STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

VENTURA COUNTY PROFESSIONAL PEACE OFFICERS' ASSOCIATION, Charging Party, v. COUNTY OF VENTURA, Respondent.	Case No. LA-CE-23l-M PERB Decision No. J1910-M June 21, 2007

Appearances: Silver, Hadden & Silver by Robert M. Wexler, Attorney, for Ventura County Professional Peace Offcers' Association; Leroy Smith, Chief Assistant County Counsel, for County of Ventura.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of Ventura (County) to an administrative law judge's (ALJ) proposed decision. The unfair practice charge alleged that the County violated the Meyers-Milias-Brown Act (MMBA)[1] by implementing a mandatory overtime program without giving the Ventura County Professional Peace Officers' Association (VCPPOA) the opportunity to meet and confer and by refusing to process a VCPPOA-filed grievance. VCPPOA alleged that this conduct constituted a violation of MMBA sections 3503

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

and 3506, and PERB Regulation 32603(a), (b) and (c)[2]. The Board has already considered and denied a request for oral argument in this case on December 11, 2006.

The Board has reviewed the entire record in this matter, including but not limited to the unfair practice charge, the County's position statement, the complaint, the answer to the complaint, the transcripts and exhibits, the parties' post hearing briefs and reply briefs, the proposed decision, the County's statement of exceptions and VCPPOA's response thereto. We reverse the ALJ's proposed decision in part and affirm it in part, consistent with the discussion below.

BACKGROUND

For the term of November 2002 to February 2006, VCPPOA and the County were parties to a comprehensive memorandum of agreement (MOA). Article 10 of the MOA governed work schedules. Section 1001 of the MOA states:

> NORMAL 80-HOUR BIWEEKLY WORK SCHEDULE: Except as may be otherwise provided, the 'normal' biweekly work schedule of the County of Ventura shall be ten (10) working days of eight (8) hours each. It is the duty of each Department/Agency Head to arrange the work of his department/agency so that each regular employee therein shall work no more than the normal schedule, except that a Department/Agency head may require any employee in his department/agency to temporarily perform service in excess of the normal schedule when public necessity or convenience so requires. The provisions of this Article are intended to define the normal work schedule and do not guarantee a minimum number of hours of work. The County retains its right to relieve employees from duty because of lack of work or for other legitimate reasons; however, this does not preclude employees or VCPPOA from grieving the practical consequences of that action.

Section i002A of the MOA states:

[2] 2pERB regulations are codified at California Code of Regulations, title 8, section 3100l, et seq.

> A Department/Agency Head may, following communication with the employees involved, assign employees of the Department/Agency to any other schedule which aids the Departments/Agency's ability to serve the public if such schedule is not a violation of State or Federal law. The County agrees to consult with VCPPOA prior to the employees being placed on a modified workweek.

Section 1003 of the MOA states:

> WORK SCHEDULE CHANGES: The County and VCPPOA agree to meet and discuss problems with, or changes in, work schedules on a Department/Agency basis during the term of this Agreement upon request of either party.

Article 11 of the MOA separately addressed overtime. Section 1102 states:

> POLICY-LIMITATION ON OVERTIME: It is the County's policy to avoid the necessity of overtime whenever and wherever possible. Overtime work may sometimes be necessary to meet emergency situations, seasonal or peak workload requirements. No employee shall work overtime unless authorized by his Department/Agency Head. Procedures governing the authorization of overtime shall be established in accordance with the provisions herein.

Under Sections 1104 and 1105, employees were compensated for overtime in cash or time off at time and a half.

Article 30 of the MOA established a grievance procedure. Section 3001 defined a grievance in part as "a dispute by an employee or a group of employees." Article 10, Section 1001, quoted above, stated in part that it did "not preclude employees or VCPPOA from grieving the practical consequences of that action."

Some of the employees represented by VCPPOA are correction service officers (CSOs) working at the County's chronically understaffed juvenile facilities. On April 15, 2005, the County issued these employees a memo on the subject of mandatory overtime, stating in part:

> We have made the difficult decision that on a temporary basis, we need to implement a mandatory overtime policy effective April 24, 2005. The majority of staff will feel little or no impact

> by this decision as they already work overtime, and we appreciate their efforts. The amount of overtime per pay period will be dictated by a number of factors, including existing staffing, population, and amount of overtime worked by non-JF staff. It is our hope that we will not need to ask staff to work in excess of 8 hours of overtime per pay period unless they desire to do so. Individual needs will be considered as much as possible in the assigning of OT shifts.

VCPPOA responded the same day with an e-mail message to the County stating in part:

> The VCPPOA contract requires that changes in working conditions, such as mandatory overtime, are subject to meet and confer.

VCPPOA requested a meeting; on April 18, 2005, the County acknowledged that VCPPOA was formally requesting to meet and confer on the mandatory overtime issue. On April 28, 2005, however, the County sent an e-mail message to VCPPOA stating in part:

> While we appreciate your concerns on this matter we respectfully submit that Management's right to require mandatory overtime is **not** subject to meet and confer. The existing agreement provides the authority to do so. (Emphasis in the original)]

The County cited Article 10, Section 1001, quoted above. The County still indicated its wilingness to "discuss" the issue with VCPPOA, but for various reasons a meeting was not immediately held.

On May 4, 2005, the County issued a second memo to employees, stating in part:

> On April 15, 2005, a memorandum was circulated to you via email announcing our plan to make mandatory overtime at the Juvenile Facilities more equitable for all CSO staff beginning the week of April 24th . We did not go forward with this plan at the request of VCPPOA as the County Human Resources Department needed sufficient time to review VCPPOA's request for a formal 'meet and confer' discussion. We have corresponded with VCPPOA over the past couple of weeks regarding this pending issue, and to date, no meeting has taken place. We continue to be understaffed throughout the facility and arranging for shift coverage has been a constant struggle.

> In the Memorandum of Understanding (MOU) between VCPPOA and the Probation Agency, the Director/Chief Probation Officer has the authority to temporarily mandate that staff work in excess of their normal work schedule 'when public necessity or convenience so requires' (Article 10 Section 1001). During periods of severe staffing shortages, we do not meet our Title 15 requirements and, as a result, we cannot provide a safe environment for staff and minors. As such, we've made the difficult decision to implement our mandatory overtime plan beginning May 15th.

The memo then set forth the "protocol for the JF mandatory overtime plan," including a statement that "CSO staff are required to work eight (8) hours of overtime per pay period."

VCPPOA and the County finally met on May 11, 2005. The County said it was willing to discuss the mandatory overtime issue, but not to meet and confer about the decision to implement the policy. VCPPOA made a series of proposals, but the County made no counterproposals, and no agreement was reached. On May 13, 2005 the County sent a third memo to employees, stating in part:

> We continue to be understaffed throughout the Juvenile Facilities (JF). We have attempted to meet our obligations with the use of employees who volunteer to work overtime but arranging for necessary shift coverage has been a constant struggle. At times, we have had to mandate that some staff stay over and work beyond the end of their regular shift which is highly disruptive to their personal lives. Despite all this, we have not been able to meet our Title 15 requirements, and as a result, have not been able to guarantee a safe environment for staff and minors. As such, on Sunday, May 15th, the JF Master Scheduler will begin a more equitable method of assigning overtime.

The May 13 memo stated that "employees who do not volunteer to work an overtime shift at the JF will be mandated to work overtime as deemed necessary by their supervisor." It also expressed a "hope and expectation that the need to mandate overtime will be temporary."

On May 25, 2005, VCPPOA filed a written grievance with the County, alleging that the mandatory overtime program violated the MOA. The grievance was fled in the name of

"Diane Hubbard, President, VCPPOA, and its affected members of the bargaining unit." The County responded on June 1, 2005, with a letter stating in part:

> On May 25, 2005, we received by facsimile a purported grievance in the name of Diane Hubbard, President, VCPPOA, and its affected members of the bargaining unit. We are returning the purported grievance to you because it does not qualify as a grievance under Article 30 of the Memorandum of Agreement between the County and VCPPOA.
>
> Only individual employees or a group of individual employees may file a grievance under the MOA (Section 3001). The MOA does not provide for union grievances or class action grievances filed on behalf of similarly situated employees.

VCPPOA filed its unfair practice charge with PERB on July 20, 2005. The County discontinued the mandatory overtime program in December 2005.

DISCUSSION

VCPPOA's unfair practice charge alleged that the County: (1) violated the MOA by unilaterally implementing a mandatory overtime program; and (2) failed to process a grievance filed on behalf of VCPPOA.[3]

The ALJ applied the "per se" test to consider whether or not the County's change in overtime policy was a unilateral change. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation; and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 (165 Cal.Rptr. 908); Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of Stockton (1984)

[3]The ALJ found that the County committed unfair labor practices in failing to meet and confer before implementing the mandatory overtime program and in failing to process VCPPOA's grievance. This decision focuses on the implementation of the mandatory overtime program, as we agree with the analysis and discussion in the proposed decision as to the grievance processing.

161 Cal.App.3d 813; Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant).) The ALJ found that work schedules and overtime are within the scope of representation and were covered by Articles 10 and 11 of the parties' MOA.

The ALJ considered what the proposed decision termed the "most crucial language," found in Article 10, Section 1001, which states in part:

> It is the duty of each Department/Agency Head to arrange the work of his department/agency so that each regular employee therein shall work no more than the normal schedule, except that a Department/Agency head may require any employee in his department/agency to temporarily perform service in excess of the normal schedule when public necessity or convenience so requires. (Emphasis added.)

The ALJ considered VCPPOA's argument that this language authorizes only individual schedule changes, and the County's argument that the language allows the generalized schedule changes which occurred in 2005. The proposed decision concluded that the plain contractual language supported VCPPOA's argument. According to the ALJ's analysis, because the MOA language is phrased in the singular, i.e. "the County may require 'any employee' to work in excess of the normal schedule," the argument is more persuasive than the County's which would stretch the language to mean "any or all employee~".

The ALJ further analyzed that the emphasized language is phrased as an exception to the norm of an 80-hour biweekly work schedule and the County's argument would "allow the exception to swallow the norm." Therefore, the ALJ found that the County did not simply utilize an exception allowed by the MOA; it changed the norm established by the MOA.

The ALJ cited Article 11, Section 1102, in determining that it was "the County's policy to avoid the necessity of overtime whenever and wherever possible," noting that overtime might still be "necessary to meet emergency situations, seasonal or peak workload requirements." According to the ALJ, "(t)his language would have little or no meaning if the

County was to be free under Section 1001 to impose a months-long generalized mandatory overtime program whenever 'public necessity or convenience so requires'."

Finally, the ALJ cited to Article 10, Section 1003, which he determined "clearly established" what the County could and should have done if it had "problems with" or wanted "changes in" normal work schedules "on a Department/Agency basis" during the term of the MOA. The ALJ concluded that both parties had agreed to "meet and discuss" such matters on request, presumably with a view toward reaching some new agreement. Under this language, the ALJ found that neither party could be forced to agree, and neither party could abrogate the existing MOA. Therefore, the ALJ concluded that the County's mandatory overtime program unilaterally and unlawfully changed the policy established by Articles 10 and 11 of the MOA, in violation of MMBA section 3505. The ALJ also concluded that this unilateral action interfered with the right of employees to be represented by VCPPOA and denied VCPPOA its right to represent them in violation of MMBA sections 3502 and 3503.

To prevail in a unilateral change case, the charging party must first establish that the employer breached or altered the parties' written agreement or established past practice. (Gran(Grant.) While the Board gives deference to an ALJ's factual findings which incorporate determinations of witness credibility, the Board reviews the record of the cases before it de novo, and has the duty and responsibility to take the actions based on that review which it deems appropriate to take. (Santa Clara Unified School District (1979) PERB Decision No. 104; Mt. Diablo Unified School District (1984) PERB Decision No. 373b; Lake Elsinore School District (1987) PERB Decision No. 646.) In this instance, we reject the proposed decision's determination that the County breached the parties' MOA based on the plain meaning of the contract. Under our review of the record, the parties' agreement allowed the

County to mandate the temporary overtime program for a group of employees as was done here.[4]

PERB may interpret contract language if doing so is necessary in deciding an unfair practice charge case. (Grant; Victor Valley Joint Union High School District (1981) PERB Decision No. 192; Inglewood Unified School District (1991) PERB Order No. Ad-222.) The proposed decision states that because the MOA refers to the County's ability to require "any employee" as opposed to "any or all employees" to temporarily perform overtime service, the contract would only allow the County to require an individual employee to work overtime. We disagree. The parties agreed in Section 1001 of the MOA that the County could temporarily require overtime of "any employee" if public necessity or convenience so required. The term "any employee" is inclusive of both any single employee or any group of employees under the plain meaning of the contract.[5] This finding is further bolstered by Section 1002A of the MOA which states that:

> A Department/Agency Head may, following communication with the employees involved, assign employees of the Department/Agency to any other schedule which aids the Department's/Agency's ability to serve the public if such schedule is not a violation of State or Federal law. The County agrees to consult with VCPPOA prior to the employees being placed on a modified workweek. (Emphasis added.)

The proposed decision did not discuss this portion of the MOA or its reference to the County's ability to assign "employees" (plural) to "any other schedule which aids the Department's/Agency's ability to serve the public."

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[4]Even if we accepted the ALJ's analysis, it should be noted that because the parties' MOA includes binding arbitration, this charge could have been placed in abeyance as it is largely a dispute of contract interpretation and therefore subject to the grievance procedure. (PERB Reg. 32620(b)(6).)

[5]The ALJ did not discuss whether "public necessity or convenience" required the overtime program, only the reference to "any employee."

We find that the change was temporary, i.e., from May 2005 to December 2005, and that the County's evidence demonstrated that public necessity or convenience required the temporary overtime program. Therefore the County had the authority to implement mandatory overtime department-wide as allowed by the plain meaning of the MOA. The County's sole obligation would have been to "meet and discuss problems with, or changes in, work schedules on a Department/Agency basis" as required by Section 1003 of the MOA. The County complied with that obligation when it met with VCPPOA on May 11, 2005. The Board hereby dismisses the complaint and underlying charge as to the issue of the County's implementation of mandatory overtime for the department.

County Treatment of VCPPOA Filed Grievance

In the proposed decision, the ALJ found that when VCPPOA attempted to challenge the mandatory overtime program by filing a grievance, the County refused to process the grievance. The ALJ determined that the County's argument that VCPPOA did not have a right to fie a grievance under Article 30, Section 3001 did not accord with the plain meaning of the MOA. Section 3001 of the MOA defines a grievance, in part, as "a dispute by an employee or group of employees."

The County argued that the reference to "group of employees" did not apply to VCPPOA, because VCPPOA is an organization and not a group of employees.[6] The ALJ was not persuaded by the argument. He found that "(a)n organized group of employees is exactly what VCPPOA is." We agree. Under the plain language of the MOA, the VCPPOA had the right to fie a grievance on behalf of an individual employee or a group of likely situated employees, as it did here. Furthermore, as asserted in the proposed decision "(t)his conclusion

[6]In its exceptions, the County cited past practice relative to the treatment of VCPPOA-filed grievances. However, the Board need not consider past practice with respect to the County's handling of grievances when the MOA's language is clear and unambiguous.

is reinforced by the final language of Article 10, Section 1001, that 'this (article) does not preclude employees or VCPPOA (emphasis added) from grieving the practical consequences of (a particular action)'." The Board therefore adopts the portion of the proposed decision which relates to the grievance procedure handling.

ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the portion of the unfair practice charge and complaint alleging the County of Ventura's (County) unilateral implementation of a mandatory overtime program is DISMISSED.

As to the portions of the charge and complaint alleging the County refused to process the grievance filed by the Ventura County Professional Peace Officers' Association (VCPPOA), it is found that the County violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3502, 3503 and 3505, and California Code of Regulations, title 8, section 32603(a), (b), and (c), by unilaterally changing a negotiated policy, Article 30, of the parties' memorandum of agreement which addresses grievance processing, without providing VCPPOA with prior notice and an opportunity to bargain.

Pursuant to Government Code sections 3509(a) and 3541.5(c), it is hereby ORDERED that the County and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with VCPPOA regarding a change in policy affecting grievance processing, a matter within the scope of representation;

2. Refusing to process a VCPPOA-filed grievance.

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

1. Within ten (10) workdays following the date this Decision is no longer subject to appeal, 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 the Notice is not reduced in size, altered, defaced, or covered with any other material.

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

Members Shek and McKeag joined in this Decision.

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 No. LA-CE-23i-M, Ventura County Professional Peace Offcers' Association v. County of Ventura , in which all parties had the right to participate, it has been found that the County of Ventura violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3502, 3503 and 3505, and California Code of Regulations, title 8, section 32603(a), (b), and (c), by unilaterally changing a negotiated policy, Article 30, of the parties' memorandum of agreement which addresses grievance processing, without providing the Ventura County Professional Peace Officers' Association (VCPPOA) with prior notice and an opportunity to bargain.

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

. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with VCPPOA regarding a change in policy for processing grievances, a matter within the scope of representation.

2. Refusing to a VCPPOA-filed grievance.

Dated: _____ COUNTY OF VENTURA

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.