DATE August 19, 2015

TOPIC Response to the Grand Jury Report Titled, "The Need for Labor Negotiation Transparency-Part II"

RECOMMENDATION
The Board of Directors to instruct staff on responses to the "Findings" and "Recommendations" contained in the Grand Jury's report titled, "The Need for Labor Negotiation Transparency-Part II" (Attached as Exhibit A).

SUMMARY
On June 17, 2015, the Marin County Civil Grand Jury released a report titled, "The Need for Labor Negotiation Transparency-Part II." The essence of the report was the Grand Jury's conclusion that additional transparency is needed in the negotiation process between Marin's government agencies and their respective employee unions. The report recommends the adoption of a formal negotiation process called COIN, or Civic Openness in Negotiations, in order to achieve the transparency the Grand Jury feels is needed. The Fire District is required to respond to each "Finding" and "Recommendation" in accordance with Penal Code Section 933.05, which is attached as Exhibit B.

Legal Counsel has reviewed and approved this documentation.

FINANCIAL IMPACTS
There are costs associated with conforming to the requirements of the COIN process. Those costs would need to be identified if the COIN process is implemented in any capacity.

OPTIONS
Responses to "Findings" and "Recommendations" are required pursuant to Penal Code 933.0S(c). For each Finding, the Board may choose one of the following two responses:

1. The respondent agrees with the finding.
2. The respondent disagrees wholly or partially with the finding in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.
For each Recommendation the Board may choose one of the following four responses:

1. The recommendation has been implemented, with a summary of the implemented action.

2. The recommendation has not yet been implemented, but will be implemented in the future, with a specified timeframe for implementation.

3. The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a timeframe for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This timeframe shall not exceed six months from the date of publication of the grand jury report.

4. The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor. The above responses are due within 90-days of the date of the Grand Jury's final report. (Report date: June 12, 2015; Response deadline: September 10, 2015.)

**BACKGROUND**

The Meyers-Milias-Brown Act ("MMBA") is the statutory scheme governing the District's labor relations. The MMBA requires a good faith "meet and confer" process between the District and any labor union for changes to compensation, benefits, and/or proposed ground rules that affect the bilateral bargaining process. The "meet and confer" process is required to "continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation ...." (Gov. Code § 3505.) The process is also required to be conducted in "good faith," a term about which there is significant case law.

The concept of COIN originated in the Orange County area of Southern California, and was an attempt to add further transparency to labor negotiations. An example of a COIN ordinance as proposed by the County of Orange is attached as Exhibit C. Components of this COIN ordinance, like others, include use of an outside negotiator, the commissioning of an independent economic analysis of the fiscal costs to the County of each term and condition of employment offered in negotiations, and public reporting of all offers, counteroffers and supposals made by either the County or by representatives of the recognized employee organization. The COIN process recommended by the
Marin County Grand Jury closely tracks the process proposed in the Orange County Ordinance.

In considering the adoption of a COIN ordinance at this point in time, it is important for the Board to be aware that the Orange County COIN ordinance has been legally challenged, has had major parts of it ordered rescinded, and that the legal process is not over in regards to the challenge of that ordinance. Specifically, Orange County's affected employee organizations filed an unfair labor practice claim with the California Public Employment Relations Board ("PERB") alleging that the County had failed to meet and confer in good faith in violation of the MMBA before adopting the subject COIN ordinance. The matter went to a hearing before a PERB Administrative Law Judge and, on June 16, 2015, the Judge issued a decision finding that the Orange County COIN ordinance came within the scope of representation and, therefore, was subject to the meet and confer process prior to being implemented. The judge's ruling is attached as Exhibit D.

In addition to finding that the COIN ordinance impacted the County's obligation to meet and confer over bargaining ground rules, the decision addressed specific areas of the COIN ordinance and found that the Ordinance's 30-day public review period and reporting-out requirements impacted the duty to bargain and, therefore, were adopted in violation of the MMBA. The Judge's decision is currently on appeal to the PERB Board. Until the appeal is final, which can take anywhere from six months to two years, the procedural and substantive legalities of how to adopt, and what can be contained in, a COIN ordinance, will remain unsettled.

**FINDINGS AND RECOMMENDATIONS**
The findings and Recommendations the Board needs to respond to are noted below with corresponding comments from staff:

**FI.** The residents of Marin County pay taxes to support decisions made by the Board of Directors of Special Districts; however these residents have minimal opportunity to provide input into labor negotiations.

**RESPONSE:** The District partially disagrees. The SMFPD has a Board of Directors elected to represent the interests of the residents of the District in a legal, transparent, efficient and effective manner. Current employee contracts (MOUs) and District financial condition (adopted budget and supporting materials) are available to the public. Labor negotiator selection and MOU adoption take place at public meetings with an opportunity for public comment. These issues are also discussed at the Finance Committee and Personnel Committee meetings which are also open to
the public. Information regarding these committees meetings will be more widely distributed in the future. Their agendas have not previously been promoted beyond legal requirements.

**F2.** The COIN process can be implemented without affecting the manner in which tentative agreements are negotiated but which nevertheless will ensure public awareness of the terms and cost of those agreements in advance of their being adopted.

**RESPONSE:** The District partially disagrees. The COIN process is designed to affect the manner in which tentative agreements are negotiated. Any COIN process would need to reconcile the way the law has developed regarding the application of the good-faith bargaining standard to the ultimate adoption of tentative agreements. Also, the specific COIN process proposed would come with great expense and would greatly extend the length of negotiations.

**F3.** The COIN process mandates transparency in government decision-making, allowing residents to be informed and to participate in public discussion of how their tax dollars are spent.

**RESPONSE:** The District agrees that the COIN process would increase the amount of information that the District would publish during the negotiation process and that it stands to reason that public discourse would follow.

For any agency adopting a COIN process, the District believes residents should be advised as to when public discussion and input can be most effective. Based on our interpretation of the COIN process and our understanding of applicable labor law, the best point in the COIN process for public discussion between and with the Fire District is prior to the start of bargaining. In the COIN process, the initial forum to discuss the summary report of employee costs would be the one point in the process the District believes could be a true exchange of ideas about labor negotiations. Once bargaining begins, the District would be quite limited by law in its ability to converse with the public about negotiations. Additionally, the COIN process places great weight on establishing a two-meeting review period for a draft employment agreement, after which the agreement would be approved or disapproved. As noted previously, given the Board of Director’s role in the our bargaining process, the rejection of a tentative agreement would significantly damage the District’s credibility at the bargaining table and potentially bring charges from our labor groups that we bargained in bad faith.
RI. The Special Districts listed as Respondents adopt and implement a COIN ordinance prior to June 1, 2016, or prior to the next round of negotiations, whichever comes earlier.

RESPONSE: The adoption of a COIN ordinance would be premature at this time due to the ongoing legal challenge and untested track record of such an ordinance in action. Therefore the COIN ordinance outlined in the Grand Jury report will not be implemented however elements may be implemented in the future.

R2. The Special Districts listed as Respondents adopt and implement a COIN ordinance which includes, but is not limited to the following:

1. Hire an independent, experienced Lead Negotiator to negotiate all labor agreements.

2. Hire an independent auditor to determine the fiscal impact of each provision in the current contract, and make this analysis available for public review.

3. Make public each proposal, after it is accepted or rejected by either Party, and publicly verify the costs of that accepted or rejected proposal by an independent auditor.

4. Make public seven days prior to a Board or Council meeting the negotiated tentative agreement and the fiscal analysis thereof, which are to be independently verified.

5. After seven days, place the final tentative agreement on the following two consecutive Employer's public meeting agendas: the first meeting is for discussion of the tentative agreement; the second meeting is for a vote by the Employer to approve or disapprove the tentative agreement.

RESPONSE: The District believes that the adoption of a COIN ordinance would be premature at this time due to the ongoing legal challenge and untested track record of such an ordinance in action. Therefore the COIN ordinance outlined in the Grand Jury report will not be implemented however elements may be implemented in the future.

CORRESPONDENCE
The District has received the correspondence attached as Exhibit E regarding the Grand Jury's report.
CONCLUSION
It would appear to staff the adoption of a COIN ordinance would be premature at this time due to the ongoing legal challenge and untested track record of such an ordinance in action. However, staff defers to the Board's direction on responses to the report and whether the Board wishes to implement any type of COIN ordinance at this time.

Approved By

Chris Tubbs, Interim Fire Chief
Southern Marin Fire District

Attachments:

Exhibit A: Marin County Civil Grand Jury report titled, "The Need for Labor Negotiations Transparency-Part II
Exhibit B: California Penal Code Section 933.05
Exhibit C: Proposed COIN ordinance by the County of Orange
Exhibit D: Preliminary PERB decision in OCEA v. OC
Exhibit E: Letter received from Mr. Bob Briare, President of IAFF 1775
Exhibit F: Senate Bill 331 – Special Contracting Requirements for Agencies adopting COIN
The Need for Labor Negotiation Transparency – Part II

Report Date: June 12, 2015
Public Release Date: June 17, 2015
The Need for Labor Negotiation Transparency – Part II

SUMMARY

During the 2014-2015 Marin County Grand Jury investigation leading to its 2015 report, Pension Enhancements: A Case of Government Code Violations and A Lack of Transparency, the Grand Jury learned that negotiations between Marin County, the cities and towns therein, Special Districts and their respective unions (hereafter collectively referred to as the “Parties”) are conducted in private, without transparency, and removed from the scrutiny of the Marin community. Although Marin County residents pay taxes to support decisions made by the Marin County Board of Supervisors (BOS) and the City and Town Councils and Special Districts, (hereafter collectively referred to as “Employer(s)”), there are numerous times when no transparency into the background of those decisions is made to the public.

The Grand Jury learned that the public is notified of a negotiated tentative labor agreement only when the agenda, which schedules consideration of the agreement, is posted—some three to four days prior to the Employers' public meetings. This is also the meeting at which the Employers vote to approve or disapprove the agreement. Prior to the agenda posting, little or no detailed information is made public about the terms of the tentative agreement or what it will cost. Without this information, there is no full public disclosure of the terms and cost of an agreement during the negotiation process and prior to its being voted upon. With no transparency, the public is excluded from input until it is too late for a reasoned public dialogue.

During its investigation, the Grand Jury also learned that various California cities and Orange County adopted a formal negotiation process, Civic Openness In Negotiations (COIN), which allows for community review of not only what is being negotiated, but also what a tentative agreement will cost to implement. One key element of the COIN process is the stipulation that the Employer hire an experienced, independent Lead Negotiator for all negotiations. This requirement precludes any city or county employee from negotiating terms that may benefit that employee, thus avoiding any conflict of interest.

The common elements of the COIN process are as follows:

1. The Employer hire an experienced, independent Lead Negotiator for all negotiation of wages, hours, and terms and conditions of employment.
The Need For Labor Negotiation Transparency

2. The Employer hire an independent auditor to assess the fiscal impacts of each provision in the current labor contract. This fiscal impact is made available for public study.

3. After each proposal is accepted or rejected by either of the Parties, it is publicly disclosed (generally on the Employer’s website). The costs for the implementation of the proposal are verified by an independent auditor and also publicly disclosed.

4. Seven days prior to the Employer’s public meeting, the final tentative agreement is made public (generally on the Employer’s website), including all associated costs, which are independently verified.

5. After seven days, the final tentative agreement is placed on two consecutive Employer’s public meeting agendas: at the first meeting, the agreement is a discussion item; at the second meeting, the Employer votes on the agreement.

The Grand Jury recommends that the Employers adopt an ordinance implementing the COIN process to ensure transparency and prior public review of all proposals and final tentative labor agreements.

BACKGROUND

During the 2014-2015 Marin County Grand Jury investigation leading to the 2015 Grand Jury report, Pension Enhancements: A Case of Government Code Violations and A Lack of Transparency, the Grand Jury learned that labor negotiations in Marin County and the cities and towns therein are conducted without transparency, and are thereby removed from the scrutiny of the community. During this time, the Grand Jury also learned that various California cities and Orange County had adopted a transparent negotiation process, Civic Openness in Negotiations (COIN), which allows for community review of tentative proposals being negotiated and also what those proposals will cost if accepted or rejected. As a result, the Grand Jury decided to investigate whether a more transparent negotiation process might be appropriate for Marin County and its cities and towns.

APPROACH

The Grand Jury interviewed representatives of the Orange County Management of Government Affairs, various Marin County officials directly involved with labor contract negotiations, and officials from Costa Mesa who are engaged in the implementation of COIN. Orange County and Costa Mesa COIN ordinances were reviewed along with numerous websites of various cities and counties involved in the use of COIN. Additionally, Grand Jury members attended multiple Marin County Board of Supervisors meetings at which the public brought COIN to the attention of the Board of Supervisors. Grand Jury members also attended the April 28, 2015, BOS meeting where COIN was agendized for discussion; they later viewed the video of the meeting and read the staff report relating to COIN as presented at that meeting.
DISCUSSION

The Need for Civic Openness in Labor Contract Negotiations (COIN)

Although Marin County residents pay taxes to fund decisions made by the Marin County Board of Supervisors and the City and Town Councils and Special Districts, often there is no transparency into the background of those decisions. One specific area that lacks transparency is labor negotiations between the Parties. In general, the public is notified of the Parties’ tentative agreements only three to four days prior to the Employers’ public vote; it is only then that the meeting agenda is posted for public view. Prior to the agenda posting, little or no detailed information is made public about the terms of the tentative agreement or what it will cost. In sum, there is no transparency before the vote on the tentative agreement.

This short time period (three to four days) gives the residents of Marin little time to review the tentative agreement in order to provide input at an Employers’ public meeting—the meeting at which the tentative agreement is presented for approval. Furthermore, the public receives no information regarding any proposal made by either Party or the associated costs of those proposals, which leads to the question: What should be disclosed to the residents of Marin and when?

COIN Started In Costa Mesa

The Grand Jury learned that a newly elected Costa Mesa City Council had discovered the financial strain placed on their city by their unfunded pension liabilities. This discovery, coupled with the realization that opaque labor negotiations had created an environment devoid of public oversight, review or input, motivated the Council to adopt a more transparent process for all labor negotiations. Accordingly, the City of Costa Mesa adopted a COIN ordinance in September of 2012, the first municipality in California to do so.

Subsequently, Beverly Hills, Fullerton and Rancho Palos Verdes also adopted variations of COIN, as did Orange County (Appendix A). For all these entities, the principal objective of the COIN process is to allow the public to review and to provide input during negotiations. One person interviewed stated, “...it occurred to the Council that the public’s full understanding of what they are being asked to pay for is good governance.”

Learning this, the Grand Jury investigated various existing COIN ordinances and procedures to determine what the COIN process might mean for Marin County and its cities and towns.

1 Orange County Employee Association has made an unfair practice charge to the Public Employment Relations Board concerning how COIN was adopted, not the implementation of COIN. This is not yet resolved.
What COIN is: Key Components

The common elements of the COIN process are as follows:

1. The Employer hire an experienced, independent Lead Negotiator for all negotiation on wages, hours, and terms and conditions of employment. This requirement precludes having a city or county employee negotiate terms of an agreement that could directly benefit such employee.

2. The Employer hire an independent auditor to assess the fiscal impacts of each provision in the current labor contact. This fiscal impact is made available for public study.

3. Labor contract negotiations begin.

4. After each proposal is accepted or rejected by either Party to the negotiation, the proposal is publicly disclosed (generally on the Employer’s website). The long-term and short-term costs of the proposal are verified by an independent auditor and also publicly disclosed.

5. Negotiations conclude with a final tentative agreement.

6. Seven days prior to the Employer’s public meeting, the final tentative agreement is made public (generally on the Employers’ website), including all associated costs that are independently verified.

7. Following these seven days, the final tentative agreement is placed on the following two consecutive Employer’s public meeting agendas: at the first meeting, the tentative agreement is a discussion item; at the second meeting, the Employer(s) vote on the tentative agreement.

The above process is used in a number of municipalities. For more details see Appendix A.

What COIN is Not: Misconceptions

The Grand Jury learned that there are many misconceptions about the COIN process, as follows:

Misconception #1: The public negotiates.

COIN does NOT involve the public in actual negotiations, nor does it disclose what occurs at the negotiation table. Fair-minded taxpayers recognize that such an attempt would lead to an unproductive bargaining environment at best and would likely evolve into intractable positions by both sides that would prevent a constructive outcome.
Misconception #2: Negotiations are held open for public observation.

In none of the cities or Orange County are COIN negotiations open for public view or public participation. Negotiations occur in private, but the decisions on proposals are made available for public review.

Misconception #3: COIN slows down the negotiation process.

The Grand Jury has learned that, during the first round of negotiations using the COIN process, there is a learning curve, since COIN provides a new framework within which to operate. However, after learning the new process, those interviewed noted that negotiations proceeded in a timeframe similar to prior negotiations.

Misconception #4: Not all types of negotiation methods can adapt to the COIN processes.

The COIN process is about transparency and not about the negotiation method. Commonly used negotiation practices, such as interest-based or adversarial, can still be the norm while using the COIN process.

The COIN process is about the transparency of decisions made during negotiations that lead to a tentative agreement – the agreement that is recommended to the Employer for approval. It is through the COIN process that the public is made aware of the terms and associated costs of tentative agreements well before they are adopted, thereby giving taxpayers opportunity to provide timely public review and input.

FINDINGS

F1. The residents of Marin County pay taxes to support decisions made by the Board of Directors of Special Districts; however these residents have minimal opportunity to provide input into labor negotiations.

F2. The COIN process can be implemented without affecting the manner in which tentative agreements are negotiated but which nevertheless will ensure public awareness of the terms and cost of those agreements in advance of their being adopted.

F3. The COIN process mandates transparency in government decision-making, allowing residents to be informed and to participate in public discussion of how their tax dollars are spent.

RECOMMENDATIONS

R1. The Special Districts listed as Respondents adopt and implement a COIN ordinance prior to June 1, 2016, or prior to the next round of negotiations, whichever comes earlier.
R2. The Special Districts listed as Respondents adopt and implement a COIN ordinance which includes, but is not limited to the following:

1. Hire an independent, experienced Lead Negotiator to negotiate all labor agreements.

2. Hire an independent auditor to determine the fiscal impact of each provision in the current contact, and make this analysis available for public review.

3. Make public each proposal, after it is accepted or rejected by either Party, and publicly verify the costs of that accepted or rejected proposal by an independent auditor.

4. Make public seven days prior to a Board or Council meeting the negotiated tentative agreement and the fiscal analysis thereof, which are to be independently verified.

5. After seven days, place the final tentative agreement on the following two consecutive Employer’s public meeting agendas: the first meeting is for discussion of the tentative agreement; the second meeting is for a vote by the Employer to approve or disapprove the tentative agreement.

REQUEST FOR RESPONSES

Pursuant to Penal Code section 933.05, the Grand Jury requests responses as follows:

From the following governing bodies:

- Golden Gate Bridge, Highway and Transportation District: All Findings and Recommendations.
- Marin Municipal Water District: All Findings and Recommendations.
- North Marin Water District: All Findings and Recommendations.
- Novato Fire Protection District: All Findings and Recommendations.
- Southern Marin Fire Protection District: All Findings and Recommendations.

The governing bodies indicated above should be aware that the comment or response of the governing body must be conducted subject to the notice, agenda and open meeting requirements of the Ralph M. Brown Act.
## APPENDIX A

### Summary of “COIN” Requirements Adopted by City/County

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Costa Mesa</th>
<th>Beverly Hills</th>
<th>Fullerton</th>
<th>Rancho Palos Verdes</th>
<th>Orange County</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applies to all negotiations between the Parties.</td>
<td>Yes</td>
<td>Yes</td>
<td>Must include Salary Changes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Independent Negotiator</td>
<td>Yes</td>
<td>Yes</td>
<td>May be Waived by Council</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Executive Employee Involved in Bargaining</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Pre-Negotiation Economic Analysis (Baseline)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Each Accepted or Rejected Proposal plus the Economic Analysis made public</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Proposals Verified Independently</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>May be Waived by Council</td>
<td>Yes</td>
</tr>
<tr>
<td>Tentative Agreement an Agenda Item on 2 Meetings Prior to Adoption</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Meetings must be 2 Weeks Apart</td>
<td>Yes</td>
</tr>
</tbody>
</table>
APPENDIX B

THE COIN PROCESS

The Employer hires an experienced, independent, Lead Negotiator for all negotiation on wages, hours, and terms and conditions of employment.

At the second Employers' public meeting a vote is taken by the Employer.

After seven days, the final tentative agreement is placed on the following two consecutive Employers public meeting agendas: meeting one is a discussion item;

The Employer hires an independent auditor to assess the fiscal impacts of each provision in the current contact. This fiscal impact is available for public study.

Seven days prior to the Employers' public meeting, the final tentative agreement is made public (generally on the Employers' website), including all associated costs, which are independently verified.

After each proposal is accepted or rejected by either Party it is publically disclosed (generally on the Employers' website).

The long-term and short-term associated costs of the proposal are verified by an independent auditor and also publically disclosed.
BIBLIOGRAPHY


California Penal Code Section 933.05

933.05. (a) For purposes of subdivision (b) of Section 933, as to each grand jury finding, the responding person or entity shall indicate one of the following:

(1) The respondent agrees with the finding.

(2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.

(b) For purposes of subdivision (b) of Section 933, as to each grand jury recommendation, the responding person or entity shall report one of the following actions:

   (1) The recommendation has been implemented, with a summary regarding the implemented action.
   (2) The recommendation has not yet been implemented, but will be implemented in the future, with a timeframe for implementation.
   (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a timeframe for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This timeframe shall not exceed six months from the date of publication of the grand jury report.
   (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.

(c) However, if a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the board of supervisors shall respond if requested by the grand jury, but the response of the board of supervisors shall address only those budgetary or personnel matters over which it has some decision-making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

(d) A grand jury may request a subject person or entity to come before the grand jury for the purpose of reading and discussing the findings of the grand jury report that relates to that person or entity in order to verify the accuracy of the findings prior to their release.

(e) During an investigation, the grand jury shall meet with the subject of that investigation regarding the investigation, unless the court, either on its own determination or upon request of the foreperson of the grand jury, determines that such a meeting would be detrimental.

(f) A grand jury shall provide to the affected agency a copy of the portion of the grand jury report relating to that person or entity two working days prior to its public release and after the approval of the presiding judge. No officer, agency, department, or governing body of a public agency shall disclose any contents of the report prior to the public release of the final report.
LABOR NEGOTIATION STRATEGIES AND PRINCIPLES

I. Introduction

The Association of California Cities – Orange County (ACC-OC) serves as the regional advocate for local control, both regionally and in Sacramento. The ACC-OC accomplishes this by adhering to a member-driven model for creating good public policy from the ground up. As such, the ACC-OC has responded to member requests to provide model guidelines to cities when negotiating with bargaining units, with commitment to transparency and accountability.

II. Background

Existing California law, known as the Meyers-Milius-Brown Act (MMBA),\(^1\) seeks to provide a uniform and orderly process for communication between public agencies and employees regarding the changes in wages, hours, or any other terms or conditions of employment of county or city employees. All policies and ordinances must comply with the MMBA.

The ACC-OC seeks to provide a guideline for bringing transparency and accountability to the collective bargaining process, while wishing to respect the autonomy and inherent practices of each city.

III. General Approach

It is important for all parties involved that the rules of engagement be set forth in advance.

Including staff subject matter experts in closed session meetings can provide council members with greater confidence and understanding of issues. In addition, ongoing discussion and disclosure of budget and financial information can assist in facilitating the negotiation process.

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\(^1\) To access the Meyers-Milius-Brown Act, Government Code Section 3500-3511, please click the following link:  [http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=03001-04000&file=3500-3511](http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=03001-04000&file=3500-3511)
The following strategies are offered as a menu of suggestions that can be adopted by cities in whole or in part and should be customized by cities for each specific application.

1. **Use of Outside Negotiators**

Utilization of an outside negotiator as the principal negotiator for the city is an example of good governance and a general good practice to avoid actual or perceived conflicts of interest.

**FACTORS TO CONSIDER:**

A. **Expertise**

   An outside negotiator may provide greater expertise in subject matter, negotiation strategies, contract language, and a valuable independent, third-party perspective.

B. **Complexity**

   While requiring an outside negotiator is a good practice, the necessity may be considered on a case-by-case basis, based on the complexity and value of the issues at hand.

C. **Costs**

   Costs of the negotiation should be evaluated based on the value of the contracts negotiated. Cities should balance the costs of the contract over the costs of an outside negotiator, with the understanding that the labor contract may go to arbitration.

D. **Evaluate Existing Code**

   Make sure that proposed policy and language does not violate current municipal code.

**SAMPLE LANGUAGE:**

*The use of an outside negotiator shall apply to all formal meet and confer processes undertaken pursuant to the Meyers-Milia-Brown Act, where either a recognized employee organization or the city, through their respective representatives propose 1) significant changes to contract terms, 2) extensions, or 3) when the employee association negotiates with third party negotiators or legal counsel. In an effort to avoid inherent conflicts of interest, if an outside negotiator is deemed necessary, the principal representative negotiating on behalf of the city shall 1) not be an employee of the city, 2) not be a member of any public pension plan under the city, and 3) have a demonstrated expertise in negotiating labor and employment agreements on behalf of municipalities. The city*
council shall designate one or more management level employees to be present during negotiations and to assist the principal negotiator as the city council and/or principal negotiator deem appropriate.

2. Fiscal Impact of Public Disclosure

Clear and factual information is the starting point for an effective economic analysis of the fiscal impacts of the contract, and can be utilized to justify the action taken. There are various methods for acquiring this information and for communicating it with the public.

FACTORS TO CONSIDER:

A. Actuarial Analysis

Preparing and providing an actual and specific economic analysis of the short and long term costs of every term and condition of employment in the contract is the first way to ensure that 1) City council members have the best data available in front of them to negotiate and make a decision, and 2) the public has the appropriate data to vet the contract and the Council’s proceedings.

The economic analysis may include both the funded and unfunded actuarial liability that would or may ensue from adoption of the contract.

B. Confidence from Analysis

The use of an independent auditor will allow city council members, staff, and the public to benefit from the general level of confidence provided by a thorough and reliable economic analysis by an external professional.

Information from outside auditors should be used in conjunction with information from staff whenever practical.

C. Tangible Comparisons

The economic analysis of each term and condition of the contract can be viewed in the framework of how it will affect the citizens.

Utilize tangible examples of comparisons with other programs. For instance, if a contract will cost the city X amount of dollars, contextualize it to show that X amount of dollars is equal to a specific city service or program.

D. Staff Training
In addition to the use of an independent auditor, city human resources professionals need the proper resources and training to provide and analyze an economic analysis.

**E. Public Review**

The City may consider making the fiscal impacts of the contract available to the public and the City Council at least two (2) City Council meetings prior to consideration by the City Council of an initial meet and confer proposal.

**F. Council Acknowledgement**

Consider requiring City Council members to acknowledge receipt and review of the economic analysis in writing.

**SAMPLE LANGUAGE:**

An independent auditor, a certified public accountant, or an actuarial accountant, shall prepare a study and supplemental data upon which the study is based, that identifies the fiscal impacts attributed to each term and condition of employment made available to the members of all recognized employee organizations.

The first analysis shall be of existing contract costs and of each thereafter.

The above report and findings of the independent auditor shall be completed and made available for review by the city council and the public at least two (2) City Council meetings before consideration by the city council of an initial meet and confer proposal.

The above report shall be regularly updated by the independent auditor to itemize the cost and the funded and unfunded actuarial liability which would or may result from adoption or acceptance of each meet and confer proposal. These measurements shall display the fiscal impacts of the employee association and/or city proposals. The report shall be prepared to include all benefit and pay aspects of each MOU, and shall include written council member acknowledgement that the report has been read and considered by the signing councilmember.

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**3. Discussion of Offers and Counteroffers**

California’s current open meeting laws provide that a City Council can meet in closed session to provide its bargaining unit representatives with instructions and parameters for negotiation in the meet and confer process. Closed sessions allow City Councils to speak privately regarding their bargaining parameters without disclosing these parameters to labor representatives.²

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Additionally, the meet and confer process provides the opportunity for city representatives and labor representatives to bargain in good faith in order to reach an agreement on the proposed labor contract.

**FACTORS TO CONSIDER:**

**A. Report the Facts**

Transparency may result in more realistic counters or counteroffers.

Broad dissemination of offers and counteroffers provides a progress report and clearer understanding for both the public and bargaining unit members.

**B. Discretion**

Disclosure of offers and counteroffers may result in additional public posturing and increased politicization, which can affect negotiations.

All parties involved in negotiations should use caution and clear communication when reporting out of closed session.

**SAMPLE LANGUAGE:**

*The city council shall report out the details of all formal offers that have been rejected at the time of the counteroffer rejecting each proposed term.*

*City council labor negotiators shall have the duty to advise the city council during any closed session of all offers, counteroffers, information, and/or statements of position discussed by the labor negotiators taking place in the meet and confer process since the last such closed session.*

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**4. Disclosures of Private Communications**

Having city council members disclose communication contacts that were had with any labor representative is another way to bring transparency to the negotiation process and to build faith with the public. A careful value judgment can be made to what type of conversation is appropriate to report to the public.

**FACTORS TO CONSIDER:**

**A. Disclose Communications**
While this principle may be contentious for some city council members, it can be viewed as a disclosure requirement, not a “no-deal” requirement.

The communication that is disclosed may simply be that the conversation occurred.

B. **Impact on the Process**

There is some historical context that private meetings, without the disclosure of names, have been the environment needed to reach an agreement. However, a balance can be found to reconcile transparency with private communications.

If a council member is going to meet with the employee group they should remember their closed session obligations and just listen.

Council members that talk to employee groups outside of formal negotiations may undermine the negotiation process.

C. **Ongoing Relationship**

All parties should approach the process in a respectful and sensitive way that will assist in building long-term working relationships that survive the sometimes difficult negotiation process.

**SAMPLE LANGUAGE:**

> Each city council member shall disclose both publicly and during closed sessions, the identity of any and all employee association representatives with whom the city council member has had any verbal, written, electronic or other communication(s) regarding a subject matter of a pending meet and confer process.

5. **Ordinance Model Process**

Disclosing the MOU and making it subject to more than one (1) city council meeting provides the opportunity for the public to effectively weigh in on the matter.

**FACTORS TO CONSIDER:**

A. **Consistency**

1\(^{st}\) and 2\(^{nd}\) readings at City Council meetings is standard practice for normal ordinances, and this seeks to put labor negotiations under that standard.
B. **Timing**

Cities must remain in compliance with AB 537 (Chapter 785, Statutes of 2013)\(^3\) which requires that if a tentative agreement is reached by the authorized representative of a City and a recognized bargaining unit, the city council must vote to accept or reject that agreement within thirty (30) days of 1\(^{st}\) consideration at a noticed public meeting.

**SAMPLE LANGUAGE:**

*Any agreed upon memorandum of understanding shall be introduced for first reading at a regular city council meeting and presented for approval at the next regular city council meeting in the same manner as a the first and second reading of an ordinance.*

\(^3\) To read Assembly Bill No. 537 (Chapter 785, Statutes of 2013) please click the following link: [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0501-0550/ab_537_bill_20131013_chaptered.htm](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0501-0550/ab_537_bill_20131013_chaptered.htm)
UNFAIR PRACTICE CHARGE No. LA-CE-934-M
STATEMENT OF CHARGE (cont.)

BACKGROUND

1. The Orange County Employees Association (OCEA) is the exclusive representative for multiple County of Orange (County) bargaining units including the following: General Unit, Health Care Professional Unit, Community Services Unit, Office Services Unit, Sheriff’s Special Officer and Deputy Coroner Unit, Supervisory Management Unit, Probation Services Unit, and Probation Supervisory Management Unit (collectively, the “OCEA bargaining units”).

2. OCEA and the County are parties to Memorandums of Understanding for each of the OCEA bargaining units, which expire on June 25, 2015 and have been in full force and effect at all times relevant to this charge.

3. During the six months immediately preceding the filing of this Unfair Practice Charge the County has unilaterally changed terms and conditions of employment and failed to bargain in good faith regarding mandatory subjects of bargaining with OCEA as representative for the bargaining units, all in violation of the Meyers-Milias-Brown Act (MMBA).

FAILURE TO BARGAIN, INTERFERENCE WITH EXCLUSIVE REPRESENTATIVE AND INTERFERENCE WITH COLLECTIVE BARGAINING RIGHTS UNDER MMBA

4. On May 20, 2014 the Orange County Board of Supervisors (BOS) agenda included the first reading of a new ordinance titled “Civic Openness in Negotiations,” also known as “COIN.” (See Attachment 1A to the initial Unfair Practice Charge).

5. Under the initial proposed COIN ordinance, for any proposed labor contract, the County Auditor-Controller would have been required to estimate the financial impact of the new contract terms, to be made available to the public for comment. (Attachment 1A, p. 2-3).

6. The initial proposed COIN ordinance would have required the BOS to publicly report any offers and counteroffers discussed in closed session. (Attachment 1A, p. 4).
7. Any closed session itself would have been required to “include the release of a list of names of all persons in attendance during the negotiation session, the date of the sessions, the length of the sessions, the location where the sessions took place, and any pertinent facts regarding the negotiations that occurred in a particular session, including, without limitation, all offer and counteroffers made both by the County and the recognized employee association.” (Id.).

8. Under the initial proposed COIN ordinance it would also have been the duty of BOS representatives to provide the foregoing information to the BOS in closed session. (Id.)

9. On June 11, 2014, the office of Supervisor John Moorlach sent an e-mail to Jennifer Muir, OCEA Assistant General Manager. Attached to the e-mail was modified language for the proposed COIN ordinance, along with copies of two memoranda. A June 3, 2014 memorandum from Supervisor Moorlach attached to the e-mail contended that the ordinance “... does not impact the wages, hours, or terms and conditions of employment for County employees and does not impact the negotiation of ground rules for current or future labor negotiations and therefore does not have to be bargained.” (Attachment 1B to the initial Unfair Practice Charge).

10. In response to the first reading of the COIN ordinance on May 20, 2014 and Supervisor Moorlach’s e-mail dated June 11, 2014, OCEA sent a request to the County on June 13, 2014, to meet and confer regarding the adoption and implementation of the COIN ordinance. (Attachment 1C to the Initial Unfair Practice Charge).

11. The County failed and refused, and has continued to fail and refuse, to respond to OCEA’s request to meet and confer.

12. On June 24, 2014, the BOS agendized and unanimously passed a modified version of the COIN ordinance and scheduled it for a second reading and adoption at its July 15, 2014 meeting.

13. On July 11, 2014, OCEA filed an initial Unfair Practice Charge against the County based on the County’s refusal to meet and confer regarding the COIN ordinance. (UPC No. LA-CE-934-M).

14. On July 15, 2014, Supervisor Moorlach introduced a second modified version of the COIN ordinance and it was set for a first reading at the July 22, 2014 BOS meeting. OCEA was not informed or aware of the existence or content of the second modified version of COIN until its introduction at the BOS meeting on July 15, 2014.
15. On July 22, 2014, the BOS set the COIN ordinance for a first reading with new amendments and unanimously set the ordinance for second reading and adoption, to occur at its August 5, 2014 meeting. OCEA was not informed or aware of the new amendments until their introduction at the BOS meeting on July 22, 2014.

16. The BOS approved the amended COIN ordinance at its meeting on August 5, 2014. A true and correct copy of the COIN ordinance as adopted by the BOS is attached hereto as Attachment 1D.

17. By the BOS’s adoption of the COIN ordinance, the County unilaterally implemented a change to matters within the scope of representation on the OCEA bargaining units and their represented employees.

18. By refusing to bargain with OCEA regarding the COIN ordinance prior to its adoption after OCEA’s timely request to do so, and subsequently adopting the COIN ordinance, the County unlawfully implemented a unilateral change and committed a per se violation of its obligation to bargain in good faith. The County’s actions and omissions also interfere with OCEA’s statutory right to represent OCEA-bargaining unit members as their exclusive representative and with the rights of those members to be represented by OCEA.

19. The COIN ordinance adopted by the BOS virtually requires immediate public disclosure of all offers, counteroffers, and supposals made by the County and OCEA during contract negotiations. In practice, the County has thus unilaterally required that bargaining sessions be conducted in public, subjecting both OCEA and its represented employees to elements of bias, intimidation, and coercion not present in the bargaining process contemplated by and historically conducted under the MMBA.

20. Under the COIN ordinance, an “independent economic analysis” must be prepared and made public for every offer, counteroffer, and supposal made by the County and OCEA. Like the immediate public disclosure of offers, counteroffers, and supposals, this requirement interferes with and discourages full communication between the County and its employees, in direct conflict with the purpose and intent of the MMBA.
21. In addition to the foregoing, the COIN ordinance unilaterally sets additional ground rules for bargaining, specifically setting release of information and confidentiality standards, including the release of names of those participating, the location where negotiations are held, and “any pertinent facts” regarding negotiations.

22. The cumulative effect of the COIN ordinance is to disrupt and undermine the statutory collective bargaining process, interfere with the legal rights of both the exclusive representative and bargaining unit employees, and unilaterally impose conditions inconsistent with the purpose and intent of the MMBA. In short, the COIN ordinance is a thinly-veiled attempt by the County to significantly preempt state law and authority applicable to the subject of collective bargaining.

REQUESTED REMEDY

Based on the foregoing, OCEA respectfully requests that the Public Employment Relations Board:

1. Determine that the County has violated PERB Regulation 32603 and Government Code Sections 3500, 3502, 3502.1, 3503, 35404.5, 3505, 3505.1, 3506, 3506.5, and 3507;

2. Require the County and its Board of Supervisors, representatives and agents to immediately rescind the COIN ordinance, restore the status quo with respect to all matters within the scope of representation, and make OCEA and members of OCEA-represented bargaining units whole for any monetary losses resulting from the County’s unlawful unilateral change to a matter within the scope of representation;

3. Retain continuing jurisdiction of this charge until such time as PERB shall make a determination that the County has fully complied with PERB's order herein;

4. Award OCEA its attorneys fees and costs related to bringing this charge; and

5. Grant such other and further relief as may be deemed appropriate.
Items 13 and 14 on the OCFA November 20th Board Agenda go hand in hand. The goal of these two agenda items that were placed on this agenda at my request is to increase government transparency by requiring public disclosure of documents and various aspects of labor negotiations. The attached agenda items outline the provisions of both Proposed Rule 16 and COIN. The County of Orange has both of these provisions in place.

I urge you to note that these two items are interrelated as they possess the same goal – to allow the public access and knowledge regarding government proceedings as they relate to MOUs and posting requirements.

In item 14, the COIN item, Mr. Kendig has suggested to, “Defer further action on this matter until after a ruling is issued in the OCEA Unfair Practice Charge filed with the Public Employee Relations Board in connection with the County’s COIN Ordinance.”

In light of the OCEA/County matter, I suggest adhering to Mr. Kendig’s suggestion, and would concur that COIN is brought back to the OCFA Board for a formal vote after the OCEA matter is addressed.

However, I urge the OCFA Board to pass Rule 16 this evening. This rule, as stated in Agenda Item 13, states that:

“Notwithstanding any provision in these Rules to the contrary, no Memorandum of Understanding, or amendment, codicil, side letter, or any other modification to a Memorandum
of Understanding, including any such documents negotiated pursuant to a reopener clause, between the Orange County Fire Authority and any employee bargaining unit (“proposed labor agreement”), shall be heard as an item on a Board agenda until and unless, at the time of the meeting during which the matter is heard by the Board, one week ten days have passed since the later of the following to occur: (1) the Clerk of the Authority has published a copy of the proposed document on the OCFA public website; and (2) the members of the employee bargaining unit have ratified the proposed labor agreement.”

This rule has allowed transparency in government and public access for such documents at the County level. I wholeheartedly support the passage of this rule here at OCFA. I suggest that OCFA edits Rule 16 slightly in order to allow a 10 day period for review by the public – therefore allowing plenty of time to address any questions or issues. This is extremely important at OCFA since the OCFA is dark every other Friday. The County is not dark every other Friday. However, OCFA is shut down for business entirely on alternating Fridays. Having the extra three days will account for this issue as well. Please see my proposed red-line edits to Rule 16 above.

I thank you for your consideration of these two agenda items.
STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ORANGE COUNTY EMPLOYEES
ASSOCIATION, et al.,

Charging Parties,

v.

COUNTY OF ORANGE,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-934-M
CASE NO. LA-CE-935-M
CASE NO. LA-CE-944-M

PROPOSED DECISION
(June 16, 2015)

Appearances: Donald L. Drozd, General Counsel, for the Orange County Employees
Associations; Reich, Adell & Cvitan, by Marianne Reinhold, Attorney, for the Orange County
Attorneys Association; The Myers Law Group, by Adam N. Stern, Attorney, for the
International Union of Operating Engineers Local 501; Liebert Cassidy Whitmore, by
Adrianna E. Guzman, Attorney, for the County of Orange.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

This case alleges that the governing body of a public agency’s adoption of an
ordinance, which mandates the public disclosure of labor negotiation proposals, without
providing notice and an opportunity to meet and confer with the recognized employee
organizations violates the Meyers-Milias-Brown Act (MMBA) and PERB Regulation. The
public agency denied that the contents of the ordinance fell within the scope of representation
and denied any violation of the MMBA or PERB Regulation.¹ The Administrative Law Judge
(ALJ) found that some of the provisions of the ordinance fell within the scope of representation

¹ MMBA is codified at Government Code section 3500 et seq. Unless otherwise
indicated, all statutory references are to the Government Code. PERB Regulations are codified
at California Code of Regulations, title 8, section 31001 et seq.
and that the public agency therefore violated the MMBA and PERB Regulation. As only certain provisions of the ordinance were found to be violative of the MMBA, and the ordinance had a severability clause, the public agency’s governing body was ordered to rescind only those violative provisions of the ordinance.

**PROCEDURAL HISTORY**

On July 11, 2014, the Orange County Employees Association (OCEA) filed an unfair practice charge (charge) against the County of Orange (County) with the Public Employment Relations Board (PERB) which was assigned as PERB Case No. LA-CE-934-M. An amended charge was filed on October 1, 2014.

On July 14, 2014, the Orange County Attorneys Association (OCAA) filed a charge against the County with PERB which was assigned as PERB Case No. LA-CE-935-M. An amended charge was filed on September 2, 2014. Both of these charges alleged that the County violated MMBA section 3507. On November 19, 2014, OCAA withdrew without prejudice an allegation that the County discriminated and retaliated against its members by beginning to process the adoption of the Civic Openness in Negotiations (COIN or Ordinance) ordinance in its amended charge.

On July 28, 2014, the International Union of Operating Engineers Local 501 (IUOE) filed a charge against the County with PERB which was assigned as PERB Case No. LA-CE-944-M.

On November 20, 2014, the PERB Office of the General Counsel issued complaints in all three cases alleging that the County’s adopting of the COIN ordinance and amended COIN ordinance on June 24 and August 5, 2014, respectively, without prior notice to OCEA, OCAA and IUOE, and affording them an opportunity to meet and confer over the decision or effects
of the change in policy, violated MMBA sections 3503, 3505, 3506, and 3506.5, subdivision (a), (b), and (c), and PERB Regulation 32603, subdivision (a), (b), and (c). Additionally, one of the complaints alleged that the County’s refusal to meet and confer with IUOE violated the same MMBA sections and PERB Regulations.

On December 15, 2014, the County filed its answers to all three complaints. While the answers admitted to the three charging parties being the exclusive representatives of an appropriate unit of employees under PERB Regulation 32016, subdivision (b), and the County being a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a), the County denied that the COIN ordinance was adopted on or about June 24, 2014, and denied any violation of the MMBA or PERB Regulation.

On January 29, 2015, the parties met at an informal conference, but the matter was not resolved. At the informal conference, all parties agreed that the three cases should be consolidated for formal hearing.

On March 20, 2015, OCEA filed a request for injunctive relief. On March 27, 2015, the PERB Board denied the request, yet directed that the administrative proceedings be expedited.

On April 17, 2015, the parties submitted a stipulated record, containing stipulated facts and exhibits which was to be accepted in lieu of conducting a formal hearing. (PERB Regulation 32207.) The parties submitted briefs on May 1, 2015.

In OCAA’s brief, it requested that the ALJ take official/administrative notice of the County’s Employee Relations Resolution (ERR) which it attached to its brief. The County did not object to the request and therefore the ALJ grants the request and hereby takes official/administrative notice of the ERR.
Additionally, OCAA requested that its complaint be amended to include that the County also violated its consultation in good faith obligation as set forth in MMBA section 3507, subdivision (a). Specifically, OCAA alleged that the County’s adoption of the COIN ordinance was in fact an adoption of a rule and regulation set forth in MMBA section 3507 subd. (a)(5) “additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment,” and (9) “any other matters that are necessary to carry out the purposes of this chapter,” without consulting in good faith with OCAA. As the motion to amend was made in the closing brief and after the stipulated record was submitted, it was not made before or during the hearing as set forth in PERB Regulations 32647 and 32648, and, as such, the motion to amend is denied. However, later in the proposed decision, the ALJ will resolve the allegation under the theory that it was an unalleged violation.

FINDINGS OF FACT

The OCEA, OCAA, and IUOE are all exclusive representatives of an appropriate unit of employees within the meaning of PERB Regulation 32016, subdivision (b), and therefore are recognized employee organizations within the meaning of MMBA 3501, subdivision (b). The County is a public agency within the meaning of MMBA section 3501, subdivision (c) and PERB Regulation 32016 subdivision (a).

The OCEA represents multiple County bargaining units including the General Unit, Health Care Professional Unit, Community Services Unit, Office Services Unit, Sheriff’s Special Officer and Deputy Coroner Unit, Supervising Management Unit, Probation Services Unit, and Probation Supervisory Management Unit. Nick Berardino (Berardino) is the OCEA General Manager and Jennifer Muir (Muir) is the OCEA Assistant General Manager.
The OCAA represents the Attorney Unit. Larry Yellin (Yellin) and Mena Guirguis (Guirguis) are the President and Vice President of the OCAA, respectively. Mark McDorman (McDorman) is a consultant hired to assist OCAA in labor relations matters. OCAA also has a legal representative, Marianne Reinhold (Reinhold), who represents OCAA on legal and labor relations issues.

The IUOE represents the Craft and Plant Engineer Unit. Blair Brim (Brim) is the IUOE business agent assigned to represent this County unit.

The Orange County Managers Association (OCMA) is the recognized employee organization of the County’s Administrative Management Unit.

The County has a five-member Board of Supervisors: John Moorlach (Supervisor Moorlach), Shawn Nelson, Patricia Bates (Supervisor Bates), Janet Nguyen, and Todd Spitzer. David Mansdoerfer (Mansdoerfer) is the Deputy Chief of Staff of Supervisor Moorlach.

Susan Novak (Novak) is the Clerk of the Board of Supervisors. The County Chief Executive Officer (CEO) is Michael Giancola (Giancola) and the County Counsel is Nicholas Chrisos (Chrisos). The County’s Chief of Human Resources is Steve Danley (Danley). The County’s Auditor-Controller is an elected public official.

OCEA’s Methods of Communication with its Membership

The OCEA has a public website, a Facebook page, and a quarterly magazine.² In the past, OCEA has reported in all three media its progress (or lack of progress) in its successor Memorandum of Understanding (MOU) negotiations. These reports have included: the names of the members of the OCEA bargaining team; the names of the members of the County bargaining teams; dates, times, and locations of bargaining sessions; presentations made by the

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² The quarterly magazine is also accessible through OCEA’s public website.
County to the OCEA bargaining team about revenue reduction and proposed resolutions for the reduction in revenue; public comments made by Berardino as he addressed the Board of Supervisors about negotiations; OCEA’s recommendation that its members reject the County’s last, best, and final offer (LBFO); explanation of the mediation and fact-finding process; criticisms of the County for hiring an outside negotiator; the mediator’s proposal during mediation compared to the County’s LBFO; OCEA’s recommendation that it members approve/ratify the mediator’s proposal; and continued requests that the members stay united and get involved with OCEA.

May 20, 2014 Board of Supervisors Meeting

On May 14, 2014, at 9:30 a.m., the County posted its’ agenda for the May 20, 2014 Board of Supervisors meeting which was to begin at 9:30 a.m. The agenda included Item 64, Supervisor Moorlach’s item, that the Board of Supervisors consider the first reading of the proposed COIN ordinance. The agenda was the first notice that OCEA, OCAA, and IUOE had that the Board of Supervisors would be considering the proposed COIN ordinance.

The proposed ordinance was to apply to MOU negotiations with the recognized employee organizations and the stated purpose of the ordinance was to bring “transparency and openness” to labor negotiations and keep the public informed of these negotiations. The proposed ordinance had numerous provisions which included in part: the principal County negotiator was to be independent (not a County employee); the County Auditor-Controller would conduct a study and prepare a report as to the fiscal impact of each term and condition of employment offered to the recognized employee organization(s) which would be made available to the Board of Supervisors and the public at a period of time before consideration of this opening proposal was to be presented to the recognized employee organization; the
Auditor-Controller would regularly update its report to itemize the costs which may result from the acceptance of each meet and confer proposal;\(^3\) the Board of Supervisors would report out of its closed session all prior offers and counteroffers made by the County and/or the recognized employee organization; and, the proposed MOU to be considered for adoption by the Board of Supervisors would be posted on the County website and would be adopted only after a minimum of two Board meetings where the public had an opportunity to review and comment on it.

At the May 20, 2014 Board of Supervisors meeting, Berardino, Brim, and Guirguis all addressed the Board. Berardino objected that OCEA had not been provided notice and an opportunity to study the proposed ordinance; Brim claimed that IUOE had been “ambushed” and that COIN would “significantly interfere” with the bargaining process; and Guirguis stated that the County needed to bargain with OCAA before it adopted the ordinance. The Board of Supervisors then decided to continue the first reading to the June 17, 2014 Board of Supervisors meeting.

Supplemental Information from Supervisor Moorlach and Responses from the Associations

On June 3, 2014, Supervisor Moorlach issued a memo providing “supplemental information” about COIN to his fellow board members and CEO Giancola and County Counsel Chrisos in order to address all of the expressed concerns received by their offices and to provide further clarification. Specifically, Supervisor Moorlach clarified that the proposed ordinance would apply only to labor negotiations which began after the adoption of COIN and

\(^3\) The proposed ordinance set forth a spreadsheet format as to what would be included in the report, including changes in the unfunded liabilities of retiree pension and retiree medical.
would not apply to “supposals.” Additionally, Supervisor Moorlach asserted that since COIN did not impact wages, hours, or terms and conditions of employment, it did not impact the negotiations of ground rules and, therefore, the County was not required to meet and confer over the proposed ordinance before the Board of Supervisors adopted it.5

On June 10, 2014, Supervisor Moorlach provided another memo to his fellow board members and CEO Giancola and County Counsel Chrisos in order to address the expressed concerns received by his office. As a result, Supervisor Moorlach intended to clarify the language of the proposed ordinance by requiring the County to disclose to the Board of Supervisors and to the public any offers/counteroffers made by the County or recognized employee organization within 24 hours of the offer/counteroffer being proposed.

On June 11, 2014, Supervisor Moorlach’s office provided these two memos to representatives of OCEA and OCAA. Both recognized employee organizations were invited to sit down and discuss these with the Supervisor’s office staff.

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4 Supervisor Moorlach defined a “supposal” as a hypothetical scenario designed to gauge a party’s willingness to alter its position in negotiations.

5 Supervisor Moorlach proposed adding a section to the proposed ordinance which stated that it would not prevent the negotiation of ground rules. The new section did not include confidentiality of the ongoing negotiations as a ground rule of what could be negotiated. The OCMA and the County have negotiated ground rules prior to the consideration of COIN, which included the confidentiality of the ongoing negotiations. That ground rule provided:

9. The content of the proposals that have been exchanged by the parties at the bargaining table shall be considered confidential and not disseminated publicly other than to the membership of OCMA by either party unless or until an impasse is declared other than communications by OCMA to the membership of OCMA. Nothing in these ground rules is intended to prevent a party from pursuing in the appropriate forum unfair practice allegation(s) and making use of information regarding the negotiations of the proceedings.
On June 13, 2014, Berardino wrote the County’s Chief of Human Resources Danley and stated his disagreement over Supervisor Moorlach’s contention that the proposed ordinance did not impact wages, hours, and terms and conditions of employment and did not impact the negotiations of ground rules in current/future negotiations. On the same date, OCAA attorney Reinhold sent Danley a similar letter.

**June 17, 2014 Board of Supervisors Meeting**

On June 17, 2014, the Board of Supervisors met to again consider a first reading of the proposed COIN ordinance. The clarifications made by Supervisor Moorlach had been incorporated into the proposed ordinance. The matter was continued to June 24, 2014, due to Supervisor Bates’ absence.

**June 20, 2014 Letter from Brim**

On June 20, 2014, Brim wrote Danley and stated his disagreement over Supervisor Moorlach’s contention that the proposed ordinance did not impact wages, hours, and terms and conditions of employment and did not impact the negotiations of ground rules in current/future negotiations. Brim also demanded to meet and confer over the proposed ordinance.

**June 24, 2014 Board of Supervisors Meeting**

On June 24, 2014, the Board of Supervisors met again to consider a first reading of the proposed COIN ordinance. After hearing some public comment, the Board of Supervisors scheduled a second reading and adoption of the proposed COIN ordinance on July 15, 2014. Changes were made to the proposed ordinances.

**July 9, 2014 Letter from Danley to OCAA**

On July 9, 2014, Danley responded to OCAA’s demand to negotiate the proposed COIN ordinance. In summary, Danley argued that the ordinance did not have a “significant
and adverse” impact on wages, hours or working conditions of bargaining unit employees and therefore COIN did not concern a mandatory subject of bargaining. Danley then denied that the County was obligated to meet and confer with OCAA. On July 11, 2014, both OCEA and OCAA filed unfair practice charges with PERB.

**July 15, 2014 Board of Supervisors Meeting**

On July 15, 2014, the Board of Supervisors met to consider the second reading and adoption of the proposed COIN ordinance. OCEA Assistant General Counsel Muir spoke during the public comment period that OCEA had filed an unfair practice charge with PERB. The Board of Supervisors considered an amendment, then continued the first reading of the amended proposed COIN to July 22, 2014.

On July 17 and 21, 2014, Danley spoke with Berardino and told him that because the proposed COIN ordinance did not involve matters subject to an obligation to meet and confer, the County was not required to nor did it intend to negotiate COIN with OCEA.

**July 22, 2014 Board of Supervisors Meeting**

On July 22, 2014, the Board of Supervisors met over the first reading of the amended proposed COIN ordinance. During the public comment period, OCEA Assistant General Counsel Muir argued that COIN was unlawful and reminded the Board of Supervisors that OCEA had filed an unfair practice charge. The Board of Supervisors then approved the first reading of the proposed amended COIN ordinance and continued the second reading and adoption until the Board of Supervisors August 5, 2014 meeting.

**OCAA Letter to Danley**

On August 1, 2014, OCAA attorney Reinhold wrote Danley. After contending that COIN fell within the scope of representation pursuant to MMBA section 3504; modified the
ERR in violation of MMBA section 3507; and did not provide reasonable written notice to
OCAA and an opportunity to meet and confer with the governing body before adopting the
ordinance in violation of MMBA section 3504.5, Reinhold explained:

The adoption of the COIN will have serious impacts on the
timing and conduct of negotiations between the County and
OCAA going forward and, as the Board itself has acknowledged,
at a minimum it will result in delays in the bargaining process.

Reinhold closed the letter by demanding to bargain over the COIN ordinance.

August 5, 2014 Board of Supervisors Meeting
On August 5, 2014, the Board of Supervisors met and approved the COIN ordinance
(Section 1-3-21) which provided, in summary, the following key provisions:

- **Prospective Application:** The ordinance shall not apply to
  labor contract negotiations which had already commenced
  prior to the adoption of the ordinance. (Section 1-3-21(a)(1).)

- **Independent Principal Negotiator:** The County’s principal
  negotiator shall not be an employee of the County. The use of
  the principal negotiator may only be waived by a majority
  vote of the Board of Supervisors. (Section 1-3-21(a)(2).)

- **Description of Negotiable Ground Rules:** The ordinance
  shall not prevent the negotiation of ground rules to any
  MMBA labor contract negotiations. Consistent with the
  MMBA, the parties may, but are not required to, negotiate
  preliminary procedural matters governing the conduct of
  negotiations, including, but not limited to, the time and place
  of bargaining, the order of issues to be discussed, the signing
  of tentative agreements, the requirement of package
  bargaining, or the use of supposals. (Section 1-3-21(a)(3).)

- **Independent Economic Analysis—Opening Proposal:** The
  County Auditor-Controller shall prepare an independent
  economic analysis or report which describes and summarizes
  the fiscal costs to the County of benefits and pay currently
  provided to bargaining unit members in comparison to the
  costs of each term and condition offered in negotiations or set
  forth as a supposal in negotiations. The report will itemize
  the annual and cumulative costs which would result in the
adoption or acceptance of any initial meet and confer proposal. (Section 1-3-21(b)(1).)

• **Public Disclosure of Economic Analysis of Opening Proposal—30 Days Before Consideration by the Board of Supervisors:**
  The report shall be made available for review by the Board of Supervisors and the public at least 30 days before consideration by the Board of Supervisors of an opening proposal to be presented to a recognized employee organization of an amended, extended, successor or original MOU. (Section 1-3-21(b)(2).)

• **Independent Economic Analysis—Ongoing proposals:**
  The County Auditor-Controller shall prepare an updated report which would itemize annual and cumulative costs which would result in the adoption or acceptance of each meet and confer proposal from the recognized employee organization or County. Such updates shall compare the compensation elements with the prior year as well as to prior proposals made. Reports and updates shall include best estimates as to the change from currently computed pension unfunded actuarial accrued liability and retiree medical unfunded actuarial accrued liability.\(^6\) (Section 1-3-21(b)(3).)

• **Reporting Out of Closed Session-Prior Formal Offers, Counteroffers and Supposals:**
  The Board of Supervisors shall timely report out from closed session any and all prior formal offers, formal counteroffers and supposals made by either the County or the recognized employee organization which were communicated to the County during closed session. Such report shall also include the release of the names of persons in attendance at, and locations of, and any pertinent facts regarding the negotiations sessions. (Section 1-3-21(c)(2) and (3).)

• **Duty to Advise During Closed Session:**
  The Board of Supervisors representatives have a duty to advise the Board of Supervisors during any closed session of offers, counteroffers, information provided, statements of position by recognized representatives.

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\(^6\) This proposal standing alone does not have a provision regarding disclosure to the public.
employee organization and County representatives since the last closed session. (Section 1-3-21(c)(4).)

- **Disclosure of all Offers, Counteroffers and Supposals within 24 hours to the Board of Supervisors and the Public:** All offers, counteroffers and supposals made by either the County or the recognized employee organization(s) shall be disclosed to the Board and the public within 24 hours of the making of such proposal. (Section 1-3-21(c)(6).)

- **Adoption of Agreement Only After a Minimum of Two Board Meetings where Public has opportunity to Review and Comment:** The adoption of an agreement between the County and the recognized employee organization shall only take place after the matter has been heard at a minimum of two board meetings and the public has had an opportunity to review and comment on the matter. The agreement shall be posted on the County website along with the final report and updates made by the County Auditor-Controller. (Section 1-3-21(d).)

- **Severability Clause:** If any provision or clause of the ordinance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity will not affect the other provisions or clauses. (Section 1-3-21(f).)

(Emphasis added.)

**ISSUES**

1) Did the County Board of Supervisors change a matter within the scope of representation without providing notice and an opportunity to meet and confer with OCEA, OCAA, and IUOE by adopting COIN on August 5, 2014?

2) Did the County Board of Supervisors refuse to bargain over the proposed ordinance with OCEA, OCAA, and IUOE in violation of the MMBA?

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7 It should be noted that even in light of these board meetings, the governing board of the public agency must still comply with MMBA section 3505.1, by voting to accept or reject a tentative agreement within 30 days of the date it is first considered at a duly noticed meeting.
3) Should OCAA’s allegation that the County violated MMBA section 3507, subdivision (a), by adopting COIN be considered as an unalleged violation? If so, was there a violation?

CONCLUSIONS OF LAW

Statutory Provisions

MMBA provides in pertinent part the following sections:

3500 (a) Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies that establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies that provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed.

[¶...¶]

3503 Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. . . .

3504 The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

3504.5 (a) Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within
the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions.

3505 The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

“Meet and confer in good faith” means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

3505.1 If a tentative agreement is reached by the authorized representatives of the public agency and a recognized employee organization or recognized employee organizations, the governing body shall vote to accept or reject the tentative agreement within 30 days of the date it is first considered at a duly noticed public meeting. A decision by the governing body to reject the tentative agreement shall not bar the filing of a charge of unfair practice for failure to meet and confer in good faith. If the governing body adopts the tentative agreement, the parties shall jointly prepare a written memorandum of understanding.

[^...^]

3506 Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.
3506.5 A public agency shall not do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations the rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with a recognized employee organization.

(Emphasis added.)

Government Code section 54950 provides:

In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Government Code section 54957.6 provides:

(a) Notwithstanding any other provision of law, a legislative body of a local agency may hold closed sessions with the local agency’s designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily provided scope of representation.

(Emphasis added.)
Unlawful Unilateral Change

To establish an unlawful unilateral change, the charging party must prove that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without providing the exclusive representative notice or an opportunity to bargain over the change; and, (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (County of Santa Clara (2013) PERB Decision No. 2321-M, p. 18-19; Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196; see also Vernon Fire Fighters, Local 2312 v. City of Vernon (1980) 107 Cal.App.3d 802, pp. 822-823.)

Since this case involves an ordinance, it is undisputed that the public agency’s governing board took action to pass the ordinance, that the action was taken without giving the recognized employee organizations an opportunity to bargain over the change, or that the ordinance will have a generalized or continuing impact on bargaining. Rather, the primary contention is whether the ordinance concerns a matter within the scope of representation. The County contends that the provisions of the ordinance fall outside of the scope of representation

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8 While the County may argue that its ordinance did not constitute a change from what OCEA’s conduct had been in the past during bargaining, this is the first time that a policy of public disclosure would be cemented in perpetuity, which constitutes a change from its prior bargaining status quo.
and OCEA, OCAC, and IUOE contend that some of the provisions fall within the scope of representation.⁹

1. **MMBA and the Scope of Representation**

MMBA section 3504 defines the scope of representation as including, "wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." A three-part inquiry is employed to determine whether an employer’s implementation of a decision purportedly within its managerial prerogative falls within the scope of representation under MMBA section 3504. *(City of Alhambra (2010) PERB Decision No. 2139-M.)*

First, it must be determined whether the management action had a significant and adverse effect on the wages, hours, or working conditions of the employees in the bargaining unit. If not, then there is no duty to meet and confer. Second, assuming a significant and adverse effect is shown, it must be determined whether the action flowed from the implementation of a fundamental managerial or policy decision. If it did not, then the duty to meet and confer applies. Third, if both factors are present—i.e., the implementation of a fundamental managerial or policy decision resulted in a significant and adverse effect on the wages, hours, or working conditions of the employees in the bargaining unit—then a balancing test is used. The action is within the scope of representation only if the employer’s need for unencumbered decision-making in managing its operations is outweighed by the benefit to

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⁹ None of the three charging parties contend that Section 1-3-21(a) falls within the scope of representation, other than the noticeable omission of being able to negotiate the confidentiality of the ongoing negotiations found in Section 1-3-21(a)(3). The issues which have not been challenged by the three charging parties as to the scope of representation therefore need not be addressed.

2. **The Scope of Representation and Ground Rules of Bargaining**

In early PERB precedent, PERB discussed the role of ground rules in the negotiations process. Specifically, in *Stockton Unified School District* (1980) PERB Decision No. 143, p. 23, PERB stated:

> The Board finds, as did the hearing officer, that the District refused to negotiate any substantive contract issues, although requested to do so by the Association, until a written agreement on ground rules was signed. . . . The NLRB has held that parties must bargain collectively about the preliminary arrangements for negotiations in the same manner they must bargain about substantive terms or conditions of employment. The NLRB finds “such preliminary matters are just as much a part of the process of collective bargaining as negotiations over wages, hours, etc.”

(Emphasis added, citations omitted.)

Later, in discussing the negotiation of grounds rules, specifically “release time,” PERB stated in *Anaheim Union High School District* (1981) PERB Decision No. 177 (Anaheim), pp. 8-12:

> It is essential to the negotiating scheme of things that neither side be afforded, by law, dominance over the process, thus negating the concept of mutuality and good faith. Allowing the employer to unilaterally dictate the matter of released time, including the number of employee negotiators, amounts of compensation and scheduling of sessions, would give to the employer precisely that objectionable form of dominance. . . .

Each negotiation, from presentation of initial proposals to final settlement, has a tempo and rhythm of its own. Typically, ground rules are first established – the time and place for bargaining to start, the order of issues to be discussed, the final settlement
conditions that may be imposed, questions of ratification and approval of school officials, and a variety of similar procedural matters. . . . To permit the employer to decide at the outset how many hours or days will finally be required and at what times negotiations take place and over what duration per session is to apply an inherently unrealistic formula to these arrangements and, by definition, to establish an unreasonably inflexible and mechanistic policy.

[¶ . . . ¶]

[T]here is no legal basis for distinguishing negotiations on ground rules from negotiations on substantive issues. The duty to bargain means just that. The employer's position on procedural issues, as its position on wages, hours or terms and conditions of employment, is to be expressed through its own proposals and counterproposals.

(Emphasis added.)

PERB's assertion as to the bilateral nature of the negotiations over ground rules and it being "equivalent" to a mandatory subject of bargaining has been repeated in subsequent PERB decisions. (Compton Community College District (1989) PERB Decision No. 728, adopted proposed decision, p. 56, (Compton); Southwestern Community College District (1998) PERB Decision No. 1282, adopted warning letter, p. 3 (Southwestern); Empire Union School District (2004) PERB Decision No. 1650, adopted proposed decision, p. 44; Trustees of the California State University (2006) PERB Decision No. 1842-H, p. 10.). Additionally, neither party has the authority to dictate the setting in which these negotiations may occur. (State of California (Board of Equalization) (1997) PERB Decision No. 1235-S, p. 3; Trustees of the California State University, supra, PERB Decision No. 1842-H, p. 10.) This prohibition from unilateral dictation as to the setting of the negotiations also extends to the scheduling of the negotiations. (Sierra Joint Community College District (1981) PERB Decision No. 179, p. 6.)
In describing the dynamic nature of negotiating ground rules, PERB provided in

*Gonzales Union High School District* (1985) PERB Decision No. 480, adopted ALJ proposed
decision, p. 47-48:

While the Association’s proposed ground rules were significantly
different than those used previously on two points, no conclusion
adverse to the Association can be drawn from this difference.
The PERB has held that negotiating “ground rules” are[sic] the
equivalent to a mandatory subject of bargaining. *Stockton
Thus, an employee organization (or an employer) is free to
propose any ground rules for negotiations which it believes to be
appropriate or helpful, and is not required to agree to the other
party’s position on any specific issue, or to agree to any specific
compromise.

(Emphasis added.)

Additionally, as stated in *City of San Jose* (2013) PERB Decision No. 2341-M, p. 26:

Parties to negotiations may propose, and *mutually agree* to,
ground rules or other arrangements governing the time and place
of their negotiations, including proposals whereby some topics
will be discussed before others. (*Southwestern Community
College District* (1998) PERB Decision No. 1282; *Compton
Community College District* (1989) PERB Decision No. 728.)

(Italics included in quotation.)

One of ground rules that is typically discussed during labor negotiations is the
confidentiality of the ongoing negotiations and some restriction(s) from or limitation(s) upon
disclosure to those outside of the circle of attendees at the bargaining table. (*Muroc Unified
PERB Decision No. 134, pp. 7 and 15; *King City Joint Union High School District* (2005)
PERB Decision No. 1777, adopted proposed decision, p. 5.) Indeed, the County and OCMA
had negotiated a confidentiality ground rule in the past.

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While an MMBA case has cited with approval EERA ground rules cases (see e.g., *City of San Jose, supra*, PERB Decision No. 2341-M, p. 26), the issue of whether ground rules are the equivalent to a mandatory subject of bargaining has not yet been determined under the *City of Alhambra* scope of representation test. While the ground rules used during negotiations do not, on their face, directly affect employees’ wages, hours, or working conditions, the application of ground rules through the bargaining process would have a significant and adverse effect on wages, hours and working conditions. If a public agency is able to exercise overall control over the ground rules of bargaining, it can short circuit and frustrate bargaining to the point it ceases to be a bilateral process. For instance, one can only imagine the one-sided result of bargaining when issues of release time, the number of union negotiators to be released,\(^{10}\) scheduling and length of negotiating sessions, order of discussion of proposals, length and frequency of caucuses, package proposals, and the confidentiality/non-confidentiality of proposals, are decided and controlled by the public agency. The negotiations would no longer become arms-length and the recognized employee organization would be forced to try to get the best agreement they could under the rules and time frames imposed by the public agency.

As the first inquiry of the test has been satisfied, the second inquiry is to determine whether the ground rules flow from a fundamental managerial or policy decision. As these ground rules affect the actual bargaining itself, a bilateral process, it does not flow from a fundamental managerial or policy decision. Therefore, a public agency would have a duty to

\(^{10}\) MMBA section 3505.3, subdivision (a), provides for a reasonable number of public agency representatives to have a reasonable amount of time off without loss of compensation for purposes of meeting and conferring with the public agency regarding matters within the scope of representation.
meet and confer over the ground rules as has been held in other labor relations statutes under
PERB’s jurisdiction where the ground rules have been determined to be the equivalent of a
mandatory subject of bargaining. However, even though grounds rules are equivalent to a
mandatory subject of bargaining and must be negotiated, one party’s insistence as to
bargaining ground rules before negotiating substantive issues can be an indicator of surface
bargaining. (San Ysidro School District, supra, PERB Decision No. 134; City of San Jose,
supra, PERB Decision No. 2341-M, pp. 27-28.)

a. Independent Economic Analysis-Opening Proposal (Section 1-3-21(b)(1)
and (2)).

Section 1-3-21(b)(1) and (2) of the COIN ordinance, when viewed together, task the
County Auditor-Controller with providing a report detailing the fiscal costs of its opening
proposal to the Board of Supervisors and the public for review at least 30 days before
consideration by the Board of an opening proposal to be presented by the County to the
recognized employee organization. Such an opening proposal provision, commonly referred to
as a “sunshine” provision, is found in other labor relations statutes such as the Educational
Employment Relations Act (EERA), Government Code section 3547; the Ralph C. Dills Act,
Government Code section 3523; the Higher Education Employer-Employee Relations Act
(HEERA), Government Code section 3595; and the Los Angeles County Metropolitan
Transportation Authority Transit Employer-Employee Relations Act (TEERA), Public Utilities
Code section 99569.

In these sunshine provisions in other labor relations statutes, both the employer and the
recognized employee organization are required to present their initial meet and confer
proposals at a public meeting and no meeting and conferring is to take place for a period of
time while the public has an opportunity to review and comment on these proposals. EERA,
HEERA, and TEERA allow for a “reasonable” period of time to transpire which can be adopted as a regulation by the school board/board for which no negotiations may occur. The Dills Act allows for a minimum of a seven-day period before bargaining may commence.

First of all, setting aside for the moment the 30-day public review period, the existence of a sunshine provision in numerous labor relations statutes demonstrates that public notice of opening proposals does not inherently conflict with the parties’ obligation to meet and confer in good faith in a public sector setting. It cannot be found that such a provision, standing alone without any reference to the 30-day non-negotiations time period, would lend to the domination of the bargaining process or unduly delay negotiations to the point that it negates the concept of mutuality and good faith. (Anaheim, supra, PERB Decision No. 177, pp. 8-11.)

The provisions regarding the County Auditor-Controller likewise do not appear to exert any dominance or control over the bargaining process. Rather, provision controls only the County’s own internal process for making and reviewing proposals. Additionally, it is the public agency’s fundamental managerial prerogative to decide whether its’ opening proposal should be costed and which department/office within the County should cost its opening proposal. Such a decision on its face would not have a significant and adverse effect upon the opening of negotiations on the face of the ordinance, as it is not clear that the County and the Auditor-Controller could not cooperate and these duties could not be performed in a coordinated and timely manner, especially as this is the opening proposal.11 The agency’s need

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11 While charging parties may speculate as to the amount of time that it would take for another agency in the County to provide such costing and that it would take longer if the costing was performed by another County department/office under the County Executive/Administrative Officer’s direct control, such conclusions are better left to a case-by-case analysis as to surface bargaining and dilatory tactics rather than facially challenging the validity of the ordinance. Likewise, the costing of each proposal during ongoing negotiations
for unencumbered decision-making in managing its internal negotiations infrastructure exceeds any benefit to employee-employer relations which would come about from bargaining over this issue. (City of Alhambra, supra, PERB Decision No. 2139-M; see also Westminster School District (1982) PERB Decision No. 277, p. 7 [holding that both parties have the unqualified right to select who will represent their interests in negotiations].).

The MMBA, the Dills Act, the Trial Court Employment Protection and Governance Act (Trial Court Act), Trial Court Interpreter Employment and Labor Relations Act (TCIELRA), and the In-Home Supportive Services Employer-Employee Relations Act (IHSSEERA) all require that for the parties to “meet and confer in good faith” they have a “mutual obligation to meet and confer promptly upon request by either party . . .” (Emphasis added, MMBA section 3505, Dills Act section 3517, Trial Court Act section 71601, subdivision (e), TCIELRA section 71801, subdivision (e), and IHSSEERA section 110003, subdivision (h), respectively.) 12 The larger question is whether the 30-day non-negotiations period portion in the COIN ordinance (Section 1-3-21(b)(2)) violates the duty found in MMBA section 3505 for the parties to meet and confer “promptly” upon request by either party. 13 The Dills Act, which also has an obligation to meet “promptly,” provides for a seven-day non-negotiations period

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12 While HEERA and TEERA do not include the “promptly” adverb to its obligation, these statutes include the “mutual obligation” to meet and confer at “reasonable times.” (HEERA section 3562, subdivision (m), and TEERA section 99560.1, subdivision (l).) Regardless of the qualifier to the meet and confer obligation in the various labor relations statutes, under the MMBA, both the County and the charging parties have a mutual obligations to meet and confer “promptly” upon the request of either party.

13 See Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist. (1975) 45 Cal.App.3d 116, 118 [duty to meet promptly is absolute].
and other labor relations statutes such as EERA, HEERA and TEERA, which do not have a “promptly” requirement, allow for a “reasonable” period of time adopted by a board. In light of this pronounced disparity between a seven-day and a 30-day non-negotiations period, a 30-day non-negotiations period is inconsistent and contrary to the MMBA’s obligation that the parties meet and confer “promptly” upon the written request by either party.

As stated earlier in this proposed decision, ground rules have been found to be equivalent to a mandatory subject of bargaining. The MMBA’s requirement to meet “promptly” upon request creates an even greater impetus for the parties to decide together how soon the parties should meet after an opening proposal is sunshined. Such bilateral negotiation of a reasonable non-negotiations period satisfying the “promptly” requirement would be an example where the benefit to employee-employer relations of bargaining over this non-negotiations time period would outweigh the employer’s need for unencumbered decision-making. (City of Alhambra, supra, PERB Decision No. 2139-M.) Such negotiations would eliminate disputes in the future as to when bargaining should commence. Therefore, the non-negotiations time period after the sunshine of an opening proposal falls within the scope of representation.

The County should have negotiated over this non-negotiations time period as it therefore fell within the scope of representation. Therefore, it is found that the County enacted an unlawful unilateral change within and therefore violated MMBA sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c).
b. Reporting out of Closed Session and Disclosure of Proposal(s) to the Board of Supervisors and Public within 24 hours of the Proposal being Made (Section 1-3-21(c)(2), (3), and (6)).

The contention of the three charging parties is that Section 1-3-21(c)(2), (3), and (6) violates the bargaining responsibility of the County to bargain over a ground rule of confidentiality. These provisions specifically require the Board of Supervisors to report out of closed session and the County to disclose within 24 hours of any bargaining proposal being made by either party. As stated earlier, bargaining over ground rules, including over the confidentiality of the negotiations, is the equivalent to a mandatory subject of bargaining. (Compton, supra, PERB Decision No. 728; Southwestern supra, PERB Decision No. 1282; Muroc, supra, PERB Decision No. 80, p. 3.) For the Board of Supervisors to declare that it will publicly disclose all bargaining proposals during negotiations is to exercise dominance over this ground rule area (confidentiality/non-confidentiality) and to unilaterally dictate the setting in which negotiations may occur. (See Anaheim, supra, PERB Decision No. 177, pp. 8-11.) While the County need not agree to proposed ground rule of confidentiality of the negotiations, it must allow for a recognized employee organization to propose such a ground rule and to fully consider the proposal in good faith, just like it would fully consider a proposal over a substantive bargaining proposal within the scope of representation. (Indio Police Command Unit Assn. v. City of Indio (2014) 230 Cal.App.4th 521, 536.) The duty to meet and confer in good faith obligates both parties to continue to meet and confer “for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement . . .” (MMBA, § 3505.)

By the Board of Supervisors adopting Section 1-3-21(c)(2), (3), and (6) of the ordinance, it exercised dominance in this area of the ground rules without any consideration of
other confidentiality proposals of ground rules, especially as those types of ground rules are
the equivalent of a mandatory subject of bargaining and therefore within the scope of
representation. As such, the Board of Supervisors implemented an unlawful unilateral change
in violation of MMBA sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c),
and PERB Regulation 32603, subdivisions (a), (b), and (c).\textsuperscript{14}

c. Adoption of the Tentative Agreement After a Minimum of Two Board of
Supervisors Meetings (Section 1-3-21(d)).

Section 1-3-21(d) provides that the adoption of a tentative agreement can only occur
after the public has had an opportunity to review and comment about the terms of the tentative
agreement at a minimum of two board meetings. As it is undisputed that approval of the
tentative agreement must be publicly approved by the Board of Supervisors, it is concluded
that public disclosure of the terms of that tentative agreement has a significant and adverse
effect on the bargaining of the terms and conditions of employment as the parties have already
come to a tentative agreement.\textsuperscript{15} The requirement for the scheduling of the two board
meetings, however, must be read in context with the Board of Supervisor's compliance with
MMBA section 3505.1, which provides that a governing body shall vote to adopt or reject a
tentative agreement within 30 days of the date it first considered a tentative agreement at a
duly noticed meeting. It is possible that both of the board meetings referenced in
Section 1-3-21(d) can be scheduled within this 30 day period prescribed in MMBA

\textsuperscript{14} The complaint did not charge the County whether the public disclosure of ongoing
negotiations provision could ever be included in a public agency's ordinance. For example,
even if the County bargained with the charging parties over this proposed ordinance provision,
could the County enact such an ordinance, which would cement a ground rule in perpetuity
rather than allow the parties to negotiate ground rules during the beginning of each successor
MOU negotiations. This issue may need to be resolved another day.

\textsuperscript{15} Such disclosure is also consistent with EERA section 3547.5, subdivision (a).
section 3505.1. MMBA section 3505.1 appears to give the governing board the freedom to act upon the tentative agreement any time within the proscribed period and Section 1-3-21(d) does not facially conflict with such requirements. Therefore, the Board of Supervisors’ adoption of this provision of COIN is not found to violate MMBA sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c).

Refusal to Bargain Allegation

MMBA section 3504.5 provides in pertinent part:

[T]he governing body of a public agency, . . . shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body . . . and shall give the recognized employee organization the opportunity to meet with the governing body . . . .

(Emphasis added.)

It is uncontested that Danley uncategorically refused OCEA’s, OCAA’s, and IUOE’s demands to negotiate the proposed ordinance as the County believed the proposed ordinance to concern matters which fell outside the scope of negotiations.

In County of San Luis Obispo (2015) PERB Decision No. 2427-M, PERB summarized its precedent concerning a parties’ refusal to bargain due to the negotiability of a subject:

When a party to negotiations refuses to discuss a particular subject or proposal based on the belief that it encompasses matters outside the scope of mandatory subjects, the lawfulness of that refusal turns on the whether the subject or proposal is negotiable. [Citations omitted.] Because the obligation to meet and confer promptly upon request regarding mandatory subjects of bargaining is absolute [Citations omitted.], there is no “good faith doubt,” “mistake of law” or similar defense available when a party has refused outright to meet or negotiate, because it denies or entertains doubt as to the negotiability of a proposal. [Citations omitted.] If the matter is within scope, then the refusal to discuss it is a per se violation of the duty to bargain and, unlike
a surface bargaining allegation, no further inquiry into the respondent’s subjective motive is necessary. [Citations omitted.]

(Ibid., p. 26.)

Refusal to bargain allegations have also been applied to the negotiation of ground rules and whether the ground rules fell within the scope of representation. In *Sierra Joint Community College District* (1981) PERB Decision No. 179, PERB discussed the ground rule of release time and an employer’s refusal to negotiate over that ground rule because it contended that it did not fall within the scope of representation. PERB provided:

The hearing officer’s conclusion that successful negotiations on other matters negated the refusal-to-negotiate charge must be considered in light of the totality of the negotiations which took place. Pursuant to this principle, the employer’s refusal to agree to a specific proposal may be lawful when viewed in the context of the employer’s good faith negotiation posture. [footnote omitted.] However, the principle is not applicable where the employer refuses to discuss a proposal because he denies its negotiability. [footnote omitted.] In such a case, the lawfulness of the employer’s position turns on the negotiability of the subject. Where the subject is negotiable, the employer’s agreement on other matters is irrelevant. Here in light of our finding that released time is a mandatory subject, the District’s flat refusal to negotiate on this matter violated section 3543.5(c).¹⁶

(Ibid., pp. 6-7.)

Similarly, in the instant case, the County refused to bargain over the non-negotiation time period in Section 1-3-21(b)(2) and the public disclosure of ongoing negotiations in

¹⁶ Government Code section 3543.5, subdivision (c), provides:

It is unlawful for a public school employer to do any of the following:

[¶ . . . ¶]

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative. . . .
Section 1-3-21(c)(2), (3), and (6). As stated earlier, these matters are the equivalent of a mandatory subject of bargaining and therefore fall within the scope of representation. As a result, the County's refusal to bargain over these matters constitutes a violation of MMBA sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c).

Unalleged Violation

OCAA alleges that the County violated MMBA section 3507, subdivision (a) when it adopted COIN without fulfilling its consultation in good faith requirement. However, this allegation is not included in the complaint nor did OCAA move to amend the complaint either before or during the hearing, or in this case, before or during the submission of the stipulated record. Therefore, to constitute a source of liability for the County, this allegation must meet the requirements for an unalleged violation. (West Contra Costa Healthcare District (2010) PERB Decision No. 2145-M.)

The Board has the authority to review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided to respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (County of Riverside (2010) PERB Decision No. 2097-M; Fresno County Superior Court (2008) PERB Decision No. 1942-C.) The unalleged violation must also have occurred within the applicable statute of limitations period. (County of Riverside, supra, PERB Decision No. 2097-M.)

All of the criteria for an unalleged violation are met in this case. The issue is timely in that a violation of MMBA section 3507 was included in its unfair practice charge. The same
set of stipulated facts applied to the unalleged violation as to the other allegations, as it was
only a matter of a new legal theory of a violation which was involved. Lastly, both OCAA and
the County addressed the unalleged violation in their briefs. As a result, the unalleged
violation will be considered.

Consultation in Good Faith Obligation

MMBA provides in pertinent part:

3507 (a) A public agency may adopt reasonable rules and
regulations after consultation in good faith with representatives of
a recognized employee organization or organizations for the
administration of employer-employee relations under this chapter.

The rules and regulations may include provisions for all of the
following:

(5) Additional procedures for the resolution of disputes
involving wages, hours and other terms and conditions of
employment.

(9) Any other matters that are necessary to carry out the
purposes of this chapter.

MMBA section 3507 concerns “ground rules pertaining to employee representation
relations” with the public agency (Service Employee International Union, Local 660 v. City of
City of Azusa (1978) 81 Cal.App.3d 48, 59-60) rather than grounds rules pertaining to the
collective bargaining of a successor agreement which is covered in this case by MMBA section
3505. The restriction on ground rules in COIN do not fall into the same category of dispute
resolution procedures set forth in MMBA section 3507, subdivision (a)(5), which would most
likely include: mediation, factfinding, or interest arbitration. In this case, the public disclosure
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of an opening bargaining proposal, ongoing bargaining proposals and the tentative agreement
for public review and comment does not rise to the same level as proceedings involving a
mediator, factfinder, or arbitrator. It also does not fall under the catchall subsection of MMBA
section 3507, subdivision (a)(9), as it does not concern employee organization/employer
"representation" matters (recognition, etc.) which is the focus of MMBA section 3507.17 For
these reasons, this allegation is dismissed.

REMEDIY

Pursuant to section 3509, subdivision (a), the PERB under section 3541.3,
subdivision (i), is empowered to:

    take any action and make any determinations in respect of these
    charges or alleged violations as the board deems necessary to
    effectuate the policies of this chapter.

The County is found to have adopted a proposed ordinance, COIN, without prior notice
to OCEA, OCAA, and IUOE, and affording them an opportunity to meet and confer over the
decision or effects of the proposed ordinance. Such a violation constitutes an unlawful
unilateral change and a refusal to bargain in good faith.

    The traditional remedy in an unlawful unilateral change case is a cease and desist order
coupled with affirmative relief consisting of an order to restore the prior status quo. (County of
Sacramento (2009) PERB Decision No. 2044-M; County of Sacramento (2008) PERB
Decision No. 1943-M.) A policy change subject to the duty to meet and confer and

17 Regardless, the County would not be allowed pursuant to MMBA section 3507 to set
parameters as to the bargaining process which conflicted with other sections of the MMBA,
such as the obligation to bargain in good faith under MMBA section 3505 as the disputed local
rule or its application would be inconsistent and contrary to the express provisions of the
MMBA. (International Brotherhood of Electrical Workers, Local 1245 v. City of Gridley
(1983) 34 Cal.3d 191; Huntington Beach; City of San Rafael (2004) PERB Decision
No. 1698-M; County of Monterey (2004) PERB Decision No. 1663-M.)
implemented without meeting and conferring is a fait accompli, which, if left in place, would compel the union to "bargain back" to the status quo (Desert Sands Unified School District (2004) PERB Decision No. 1682a, p. 5; San Mateo County Community College District (1979) PERB Decision No. 94, p. 15.) and make impossible the give and take that are the essence of good faith bargaining. (Vernon Fire Fighters v. City of Vernon, supra, 107 Cal.App.3d 802.)

In order to restore the status quo in this case, the County must be ordered to rescind the problematic language from COIN. However, as the ordinance has a severability clause, only those provisions that were adopted in violation of the meet and confer violations under the MMBA must be rescinded. (City of Sacramento, supra, PERB Decision No. 2351-M, pp. 47; Fairfield-Suisun Unified School District, supra, PERB Decision No. 2262, pp. 18-19; Desert Sands, supra, PERB Decision No. 2092, pp. 31, 34.)

As a result of the unlawful unilateral change and refusal to bargain, the County also interfered with the right of employees to participate with their recognized employee organization, in violation of sections 3506 and PERB Regulation 32603, subdivision (a), and OCEA, OCAA, and IUOE were also denied its right to represent employees in their employment relations with a public agency, in violation of section 3503 and PERB Regulation 32603, subdivision (b). The appropriate remedy is to order the County to cease and desist from such unlawful conduct. (Rio Hondo Community College District (1983) PERB Decision No. 292.)

Finally, it is the ordinary remedy in PERB cases that the party found to have committed an unfair practice is ordered to post a notice incorporating the terms of the order. Such an order is granted to provide employees with notice, signed by an authorized agent, that the offending party has acted unlawfully, is being required to cease and desist from its unlawful
activity, and will comply with the order. Thus, it is appropriate to order the County to post a notice incorporating the terms of the order herein at its buildings, offices, and other facilities where notices to bargaining unit employees represented by OCEA, OCAA, and IUOE are customarily posted. Posting of such notice(s) effectuates the purposes of the MMBA that employees are informed of the resolution of this matter and the County's readiness to comply with the ordered remedy. *(Placerville Union School District (1978) PERB Decision No. 69.)*

**PROPOSED ORDER**

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it has been found that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3505, and PERB Regulation 32603, subdivision (c), by adopting a proposed ordinance, the Civic Openness in Negotiations ordinance (COIN), without prior notice to the Orange County Employees Association (OCEA), the Orange County Attorneys Association (OCAA) and the International Union of Operating Engineers Local 501 (IUOE), and affording them an opportunity to meet and confer over the decision or effects of the proposed ordinance. By this conduct, the County also interfered with the right of unit employees to participate in the activities of OCEA, OCAA, and IUOE, in violation of Government Code section 3506 and PERB Regulation 32603, subdivision (a), and denied OCEA, OCAA, and IUOE the right to represent employees in their employment relations with a public agency in violation of Government Code section 3503 and PERB Regulation 32603, subdivision (b).

Pursuant to section 3509, subdivision (a), of the Government Code, it is hereby ORDERED that the County, its governing board, and representatives shall:
A. CEASE AND DESIST FROM:

1. Implementing an unlawful unilateral change and refusing to meet and confer with recognized employee organizations prior to adopting a proposed ordinance concerning matters within the scope of representation.

2. Interfering with the right of bargaining unit employees to be represented by the recognized employee organization of their own choosing.

3. Denying recognized employee organizations their right to represent employees in their employment relations with the County.

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

1. Rescind the 30-day non-negotiations period portion of Section 1-3-21, subdivision (b)(2), as well as Section 1-3-21, subdivisions (c)(2), (3), and (6) of COIN.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the County, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that the County 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 this Notice is not reduced in size, altered, defaced or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the bargaining units represented by OCEA, OCAA, and IUOE. (City of Sacramento, supra, PERB Decision No. 2351-M.)
3. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on OCEA, OCAA and IUOE.

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

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

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered “filed” when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered “filed” when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)
Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)
APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case Nos. LA-CE-934-M, LA-CE-935-M, and LA-CE-944-M, Orange County Employees Association, et al. v. County of Orange, in which all parties had the right to participate, it has been found that the County of Orange (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and PERB Regulation 32603, subdivisions (a), (b), and (c), by adopting a proposed ordinance, the Civic Openness in Negotiations ordinance (COIN), without prior notice to the Orange County Employees Association, the Orange County Attorneys Association and the International Union of Operating Engineers Local 501, and affording them an opportunity to meet and confer over the decision or effects of the proposed ordinance.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Implementing an unlawful unilateral change and refusing to meet and confer with recognized employee organizations prior to adopting a proposed ordinance concerning matters within the scope of representation.

2. Interfering with the right of bargaining unit employees to be represented by the recognized employee organization of their own choosing.

3. Denying recognized employee organizations their right to represent employees in their employment relations with the County.

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

1. Rescind the 30-day non-negotiations period portion of Section 1-3-21, subdivision (b)(2), as well as Section 1-3-21, subdivisions (c)(2), (3), and (6) of COIN.

Dated: ___________________________ COUNTY OF ORANGE

By: ________________________________
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.
June 25, 2015

Mayor Thomas Theodores
City of Sausalito
420 Litho Street
Sausalito, CA 94965

Steve Willis, Chairperson
Southern Marin Fire District
308 Reed Blvd
Mill Valley, CA 94941

Adam Politzer, City Manager
City of Sausalito
420 Litho Street
Sausalito, CA 94965

Fire Chief Chris Tubbs
Southern Marin Fire District
308 Reed Blvd
Mill Valley CA 94941

Re: Concerns Over Proposed Civic Openness in Negotiations (COIN)

Dear Mayor Theodores, Mr. Politzer, Mr. Willis and Chief Tubbs:

We write on behalf of the Marin Professional Firefighters, IAFF Local 1775, to express our concern over the Marin Grand Jury’s recommendation for local government agencies to adopt Civic Openness in Negotiations (“COIN”). We believe that, in considering COIN, all impacts must be considered and weighed, including the numerous harmful and costly effects COIN will have on the municipality’s finances and labor-relations with its public servants. Furthermore, ongoing legal challenges to the implementation of COIN in other jurisdictions and the likely unlawfulness of certain “outsourcing” provisions in COIN caution against adoption.

Additionally, we believe that COIN—which is championed by ultra-conservative anti-labor extremists from Orange County—is inconsistent with the values of the public we serve here in Marin County. The true purpose of COIN is to undermine the collective bargaining process and prevent labor and management from working collaboratively in the workplace in a manner that ensures that we hire and retain personnel best able to provide services to the constituents of the municipality.

**PROBLEMS PRESENTED BY PARTICULAR COMPONENTS OF COIN:**

1. COIN’s requirement that the municipality retain and compensate an outside professional negotiator is both wasteful and unlawful.

At a time when municipalities county-wide voice a desire to eliminate unnecessary expenditures and waste, the adoption of COIN would require the retention of a highly-paid private-sector professional to perform a collective bargaining function that municipality management personnel are capable of performing and always have
performed. Yet there is no basis to believe that those management personnel have
been unable to effectively bargain on behalf of the municipality.

Furthermore, such outsourcing of this basic municipal function would appear to violate
numerous provisions of the Government Code that expressly limit the authority of a
municipality, district, or city to outsource only “special services and advice in financial,
economic, accounting, engineering, legal, or administrative matters.” (See Gov. Code
§ 53060; see also Gov. Code §§ 31000 and 37103.) These statutes have been
construed as prohibiting private contracting unless it is for identified “special services”
and employees of the public entity are incapable of performing them. (Costa Mesa City

2. COIN improvidently requires the municipality to hire an independent auditor to
assess the fiscal impact of every single bargaining proposal

This component of COIN implicates the same fiscal and legal concerns raised above. It
would exponentially increase the length and cost of collective bargaining for a number of
reasons.

First, on its face, it would require a municipality to retain and compensate a private
sector auditor on a lengthy and ongoing basis over many months of bargaining.
Incurring such unnecessary costs is not only fiscally irresponsible, but is also unlawful
under the statutes referenced above, because municipality employees already perform
this function.

Second, requiring a full fiscal impact analysis of every single proposal would dramatically
increase the length of bargaining, which under normal circumstances lasts several
months. On any given day of bargaining, numerous proposals are traded back and
forth. Requiring the parties to wait for an independent auditor to assess each proposal
as it is passed would exponentially increase the length of negotiations from several
months to possibly a year or more. This, in turn, would exponentially increase the costs
associated with collective bargaining, because the municipality would be paying the
private negotiator and outside auditor for the duration.

Third, we believe this requirement, and the associated disruptions and delays in the
bargaining process, would violate the municipality’s bargaining obligations under the
MMBA. Specifically, Government Code section 3505 requires that that parties “shall
have the mutual obligation personally to meet and confer promptly upon request by
either party and continue for a reasonable period of time in order to exchange freely
information, opinions, and proposals, and to endeavor to reach agreement on matters
within the scope of representation . . . .” The stunted, intermittent process that will result if
COIN is implemented is the very antithesis of what is required by section 3505.

3. COIN Would Unlawfully Impair the Free Flow of Discussions and Proposals

Other provisions of COIN would require that the municipality publish all offers and
counter-offers communicated in bargaining, regardless of whether agreement has been
reached on such matters or whether they remain under consideration. A rule of
mandatory publication will necessarily discourage and inhibit the free flow of information, opinions, and proposals, in violation of the bargaining obligation reflected in Government Code section 3505 (see above).

Indeed, the federal courts have held that it is unlawful for an employer to insist on a bargaining procedure that would have "a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining." (NLRB v. Bartlett-Collins Co. (10th Cir. 1981) 639 F.2d 652.) This is because "[t]he proceedings may become formalized, sapping the spontaneity and flexibility often necessary to successful negotiations." (Id.; see also Latrobe Steel Co. v. N.L.R.B. (1980) 630 F.2d 171.) We believe it is obvious that a rule of mandatory publication implicates these concerns and is, consequently, unlawful.

**Prudence Counsels Against Enacting COIN Until Legal Challenges Are Resolved**

As you are presumably aware, so-called COIN ordinances have been adopted in other jurisdictions, including Orange County. The Orange County COIN is currently being challenged by the Orange County Employees Association before the Public Employment Relations Board ("PERB"), which is the California State agency charged with construing and enforcing California's labor-relations statues. These include the Meyers-Milias-Brown Act ("MMBA"), which governs municipalities. (Gov. Code § 3500 et seq.)

Prudence cautions against enacting COIN until PERB has addressed its legalities in a ruling on the Orange County ordinance. A wait-and-see approach will avoid costly litigation and potential liabilities in the event it is found to be unlawful. And this is the approach that has been recommended in other jurisdictions considering COIN, including the City of Yorba Linda and the Orange County Fire Authority. (See enclosures.)

**COIN Cannot Be Adopted Without Completing Bargaining and Impasse Procedures**

The MMBA, particularly Government Code section 3507, requires municipalities to bargain in good faith prior to implementing any rules or regulations governing the collective bargaining process. In a recent decision, PERB construed this obligation as requiring advance notice that is sufficient to allow the parties to engage in meaningful bargaining until they reach agreement or impasse. (IAFF, Local 1319 v. City of Palo Alto (2014) PERB Decision No. 2388-M.) And in the event an impasse is reached, this would initiate the statutory impasse procedures including a formal hearing before a factfinding panel. (Gov. Code § 3505.4.)
June 25, 2015
Re: Concerns Over Proposed Civic Openness in Negotiations (COIN)
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CONCLUSION

In summary, we believe there are many reasons not to move forward with adoption of COIN. These reasons are financial, legal, and pragmatic. At the very least, we believe that all of the considerations identified in this letter should be disclosed to the public, reviewed by legal counsel, and carefully weighed before any step is taken to adopt COIN.

Robert Briare, President
Marin Professional Firefighters
IAFF Local 1775

Nick Gabbard, President
Corte Madera Firefighters Association

Dan Trimble, President
Kentfield Association of Professional Firefighters

Tom Timmer, President
Larkspur Professional Firefighters

Mike TribLOT, President
Marin County Fire Department Firefighters Association

John J. Bagaria, President
Marinwood Professional Firefighters

Dean Riddle, President
Mill Valley Firefighters Association

Dan Peters, President
Novato Professional Firefighters Association

Scott Porter, President
Ross Valley Firefighters Association

Robert Winner, President
San Rafael Firefighters Association

Jason Golden, President
Southern Marin Professional Firefighters

Scott Urban, President
Tiburon Firefighters Association
An act to add Chapter 4.5 (commencing with Section 22175) to Part 3 of Division 2 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL’S DIGEST

SB 331, as amended, Mendoza. Public contracts: local agencies: negotiations.

Existing law relating to public contracts requires local agencies, including cities and counties, to comply with specified procedures for public contracting for public construction.

The Meyers-Milias-Brown Act requires the governing body of a local public agency to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of a recognized employee organization.

This bill would enact the Civic Reporting Openness in Negotiations Efficiency Act to establish specific procedures for the negotiation and approval of certain contracts valued at $50,000 or more for goods or services by cities, counties, cities and counties, or special districts that have adopted a civic openness in negotiations ordinance, or COIN ordinance, defined as an ordinance imposing specified requirements as part of any collective bargaining process undertaken pursuant to the Meyers-Milias-Brown Act. The act would require the
designates an independent auditor to review and report on the cost of any proposed contract. The act would require a city, county, city and county, or special district to disclose prescribed information relating to the contract and contract negotiations on its Internet Web site. The act would prohibit a final determination by the governing body regarding approval of any contract until the matter has been heard at a minimum of 2 public meetings of the governing body. The act would exempt from its provisions contracts required to respond to, recover from, or mitigate the effects of a temporary public safety emergency declared by the chief law enforcement officer of a city, county, city and county, or special district, or a state of war emergency, state of emergency, or local emergency, as those terms are defined in the California Emergency Services Act. By imposing new requirements on cities, counties, cities and counties, and special districts, this bill would impose a state-mandated local program.

The California Constitution requires local agencies, for the purpose of ensuring public access to the meetings of public bodies and the writings of public officials and agencies, to comply with a statutory enactment that amends or enacts laws relating to public records or open meetings and contains findings demonstrating that the enactment furthers the constitutional requirements relating to this purpose.

This bill would make legislative findings to that effect.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.


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

1 SECTION 1. Chapter 4.5 (commencing with Section 22175) is added to Part 3 of Division 2 of the Public Contract Code, to read:
22175. This chapter shall be known, and may be cited, as the Civic Reporting Openness in Negotiations Efficiency Act, or CRONEY.

22176. As used in this chapter, “civic openness in negotiations ordinance” or “COIN ordinance” means an ordinance adopted by a city, county, city and county, or special district that requires any of the following as a part of any collective bargaining process undertaken pursuant to the Meyers-Milias-Brown Act (Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 of the Government Code):

(a) The preparation of an independent economic analysis describing the fiscal costs of benefit and pay components currently provided to members of a recognized employee organization, as defined in Section 3501 of the Government Code.

(b) The completion of the independent economic analysis prior to the presentation of an opening proposal by the public employer.

(c) Availability for review by the public of the independent economic analysis before presentation of an opening proposal by the public employer.

(d) Updating of the independent economic analysis to reflect the annual or cumulative costs of each proposal made by the public employer or recognized employee organization.

(e) Updating of the independent economic analysis to reflect any absolute amount or change from the current actuarially computed unfunded liability associated with the pension or postretirement health benefits.

(f) The report from a closed session of a meeting of the public employer’s governing body of offers, counteroffers, or supposals made by the public employer or the recognized employee organization and communicated during that closed session.

(g) The report from a closed session of a meeting of the public employer’s governing body of any list of names of persons in attendance during any negotiations session, the date of the session, the length of the session, the location of the session, or pertinent facts regarding the negotiations that occurred during a session.

22177. (a) This chapter applies only to a city, county, city and county, or special district that has adopted a COIN ordinance, which is effective and operative. This chapter shall not apply if
the city, county, city and county, or special district suspends,
repeals, or revokes its COIN ordinance.
(b) This chapter shall not apply to a contract if the contract is
required to respond to, recover from, or mitigate the effects of any
of the following:
(1) A temporary public safety emergency declared by the chief
law enforcement officer of a city, county, city and county, or special
district.
(2) A state of war emergency, state of emergency, or local
emergency, as those terms are defined in Section 8558 of the
Government Code.
22178. (a) This chapter shall apply to any contracts with a
value of at least fifty thousand dollars ($50,000), two hundred fifty
thousand dollars ($250,000), and to any contracts with a person
or entity, or related person or entity, with a cumulative value of at
least fifty thousand dollars ($50,000) two hundred fifty thousand
dollars ($250,000) within the fiscal year of the city, county, city
and county, or special district, being negotiated between the city,
county, city and county, or special district, and any person or entity
that seeks to provide services or goods to the city, county, city and
county, or special district, in the following areas: accounting,
financing, hardware and software maintenance, healthcare, health
care, human resources, human services, information technology,
telecommunications, janitorial maintenance, legal services,
lobbying, marketing, office equipment maintenance, passenger
vehicle maintenance, property leasing, public relations, public
safety, social services, transportation, or waste removal.
(b) The city, county, city and county, or special district shall
designate an unbiased independent auditor to review the cost of
any proposed contract. The independent auditor shall prepare a
report on the cost of the contract and provide the report to all
parties and make it available to the public before the governing
body takes any action to approve or disapprove the contract. The
report shall comply with the following:
(1) The report shall include a recommendation regarding the
viability of the contract, including any supplemental data upon
which the report is based, and shall determine the fiscal impacts
attributable to each term and condition of the contract.
(2) The report shall be made available to the public at least 30
days before the issue can be heard before the governing body and
at least 60 days before any action to approve or disapprove the
contract by the governing body.
(3) Any proposed changes to the contract after it has been
approved by the governing body shall adhere to the same approval
requirements as the original contract. The changes shall not go
into effect until all of the requirements of this subdivision are met.
(c) The city, county, city and county, or special district shall
disclose all offers and counteroffers to the public within 24 hours
on its Internet Web site.
(d) Before approving any contract, the city, county, city and
county, or special district shall release a list of names of all persons
in attendance, whether in person or by electronic means, during
any negotiation session regarding the contract, the date of the
session, the length of the session, the location where the session
took place, and any pertinent facts regarding the negotiations that
occurred in that session.
(e) Representatives of the governing body shall advise the
governing body of all offers, counteroffers, information, or
statements of position discussed by the contracting person or entity
and city, county, city and county, or special district representatives
participating in negotiations regarding any contract.
(f) Each governing body member and staff members of
governing body offices shall disclose publicly all verbal, written,
electronic, or other communications regarding a subject matter
related to the negotiations or pending negotiations they have had
with any official or unofficial representative of the private entity
within 24 hours after the communication occurs.
(g) A final governing body determination regarding approval
of any contract shall be undertaken only after the matter has been
heard at a minimum of two meetings of the governing body
wherein the public has had the opportunity to review and comment
on the matter.
SEC. 2. The Legislature finds and declares that Section 1 of
this act, which adds Chapter 4.5 (commencing with Section 22175)
to Part 3 of Division 2 of the Public Contract Code, furthers, within
the meaning of paragraph (7) of subdivision (b) of Section 3 of
Article I of the California Constitution, the purposes of that
constitutional section as it relates to the right of public access to
the meetings of local public bodies or the writings of local public
officials and local agencies. Pursuant to paragraph (7) of
subdivision (b) of Section 3 of Article I of the California Constitution, the Legislature makes the following findings:

This act ensures that members of the public have the opportunity to be informed of, and meaningfully participate in, the negotiation and approval of contracts for goods and services by a city, county, city and county, or special district that has adopted a civic openness in negotiations (COIN) ordinance, thereby furthering the purposes of Section 3 of Article I of the California Constitution.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because the only costs that may be incurred by a local agency or school district under this act would result from a legislative mandate that is within the scope of paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution.