asserted that the parties’ impasse had been broken on June 30 and that the August 18 letter was a declaration of impasse.

The District asserts that since Local 3605 declared impasse on May 29, the September 3 request was filed outside of the 30-day time period. It further asserts that its agreement to meet with Local 3605 “in accordance with the impasse resolution procedures set forth in the District’s EERR did not relieve [Local 3605] of its obligation to timely file its factfinding request.”

As noted above, Local 3605 asserts that the parties’ continued discussions broke the impasse and/or “served to at least temporarily withdraw the declaration of impasse,” and that the instant factfinding request was timely filed after Local 3605 declared impasse a second time on August 18.

Discussion

MMBA section 3505.4, subdivision (a),⁶ provides as follows:

The employee organization may request that the parties' differences be submitted to a factfinding panel not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. . . .

PERB Regulation 32802 provides as follows:

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

. . .

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board.

⁶ The factfinding provisions were added to the MMBA by Assembly Bill 646 (Stats. 2011, ch. 680, § 2) and amended by Assembly Bill 1606 (Stats. 2012, ch. 314, § 1.) The amendment added the language about either party providing written notice of declaration of impasse. (Stats. 2012, ch. 314, § 2.)

The Board recently confirmed in *Lassen County In-Home Supportive Services Public Authority* (2015) PERB Order No. Ad-426-M, that the factfinding timelines provided for in both MMBA section 3505.4, subdivision (a) and PERB Regulation 32802, subdivision (a), must be strictly adhered to and cannot be extended. (Accord, *City of Redondo Beach* (2014) PERB Order No. Ad-409-M (*Redondo Beach*)). There the Board reviewed the date when a mediator was appointed or selected:

Both MMBA section 3505.4(a) and PERB Regulation 32802 use clear, unambiguous language to prescribe the window period within which an exclusive representative may request factfinding. The triggering event in both is the “appointment or selection of a mediator,” if, as in this case, the parties submitted their dispute to mediation. . . .

In *Redondo Beach, supra*, PERB Order No. Ad-409-M, the Board reviewed the representative’s contention that it should be relieved of the statutory timelines because the employer had not timely responded to the union’s request to engage in voluntary mediation. The Board rejected the representative’s argument and explained:

By including a definite time on the ability of employee organizations to request factfinding, presumably the Legislature intended to ensure that the factfinding process occur in a timely manner. The responsibility to request factfinding in a timely manner is therefore the sole responsibility of the employee organization.

(*Id.* at pp. 6-7.)

Here, the parties did not use mediation to resolve the bargaining dispute. Therefore, the 30-day period for Local 3605 to request factfinding was triggered by “the date that either party provided the other with a written notice of a declaration of impasse.” (Gov. Code, § 3505.4, subd. (a).)

Local 3605 asserts that the declaration of impasse should have “at least” been “temporarily withdraw[n]” because the District “stated that it was willing to utilize mediation in an attempt to reach agreement.” Local 3605 asserts that there is “a critical (and determinative) difference between *Redondo Beach* and this case” because “in *Redondo Beach* the employee association actually did sit around and wait for the Employer to agree to mediation, allowing the 30 days to expire before there was an agreement to mediate. Here, the Union did not sit around and wait. There was an agreement to mediate before the 30 days expired. Then, long after the 30 days expired, the District unexpectedly backed out of mediation.”

Local 3605 provides no authority indicating that *Lassen County In-Home Supportive Services Public Authority, supra*, PERB Order No. Ad-426-M and *Redondo Beach, supra*, PERB Order No. Ad-409-M strictly applying the timelines would be different where the parties agree to, but fail to proceed to voluntary mediation. Local 3605 also provides no authority indicating that a

party's agreement to proceed to voluntary mediation somehow tolls the statutory deadlines set forth in section 3504.5. Local 3605 similarly provides no authority indicating that PERB may or should investigate and determine whether an impasse is genuine or whether it is withdrawn or broken by the conduct of the parties. To the contrary, the Board's decisions make clear that PERB may only look at the "clear" and "unambiguous" "window periods" provided for in the statute to determine whether a request for factfinding is timely. (*Lassen County In-Home Supportive Services Public Authority, supra*, PERB Order No. Ad-426-M; *Redondo Beach, supra*, PERB Order No. Ad-409-M.) Finally, Local 3605's assertion that on August 18 it again declared impasse, lacks any authority indicating that the MMBA contemplates multiple declarations of impasse with respect to the same dispute. Rather, the factfinding timelines provided for in both MMBA section 3505.4, subdivision (a) and PERB Regulation 32802, subdivision (a), must be strictly adhered to and cannot be extended. (*Ibid.*)

Here, Local 3605 provided its written declaration of notice of impasse on May 29. Local 3605 filed its request for factfinding on September 3, 2015. The request is therefore untimely under section 3505.4 as it was not made within 30 days of the declaration of impasse. Accordingly, the instant factfinding request does not satisfy the requirements of MMBA section 3505.4 and PERB Regulation 32802, and is therefore dismissed.

Right to Appeal

Pursuant to PERB Regulations, an aggrieved party may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid.*)

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, subs. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is: Public Employment Relations Board
 Attention: Appeals Assistant
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 Sacramento, CA 95811-4124
 Telephone: (916) 322-8231
 Facsimile: (916) 327-7960
 E-File: PERBe-file.Appeals@perb.ca.gov

If a party appeals this determination, the other party(ies) may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Service

All documents authorized to be filed herein must also be “served” upon all parties to the proceeding, and a “proof of service” must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly “served” when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Sincerely,

Mary Weiss
Senior Regional Attorney

MW