STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WORKFORCE INVESTMENT BOARD OF SOLANO COUNTY, Employer, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Exclusive Representative.	Case No. SF-IM-134-M Administrative Appeal PERB Order No. Ad-418-M November 17, 2014

Appearances: Law Offices of Randal M. Barnum by Randal M. Barnum, Attorney, for Workforce Investment Board of Solano County; Weinberg, Roger and Rosenfeld by Matthew J. Gauger, Attorney, for Service Employees International Union, Local 1021.

Before Huguenin, Winslow and Banks, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the Workforce Investment Board of Solano County (WIB) from an administrative determination (attached) by PERB's Office of the General Counsel to approve a request by Service Employees International Union, Local 1021 (SEIU) pursuant to the Meyers-Milias-Brown Act (MMBA)[1] that the parties' bargaining differences be submitted to a factfinding panel.

PERB's Office of the General Counsel determined that WIB is a public agency within the MMBA and that factfinding is appropriate under MMBA section 3504.5 and PERB Regulation 32802.[2]

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

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

We have reviewed the record, including SEIU's factfinding request, WIB's opposition, documents submitted by the parties,[3] the administrative determination and WIB's appeal. The findings of the Office of the General Counsel are supported by the record, and we therefore adopt them as the findings of the Board itself, as supplemented below. The conclusions drawn by the Office of the General Counsel are in accordance with relevant law, and we therefore adopt them as the conclusions of the Board itself, as supplemented below. For the reasons set forth below and in the administrative determination, we affirm the result reached by the Office of the General Counsel.

PROCEDURAL HISTORY

On November 26, 2013, SEIU filed a request for factfinding with PERB's San Francisco Regional Office, pursuant to MMBA section 3505.4 and PERB Regulation 32802. In its request SEIU asserted that SEIU and WIB had been unable to effect a settlement in their negotiations over midterm layoffs, and that the parties had reached impasse on November 6, 2013. On December 3, 2013, SEIU provided copies of correspondence supporting its declaration of impasse, its request for mediation and, absent mediation, for factfinding, and WIB's refusal to participate in mediation or factfinding.

On December 4, 2013, WIB filed a position statement opposing both SEIU's request for factfinding and PERB's jurisdiction to consider that request.

On December 5, 2013, PERB's Office of the General Counsel determined that PERB had jurisdiction and that SEIU's factfinding request met all statutory and regulatory requirements. By e-mail, the Office of the General Counsel so informed the parties and also indicated that a formal determination would issue shortly.

[3] Our review includes documents in PERB's case file in unfair practice Case No. SF-CE-1067-M, of which the Office of the General Counsel took administrative notice. (Admin. Deter., pp. 1-2.) We likewise take notice of those documents.

On December 10, 2013, PERB's Office of the General Counsel served the parties with the attached administrative determination.

On December 20, 2013, WIB appealed from the administrative determination. WIB challenges the conclusion that PERB has jurisdiction and as well the conclusion that SEIU's factfinding request satisfies the requirements of MMBA section 3505.4 and PERB Regulation 32802.

On February 19, 2014, SEIU filed with PERB a copy of a letter dated February 7, 2014, from the National Labor Relations Board (NLRB) Office of Appeals to WIB and SEIU. In its February 7, 2014, letter, the NLRB Office of Appeals explained that it had denied WIB's appeal from a determination by the NLRB regional director not to issue a complaint against SEIU for unfair labor practices arising under the National Labor Relations Act (NLRA), as amended (29 U.S.C. § 151 et seq.). The basis for this determination by the NLRB regional director, which was affirmed by the Office of Appeals, was that the NLRB lacked jurisdiction over WIB, because WIB was a political subdivision of the State of California (State) and thus not an "employer" within Section 2(2)[4] of the NLRA. On February 24, 2014, WIB responded to SEIU's letter of February 19, 2014, urging that the NLRB's jurisdictional determination is

[4] Section 2(2) provides:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(U.S. Code (U.S.C.), Tit. 29, Ch. 7, § 152(2).)

not binding on PERB, nor does it control PERB's interpretation of PERB's own jurisdiction under the MMBA.[5]

FACTS

We present our discussion of the facts in three parts: first, the parties' recent history and factfinding dispute; second, the statutory and regulatory context of WIB; and, third, the operations and characteristics of WIB.

The Parties' Recent History and Factfinding Dispute

On May 15, 2013, SEIU filed an unfair practice charge with PERB, alleging violation by WIB of MMBA sections 3502, 3504, 3505 and 3506.[6] That charge was assigned Case

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[5] The letter of February 7, 2014, to the parties from the NLRB's Office of Appeals is relevant to our considerations and concerns a recent event such that it could not have been offered earlier. Thus, we find that good cause exists to consider this letter together with the parties' contentions regarding its significance. (See *Regents of the University of California* (1997) PERB Decision No. 1239-H, p. 2, and cases therein cited.)

[6] These portions of the MMBA provide:

> 3502. Right to join or abstain; individual representation
>
> Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.
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> 3504. Scope of representation
>
> 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.

No. SF-CE-1067-M. In a letter accompanying its charge, SEIU alerted PERB to a possible issue of PERB's jurisdiction.

On May 30, 2013, the NLRB regional director dismissed several pending unfair labor practice charges previously filed by SEIU against WIB. The regional director concluded that the NLRB lacked jurisdiction over WIB, based on a determination that WIB was a political subdivision of the State and thus not an "employer" within Section 2(2) of the NLRA.

On June 12, 2013, SEIU appealed to the NLRB Office of Appeals the NLRB regional director's May 30, 2013, dismissal of SEIU's unfair labor practice charges. The basis for

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3505. Conferences; meet and confer in good faith

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.

3506. Discrimination prohibited

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.

SEIU's appeal was its contention that WIB was not a political subdivision of the State under applicable NLRB precedent, and instead was an "employer" under the NLRA, subject to NLRB jurisdiction.

On June 13, 2013, WIB itself filed with the NLRB an unfair labor practice charge against SEIU, alleging bad faith bargaining.

On June 20, 2013, WIB responded to SEIU's PERB unfair practice charge, submitting to PERB's Office of the General Counsel WIB's position statement, appending various documents. WIB asserted both that PERB lacked jurisdiction over WIB, and that SEIU's charge lacked merit. According to WIB, SEIU's PERB charge was "the same unfair labor practice charge which has been filed by SEIU against [WIB] with [NLRB]." Moreover, according WIB, "SEIU and WIB . . . both maintained [to the NLRB] the position that it is the NLRB which has jurisdiction . . . [but] on May 30, 2013, the NLRB [acting regional director] dismissed the unfair labor practice charge filed by SEIU against WIB based on a lack of jurisdiction." Finally, according to WIB, SEIU "filed an appeal with the Office of Appeals of the NLRB contesting the dismissal" of SEIU's charge, in which SEIU: (1) informed the NLRB's Office of Appeals that it had filed a charge with PERB and (2) opined that "PERB is highly unlikely to assert jurisdiction and is likely to take the position that [WIB] is not a public agency under Section 3501(c)." (WIB Position Statement, Case No. SF-CE-1067-M, June 20, 2013, pp. 1-2.)

On October 21, 2013, PERB's Office of the General Counsel issued a complaint against WIB in Case No. SF-CE-1067-M. The complaint was set for a hearing before a PERB administrative law judge (ALJ). Prior to a hearing, however, the matter settled. Thus, neither a PERB ALJ nor the Board itself has considered the issues raised, including PERB's jurisdiction.

On November 8, 2013, the NLRB Office of Appeals denied SEIU's appeal from the NLRB regional director's determination of May 30, 2013, discussed above, to dismiss SEIU's unfair labor practice charge for lack of jurisdiction. The NLRB Office of Appeals concluded that WIB is a political subdivision of the State and thus beyond NLRB jurisdiction.[7]

On November 22, 2013, the NLRB regional director dismissed the WIB's unfair labor practice charge against SEIU for lack of jurisdiction, after determining that WIB is a political subdivision of the State and thus beyond NLRB jurisdiction. Thereafter, WIB also appealed the dismissal of its unfair labor practice charge to the NLRB Office of Appeals.

On November 26, 2013, SEIU filed the instant request for factfinding, which was assigned Case No. SF-IM-134-M. PERB's Office of the General Counsel undertook an investigation of the request.

On December 10, 2013, PERB's Office of the General Counsel served WIB and SEIU with the attached administrative determination, which concludes that PERB has jurisdiction and that SEIU's factfinding request satisfies the requirements of the MMBA and PERB Regulation 32802. WIB has taken the instant appeal from this administrative determination.

On February 7, 2014, the NLRB Office of Appeals denied WIB's appeal from the NLRB regional director's determination of November 22, 2013, to dismiss WIB's unfair labor practice charge against SEIU for lack of jurisdiction. The NLRB Office of Appeals concluded, as it had with SEIU's charge, that WIB is a political subdivision of the State and thus beyond NLRB jurisdiction. Under NLRB procedure, no further appeal is possible from the dismissal of an unfair labor practice charge.

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[7] The NLRB's Office of Appeals relied for its conclusion on *Pilsen Wellness Center and Chicago Alliance of Charter Teachers and Staff* (2013) 359 NLRB No. 72. This decision and *Chicago Mathematics and Science Academy Charter School, Inc.* (2012) 359 NLRB No. 41 discussed therein, were impacted by the recent decision of the United State Supreme Court in *National Labor Relations Board v. Noel Canning* (2014) 573 U.S. _____ (*Noel Canning*). However, because we here construe the MMBA, and in so doing rely on our own precedent as well as NLRA decisions not subject to *Noel Canning*, *Noel Canning* is of no consequence to our decision.

We next review the statutory and regulatory context of WIB.

The Statutory and Regulatory Context of WIB

Congress enacted the Workforce Investment Act of 1998 (WIA) as successor legislation to the Job Training Partnership Act of 1982 (JTPA),[8] which itself succeeded the Comprehensive Employment and Training Act of 1973 (CETA). In these federal enactments, Congress promoted training and employment opportunities through funding grants administered by participating states and/or their local government entities. Under WIA, the State and/or its local government entities act through, and with, governmentally-appointed councils or boards composed of individuals with backgrounds in business, labor and education, referred to as a "private industry council" or a "workforce investment board." (CETA, PL 95-524, § 704; JTPA, 29 U.S.C. § 15212 et seq.; WIA, 29 U.S.C. § 2832.)

Codified in U.S. Code, Title 29, Chapter 30, WIA provides, in pertinent part:

> The purpose of this subchapter is to provide workforce investment activities, through statewide and local workforce investment systems, that increase the employment, retention, and earnings of participants, and increase occupational skill attainment by participants, and, as a result, improve the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the Nation.

(29 U.S.C. § 2811.)

Workforce investment "systems" include the following:

1. A state workforce investment board established by the governor, having a prescribed membership and functions including conflict of interest protections and sunshine requirements (29 U.S.C. § 2821);

[8] Hosek and Levine, The New Fiscal Federalism and The Social Safety Net, A View from California (RAND, 1996); Reville and Klerman, Job Training: The Impact on California of Further Consolidation and Devolution (1996), pp. 127-156.

2. A state workforce investment plan, created and submitted by the governor of each state for approval by the U.S. Secretary of Labor, having prescribed contents and provisions for modification (29 U.S.C. § 2822);

3. Units of general local government designated within each state by the governor as "local areas" for workforce investment program administration and service delivery, with special provisions for small states and regional cooperation (29 U.S.C. § 2831);

4. A local workforce investment board or "local board" for each local area, created by the chief elected official of the corresponding unit of general local government, and certified by the governor, having statutorily prescribed tasks (adoption of a local plan, provider selection, budget, oversight, performance measures, linkage with and coaching of employers), and meeting statutory standards for membership, appointment and certification, sunshine requirements, conflict of interest protections, and a youth council (29 U.S.C. § 2832);

5. A "local plan" for each local area, consistent with the state plan, created by the chief elected official of the local area's unit of general local government, in partnership with the local board, submitted for approval to the governor, and containing statutorily prescribed plan contents, plus processes for public involvement in plan formulation (29 U.S.C. § 2833);

6. A "one-stop" service delivery mechanism, agreed to by the chief elected official for the local area's unit of general local government and the local board, to designate and certify "one-stop partners" to deliver mandatory and optional workforce investment services to qualifying individuals, together with a memorandum of understanding agreed to by the one-stop partner, the chief elected official and the local board (29 U.S.C. §§ 2841-2843);

7. Public funding via federal subvention to states, and through states to local areas, to support youth activities as specified (29 U.S.C. §§ 2852, 2854) and adult and dislocated worker employment and training activities as specified (29 U.S.C. §§ 2862, 2864); and

8. A performance accountability system to assess the effectiveness of states and their units of general local government, in achieving improvement of workforce investment activities, with statutorily prescribed indicators and levels of performance for state and local performance, a reporting mechanism, evaluation studies, fiscal management and accountability systems, sanctions for state and or local area failure to achieve performance goals, corrective actions, and appeals therefrom (29 U.S.C. § 2871).

Supplementing federal statute are regulations issued by the U.S. Department of Labor[9] and California's own workforce investment statute, prescribing workforce investment activities and specifying, inter alia, the role and function of the local boards. (Unemployment Insurance Code (UIC), § 14000 et seq.) California statute prescribes the makeup and authority of the California Workforce Investment Board (CWIB) and CWIB's particular responsibilities, viz., planning and coordinating the California WIB program, including establishment jointly with the Governor of guidelines under which the chief local elected official in each local area forms a "local board", and assisting the Governor to allocate the federal funds supporting the programs of the CWIB and the local boards. (*Id.*)

California's workforce investment statute provides:

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[9] The U. S. Department of Labor has promulgated WIA regulations codified at Code of Federal Regulations (C.F.R.), Title 20, Chapter V, Parts 660-671, as follows: Part 660 – Introduction; Part 661 – Statewide and Local Governance; Part 662 – The One-stop System; Part 663 – Adult and Dislocated Worker Activities; Part 664 – Youth Activities; Part 665 – Statewide Workforce Investment Activities; Part 666 – Performance Accountability; Part 667 – Administrative Provisions; Part 668 – Indian and Native American Programs; Part 669 – National Farmworker Jobs Program; Part 670 – The Job Corps; and Part 671 – National Emergency Grants for Dislocated Workers. Subparts 661.300, 305, and 350 address the following: What is the Local Workforce Investment Board? (§ 661.300.) What is the role of the Local Workforce Investment Board? (§ 661.305.) What are the contents of the local workforce investment plan? (§ 661.350.) Subparts 667.100, 105, 107, 130 and 140 address the following: When do Workforce Investment Act grant funds become available? (§ 667.100.) What award document authorizes the expenditure of Workforce Investment Act funds under title I of the Act? (§ 667.105.) What is the period of availability for expenditure of WIA funds? (§ 667.107.) How are WIA title I formula funds allocated to local workforce investment areas? (§ 667.130.) Does a Local Board have the authority to transfer funds between programs? (§ 667.140.)

1. The chief elected official(s) in each local area forms a local workforce investment board or "local board" pursuant to guidelines established by the Governor and the CWIB. (UIC, § 14200(a).) The Governor, through the CWIB, establishes standards for high-performance local boards, and certifies bi-annually a local board for each local area. (UIC, § 14200(b), (c).) Standards for certification include extensive statutorily-specified criteria. (UIC, § 14200(c).)

2. Local boards assist the local chief elected official in planning, oversight, and evaluation of local workforce investment programs and services and "shall" promote effective outcomes consistent with statewide goals and objectives, and negotiated local performance standards. (UIC, § 14201.)

3. Members of local boards are appointed by the chief elected official in each local area, using criteria established by the Governor and the CWIB. (UIC, § 14202.) Each local board's chairperson is selected by the local board members from among the local board's duly appointed members. (UIC, § 14205.)

4. Each local board performs eleven statutorily-specified tasks and functions to facilitate its workforce investment program. (UIC, § 14206.) In addition, each local board performs certain ancillary tasks and functions, also statutorily-specified (UIC, § 14207 (a), (b)) and is forbidden to perform other tasks except under prescribed conditions. (UIC, § 14207 (e), (f).)

5. In partnership with the chief elected official for the local area, each local board develops and submits to the governor for review and approval, a comprehensive five-year local plan consistent with the state plan. (UIC, § 14220.) Each local plan must contain ten statutorily-itemized elements. (UIC, § 14221.) Each local plan must include a system of one-stop career centers. (UIC, § 14230.) A full service one-stop career center includes statutorily-specified elements. (UIC, § 14231.) Each local board must meet statutorily specified

conditions regarding the one-stop career centers (UIC, § 14230 (b)-(e)) and with the agreement of the chief elected official for the local area must designate or certify each one-stop operator, develop and enter a contract with each one-stop operator, and conduct oversight of the one-stop delivery system. (UIC, § 14232.)

In sum, federal statute and regulations promulgated thereunder, as well as California statute and decisions thereunder of CWIB, establish and implement a comprehensive system of workforce development, within which local workforce investment boards are created by state and local government, publicly funded by federal grants, and operate under agreements with local government, and the performance of local workforce investment boards is monitored and assessed for compliance by state and local government.

We next examine the operations and characteristics of WIB.

The Operations and Characteristics of WIB

WIB is the WIA workforce investment board or "local board" for Solano County, California (County). The parties provided several documents describing the characteristics and operations of the WIB, including the SEIU-WIB collective bargaining agreement (CBA), the WIB Bylaws (Bylaws) and the WIB's Agreement with County of Solano (Agreement) entered pursuant to the WIA. We review relevant provisions of each.

1. The CBA

The CBA identifies the "Employer" as "the Private Industry Council of Solano County, Inc., doing Business as the Workforce Investment Board . . . of Solano County, Inc."[10] (CBA, p. 1.) and describes the bargaining unit represented by SEIU as follows: all full-time and

[10] We take administrative notice of state and county records which indicate: Private Industry Council of Solano County, Inc.'s current corporate status is active (California Secretary of State File No. C1101464); and Private Industry Council of Solano County, Inc., has registered a fictitious business name (FBN) ("Workforce Investment Board of Solano County, Inc.") in Solano County (FBN File No. 2013000812). Neither party submitted for PERB review the Articles of Incorporation for the Private Industry Council of Solano County, Inc., nor was this document readily available elsewhere.

regular part-time employees in the classifications of administrative/program specialists I, and II, and administrative/programs technicians I, II and III, excluding supervisory, confidential, and temporary employees. (CBA, p. 1.)

2. The Bylaws

The Bylaws describe a nonprofit public benefit corporation, designated the "Workforce Investment Board of Solano County, Inc." formed under California law for the purpose of implementing WIA in Solano County, California. The Bylaws state, inter alia, that:

(1) WIB is "the planning, administrative, implementation and oversight agency for WIA employment and training programs in Solano County, as defined in Section 117[11] of the Act" (art. III);

(2) WIB's purpose is "to administer and operate workforce development programs as a public/private partnership between community and business interests" (art. I, § B);

(3) WIB's goals are to carry out the "foregoing purposes" and "in connection therewith" to exercise any of the powers granted to nonprofit corporations by the laws of the State (art. II);

(4) WIB derives its authority "in part from: The federal Workforce Investment Act . . . of 1998, and its amendments" or WIA (art. I, § A);

(5) WIB's membership consists of its duly appointed directors (art. V), who are appointed by the County board of supervisors and certified by the Governor of California in accordance provisions of State and federal law, and serve terms of five (5) years consistent with such law (art. VI, § C);

(6) WIB's board of directors exercises all corporate authority, and control of the business and affairs of WIB, subject to limitations specified in WIB's articles of incorporation, federal and State laws, duties of directors under the Bylaws, the conditions of any grant under

[11] PL 105-220, § 117; 29 U.S.C. § 2832.

which WIB is operating, and to limitations of authority set forth in the WIA Agreement[12] (Agreement) entered into pursuant to the WIA between WIB and the County (art. VI, § A);

(7) WIB's officers are elected by and from among the WIB board of directors (art. IX, § B);

(8) WIB's members/directors appoint a president or chief executive officer (CEO) who is a WIB employee, who directs and supervises the business and affairs of WIB, subject to the WIA Agreement with the County and State and federal law, and who serves at the pleasure of the WIB board of directors (art. XII, § A);

(9) WIB general membership meetings are public and meeting notices must comply in all respects with the California's "open meeting" law for local public agencies[13] (art. VII, § A);

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[12] U.S. Department of Labor regulations authorize an agreement describing the respective statutory duties and responsibilities of the local board and the chief elected official for the local area providing, in pertinent part:

> The Local Workforce Investment Board (Local Board) is appointed by the chief elected official in each local area in accordance with State criteria established under WIA section 117(b) [29 U.S.C. § 2832(b)]. . . .
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> (b) In partnership with the chief elected official(s), the local board sets policy for the portion of the statewide workforce investment system within the local area.
>
> (c) The local board and the chief elected officials may enter into an agreement that describes the respective roles and responsibilities of the parties.
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> (d) The local board, in partnership with the chief elected official, develops the local workforce investment plan and performs the functions described in WIA section 117(d) [29 U.S.C. § 2832(d)].

(20 C.F.R., subpart 661.300.)

[13] 29 U.S.C. section 2832 (e); 20 C.F.R. subpart 661.307.

(10) WIB directors adopt and adhere to a conflict of interest code as required under the State plan[14] (art. VIII);

(11) WIB's fiscal year is established pursuant to the WIA as July 1 through June 30; (art. XV);

(12) WIB's offices are located in Solano County, California (art. IV).

3. The Agreement

The Agreement between WIB and the County describes the respective roles and responsibilities of WIB and the County in implementing the WIA. The Agreement recites:

> WHEREAS, the Workforce Investment Act ("WIA") [20 CFR Part 652 et al; Public Law 105-220; 20 U.S.C. 9726(c)] authorizes the expenditure of Federal funds for job training programs in local Service Areas (hereinafter "SA"); and
>
> WHEREAS, the Governor's Executive Order D-9-99, signed October 10, 1999, established the California Workforce Investment Board and provides for State implementation of the Act in California; and
>
> WHEREAS, the California Workforce Investment Board designated Solano County as a Service Area; and
>
> WHEREAS, the Act requires the establishment of a local WIB to provide policy guidance and oversight with respect to a Five-Year Local Strategic Plan for the local SA; and
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> WHEREAS, the Act requires a partnership between WIB and County and requires approval of the WIA Five-Year Local Strategic Agreement by County; and
>
> WHEREAS, the Act requires WIB and the County to define the scope of their partnership by means of an Agreement; and
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> WHEREAS, WIA section 118(b), 20 CFR 661.345 and CUIC [Cal. Unemp. Ins. Code] 15032(1) [repealed and replaced by UIC, §§ 14000, et seq.] require that an agreement enumerate procedures for the development of a WIA Five-Year Local Strategic Plan by WIB as well as additional responsibilities of the Administrative Entity; and

[14] 29 U.S.C. section 2832 (g); California Government Code sections 87300, et seq.

WHEREAS, the North Bay Employment Connection (hereinafter "NBEC") was created in March 1998 as an informal collaboration of the four Northern San Francisco Bay Area workforce development agencies, located in Marin, Napa/Lake, Solano and Sonoma, to work in partnership to enhance service delivery for job seekers and employers in the North Bay economic region; and

WHEREAS, it is the joint intention of the County and the WIB to host the administration of the North Bay Employment Connection grants and contracts for employment, training and education projects and programs for the NBEC partners in addition to the current Service Area.

(Agreement, p. 1)

The Agreement identifies particular duties to be performed by WIB as the WIA administrative/planning entity, and other duties to be performed by the County as the designated WIA grant recipient.

Duties of WIB under the Agreement include:

(1) Prepare a five-year local strategic WIA plan summary containing recommendation for operation of all WIA training programs and activities during the five-year local strategic planning period, and prepare all WIA plan documents, to include the following: (a) publish in local news media at least 30 days in advance, notice of the availability of the plan, and the date, time and location of a public hearing for review and discussion of the plan; (b) conduct the hearing and include when submitted to the governor any comments on the plan received at the hearing; (c) present the plan for approval to the WIB board of directors; (d) present the WIB-approved plan to the County board of supervisors for approval and signature of the chief local elected official (*Id.* at p. 4);

(2) Make available the documents needed by the County to perform its duties, including copies of all State and federal reports and audits regarding programs, operations or complaints (*Id.*);

(3) Maintain a contracts management system in conformity with contract policies determined by County and its counsel (*Id.*);

(4) Submit to the County board of supervisors for approval all contract actions of $50,000 or more, and to the County administrator for concurrence all contracts actions less than $50,000 (*Id.*);

(5) Pursuant to County purchasing requirements, contract directly for purchases of property, equipment, software, etc. (*Id.* at p. 5);

(6) Provide County contract administrator all finalized contract documents (*Id.*);

(7) Use County purchasing department services, except when WIB procedures produce greater efficiency or as required by grant rules (*Id.*);

(8) Submit to the County board of supervisors for approval all grants over $50,000 (*Id.*);

(9) Use and expend grant funds only for administration and implementation of the specific grant program (*Id.*);

(10) Use and expend funds pursuant to, and in accordance with, all applicable federal and State laws and regulations (*Id.*);

(11) Reimburse County for all actual costs incurred by County as the grant recipient (*Id.*);

(12) Pay solely from funds received by WIB all costs to plan, administer and manage the WIA program (*Id.*);

(13) Obtain County approval for revenue contracts exceeding $500,000 (*Id.* at p. 3).

Duties of Solano County under the Agreement include:

(1) Receive all grant funds from the State or federal government, and establish special revenue fund with County treasurer in which to deposit all grant funds and from which to disburse such finds in accordance with this Agreement (*Id.* at p. 2.);

(2) Execute local plan modification documents, WIA master subgrants and other subgrants or funding agreements, as necessary to conduct business (*Id.*);

(3) Disburse grant funds as prescribed by State and federal government (*Id.*);

(4) Allocate and account for all funds received and obligated under WIA (*Id.*);

(5) Pay all claims for authorized payrolls, subcontractors and vendors (*Id.*);

(6) Establish and provide fiscal policies and reporting procedures (*Id.*);

(7) Procure and participate in all audits (*Id.*);

(8) Monitor reporting of all fiscal data to State and federal government (*Id.*);

(9) Approve all leases entered into by WIB where grant funds are used (*Id.*);

(10) Approve all changes in the plan or in the manner of providing service if not in the plan (*Id.*);

(11) Review/approve WIB annual operating budget (*Id.*);

(12) Ratify WIB's selection of the WIB president/executive director (*Id.*);

(13) Appoint WIB board members (*Id.* at p. 3);

(14) Monitor all grant funded activities (*Id.*).

In sum, WIB's CBA, Bylaws and Agreement with Solano County indicate that WIB: (1) is part of the federal and California workforce investment system; (2) is controlled by public entities, viz., the State and the County; (3) was created for and operates to achieve a public purpose; and (4) is publicly funded via federal grants.

ADMINISTRATIVE DETERMINATION

The administrative determination states the Office of the General Counsel's findings and conclusions on PERB jurisdiction and the sufficiency of SEIU's factfinding request. (Admin. Deter., pp. 1-6.) As to jurisdiction, the Office of the General Counsel relied on

existing PERB precedent construing MMBA[15] to conclude that WIB is a public agency within the MMBA, subject both to PERB's jurisdiction and the factfinding provisions of MMBA and PERB regulations. As to the sufficiency of SEIU's factfinding request, the PERB's Office of the General Counsel construed the MMBA and PERB's regulations as implicated by SEIU's declaration of an impasse over "mid-term layoffs" and request that this dispute be submitted to factfinding.

CONTENTIONS OF THE PARTIES

WIB renews on appeal its claims that PERB lacks jurisdiction and that in any event, the dispute submitted by SEIU, viz., "mid-term layoffs," is legally insufficient for factfinding.

As to jurisdiction, WIB urges that it is a private corporation and its board of directors retains the authority to remove for cause any individual director. Thus, reasons WIB, notwithstanding the determination of the NLRB that WIB is a political subdivision of the state, WIB is not a political subdivision of the state within *National Labor Relations Bd. v. Natural Gas Utility Dist. of Hawkins Co.* (1971) 402 U.S. 600 (*Hawkins County*) and its progeny. Moreover, urges WIB, PERB's holdings in *El Camino*, *supra*, PERB Decision No. 2033-M and *Transit Authority*, *supra*, PERB Decision No. 2263-M, are distinguishable. Thus, reasons WIB, it is not a "public agency" under MMBA section 3501(c), and not subject either to the MMBA factfinding provisions or to PERB jurisdiction. Finally, urges WIB, PERB is neither bound by the NLRB's determination regarding NLRB jurisdiction, nor does the NLRB's determination regarding its own jurisdiction dispose of the separate question of PERB's jurisdiction under MMBA.

As to the parties' dispute proposed for submission to factfinding, WIB urges that: (1) the issue proposed by SEIU, "midterm layoffs," is vague; (2) WIB's decision to lay off

[15] MMBA section 3501(c); *El Camino Hospital District* (2009) PERB Decision No. 2033-M (*El Camino*); *Central Contra Costa Transit Authority* (2012) PERB Decision No. 2263-M (*Transit Authority*).

employees was due to "economic adversity" and thus was beyond WIB's duty to bargain thereon under MMBA, and in any event SEIU failed to make a negotiable proposal regarding layoffs so as implicate WIB's duty to bargain; and (3) PERB may not impose on WIB an obligation to participate in factfinding absent a request from SEIU which implicates a subject within WIB's duty to bargain.

SEIU relies on its submissions below, and upon the NLRB Office of Appeals' decision of February 7, 2014, holding that WIB is a political subdivision of the State and beyond the NLRB's jurisdiction.

DISCUSSION

PERB Regulation 32360 prescribes the contents for an appeal from an administrative determination, stating in subdivision (c) thereof, "the appeal must be in writing and must state the specific issue(s) of procedures, fact, law or rationale that is appealed and state the grounds for the appeal." (PERB Reg. 32360(c).)[16]

WIB proffers on appeal the contentions it asserted below. We turn first to our jurisdiction,[17] and then to the sufficiency of SEIU's factfinding request.

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[16] The Board may reject an appeal from an administrative determination where the appeal fails to identify the grounds or issues for the appeal. (*Los Angeles Unified School District* (1992) PERB Order No. Ad-232.)

[17] Recently, the Board elected not to resolve in an appeal from an administrative determination regarding a request for factfinding under the MMBA, and instead to address in parallel unfair practice proceedings among the same parties arising out of the same circumstances, a complex factual issue involving joint employer status and construction of the charter of the City and County of San Francisco. (*City & County of San Francisco* (2014) PERB Order No. Ad-415-M (*San Francisco*), pp. 11-14.) As noted above at pp. 6-7, the parties here similarly maintained, but dissimilarly settled prior to hearing, an unfair practice charge dispute which implicated some of the issues raised in this case. Consequently, we undertake here on the record before us resolution of the jurisdictional and other issues presented by this appeal.

PERB's MMBA Jurisdiction

In the MMBA, the Legislature enacted a broadly-inclusive scheme for labor relations between California's public agencies, as defined, and their employees. Section 3500 declares, in pertinent part, that:

> (a) It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies. 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.

(MMBA, § 3500(a).) The Legislature selected an expansive term, "public agency," to describe those employers subject to the obligations of MMBA and whose employees enjoy rights thereunder. In section 3501(c) the Legislature defined "public agency" as follows:

> (c) Except as otherwise provided in this subdivision, "public agency" means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, "public agency" does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and

Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California.

(MMBA, § 3501(c); emphasis added.)

Effective July 1, 2001, the Legislature vested PERB with jurisdiction to administer and enforce the MMBA. (MMBA, § 3509; *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072.)[18] Since then, PERB has considered the extent of its MMBA jurisdiction in several cases.

Most recently in *Transit Authority, supra*, PERB Decision No. 2263-M, we concluded that a joint powers agency (JPA) created by several Bay Area municipalities pursuant to the Joint Exercise of Powers Act (JEPA)[19] qualified as a "public agency" within MMBA section 3501(c), and therefore was an MMBA employer subject to the Board's jurisdiction. We noted "the sweeping nature" of the statutory definition of "public agency" set forth in section 3501(c), and observed that "on its face, the MMBA's definition of 'public agency' is a broad one." (*Transit Authority*, p. 15, citing *Public Transportation Services Corporation* (2004) PERB Decision No. 1637-M, p. 2.) We construed section 3501(c) to include those entities that have achieved the status of a "public agency" by statute, constitutional provision, case law or administrative precedent, and in addition those entities whose operations and characteristics bearing on their relationship to the state indicate attributes commonly associated with public bodies. (*Transit Authority*, pp. 16-25.)

Earlier, in *El Camino, supra,* PERB Decision No. 2033-M, the Board concluded that El Camino Hospital (Hospital) was a "public agency" within MMBA section 3501(c).

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[18] PERB has only such jurisdiction and powers as have been conferred on it by statute. (*Transit Authority, supra*, PERB Decision No. 2263-M, p. 6, citing *North Orange County Regional Occupational Program* (1990) PERB Decision No. 857.) Where PERB is without jurisdiction, it cannot acquire jurisdiction by the parties' consent, agreement, stipulation or acquiescence, or by waiver or estoppel. (*Ibid.*)

[19] JEPA is codified at section 6500 et seq.

Operating as a non-profit public benefit corporation under California law, Hospital was "controlled" by the El Camino Hospital District (District) which was itself a "public agency" formed pursuant to the California's Local Health Care District Law (Health & Saf. Code, § 32000 et seq.).[20] The Board reasoned that as it was controlled by the District, Hospital was a "public agency" within section 3501(c). In addition, the Board reasoned that Hospital and District together constituted a single employer which was a "public agency" within section 3501(c) and that Hospital would be excluded from NLRB jurisdiction as a "political subdivision."[21]

Since our task is construing and applying the MMBA,[22] it is to that responsibility that we now turn.

We have assessed WIB's "operations and characteristics" bearing on its relationship to local, state and federal governments. (*Transit Authority*, *supra*, PERB Decision No. 2263-M, pp. 16-25.) We conclude that while organized as a California nonprofit public benefit

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[20] In *Service Employees' International Union, Local No. 22 v. Roseville Community Hospital* (1972) 24 Cal.App.3d 400 (*Roseville*) the court confined "public agency" within section 3501(c) to entities designated as such by statute, reasoning that this narrow construction was compelled because the public employees of such employers had traditionally been denied the right to strike. Long after *Roseville* was decided, the California Supreme Court decided *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564 (*County Sanitation*), holding that strikes by public employees are not unlawful unless it is clearly demonstrated that the strike creates substantial and imminent threat to the health or safety of the public. Thus, the Board observed in *El Camino, supra*, PERB Decision No. 2033-M, that "the fundamental premise on which court in *Roseville* based its decision [viz., that public employee strikes are unlawful] was altered by the Supreme Court in *County Sanitation*. Accordingly, it is unclear whether the [*Roseville*] court's [narrow] interpretation of MMBA section 3501 survived the issuance of *County Sanitation*." (*El Camino,* p. 14.)

[21] *Hawkins County, supra,* 402 U.S. 600 (NLRB jurisdiction upheld where gas utility neither a political subdivision of a state nor controlled by one); see also *Options For Youth-Victor Valley, Inc.* (2004) PERB Decision No. 1701 (charter school organized as non-profit public benefit corporation is a public school employer under Educational Employment Relations Act is codified at Gov. Code, § 3540 et seq.).

[22] We take guidance, as appropriate, from NLRB and judicial construction of NLRA provisions analogous to those in the statutes which we administer. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617 (*Fire Fighters v. City of Vallejo*).)

corporation, WIB was created and now operates to implement the workforce investment program. We find that WIB's operations and characteristics indicate, in their totality, attributes commonly associated with public bodies. Ample support for this finding exists in the record, including the WIB Bylaws, the WIB Agreement with Solano County and the statutory and regulatory framework within which WIB was created and now operates. We explain.

1. Public Purpose

We find that WIB was created for and now operates to achieve a public purpose.

WIB Bylaws (art. I, § A) provide that WIB's purpose is "to administer and operate workforce development programs" (art. I, § B.) and that WIB derives authority from "the federal Workforce Investment Act of 1998, as amended."

WIB's Agreement with the County recites, inter alia, that: (1) WIA authorizes the expenditure of federal funds for job training programs in local service areas; (2) California has established the CWIB and provided for state implementation of the WIA; (3) CWIB has designated the County as a WIA local service area; and (4) WIA requires the establishment of a local board, which is WIB. (Agreement, p. 1.)

Federal statute creating the workforce investment system contains a declaration of public purpose:

> to provide work force investment activities, through state and local workforce investment systems, that increase the employment, retention, and earnings of participants, and increase occupational skill attainment by participants, and as a result, improve the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the Nation.

(29 U.S.C. § 2811.) This purpose is accomplished through the workforce investment system created by Congress in the WIA, a key component of which is the local board. (29 U.S.C. § 2832.) U. S. Department of Labor regulations explain and interpret this and other key components of the workforce investment system. (20 C.F.R., Parts 660-671.)

California statute declares the Legislature's intent to develop and maintain a "well-educated and highly skilled workforce" and in pursuit thereof establishes principles to "guide the state's workforce investment system" (UIC, § 14000 (a), (b)) which includes local boards such as WIB.

2. Public Funding

We find that the workforce investment system and WIB are publicly funded.

WIB's Agreement with the County acknowledges public funding of WIB and its activities, along with County's ultimate receipt and disbursement of these public funds. (Agreement, pp. 1-3.)

Federal funds flow to states under agreements between states and the U.S. Department of Labor, for subsequent disbursement to, and ultimate expenditure by, local governments to support activities jointly planned and agreed upon by the local government and its local area board. (See 29 U.S.C. §§ 2852, 2854, 2862 2864 and 20 C.F.R., subparts 667.100-140.)

3. Public Control

We find that through the federal/state workforce investment system, government/public entities establish and maintain control over WIB.

WIB Bylaws reflect government control of WIB by the State and/or its political subdivision, the County: (1) WIB's corporate directors are appointed by the County and certified by the Governor of California (Bylaws, art. VI, § C); (2) WIB's president/CEO is appointed by and serves at the pleasure of these directors, and the appointment must be ratified by the County (Bylaws, art. VII, § A); (3) WIB director meetings are subject to requirements of the California "open meeting" statute applicable to local agencies (Bylaws, art. VII, § A; 29; U.S.C. § 2832(e); 20 C.F.R., subpart 661.307); (4) WIB directors are subject to the California "conflict of interest" regime applicable to local agency officials. (Bylaws, art. VIII; 29 U.S.C. § 2832 (g); Cal. Gov. Code, §§ 87100 et seq.)

WIB's Agreement with the County likewise reflects control of WIB by the State and/or the County. WIB's duties under the Agreement include, inter alia: preparing a local five-year strategic plan and all associated documents, with a public hearing thereon, for submission to and approval of the County; providing to the County all State and federal reports and audits regarding programs, operations or complaints; maintaining a contracts management system in conformity with contract policies determined by County; obtaining approval/concurrence of the County for all contracts; providing the County all finalized contract documents; using County purchasing services; obtaining County approval for program grants over $50,000; reimbursing the County for its costs as grant recipient. The County's rights/duties under the Agreement include, inter alia: appointing all WIB board members; ratifying WIB's selection the WIB president/executive director; reviewing/approving WIB's annual operating budget; receiving, holding and disbursing for WIB all WIA grant funds from the State or federal government; allocating and accounting for all WIA funds; paying authorized WIB payrolls, subcontractors and vendors; establishing fiscal policies and reporting procedures to be used by WIB; procuring and participating in all audits of WIB; monitoring WIB reporting of all fiscal data to State and federal government; approving all changes in the local plan or in the manner of providing service; and monitoring all WIB grant funded activities.

Finally, federal and California statutes also reflect control of WIB by the State and/or the County: (1) WIB's local plan is developed jointly with, and is subject to approval by the County, and thereafter reviewed and approved by the Governor (29 U.S.C. § 2833; UIC, § 14220); (2) the local plan must be consistent with the CWIB state plan (29 U.S.C. § 2833; UIC, § 14221); (3) activities funded under the local plan must meet the mandatory specifications therefor in federal and state statute (29 U.S.C. §§ 2833, 2841-2843; UIC, § 14221); (4) local plan implementation is subject to mandatory performance review (29 U.S.C. § 2871).

Based on these findings, plus those stated in the administrative determination, we conclude that WIB is a public agency within MMBA section 3501(c).

4. WIB's Jurisdictional Contentions

WIB contends that it is a private corporation because pursuant to WIB Bylaws only WIB directors may remove for cause one of their own, thus vesting "control" over sitting WIB directors in WIB and not a government entity. For this reason, urges WIB, it is not a "public agency" within section 3501(c). We are not persuaded. We explain.

Unlike most private corporations, WIB is a public benefit corporation under California statute, having as its sole purpose and function to serve, pursuant to federal and State statutes and regulations and an Agreement with the County, as the Workforce Investment Board for Solano County, California.

Unlike officials of a private corporation, WIB's directors are publicly, not privately, appointed by a government entity, County, and approved by another government entity, California's Governor. By statute as well as WIB Bylaws, WIB directors serve five-year terms. Although WIB Bylaws do authorize the publicly-appointed directors to remove for cause one of their own, WIB has proffered no proof, nor even claimed, that this removal power has been exercised. In any event, this removal authority is of little moment, since any vacancy arising from such a removal is filled by governmental appointment.

Unlike officials of a private corporation, WIB directors are obliged, as are officials of local government, to: (1) adopt a conflict of interest code pursuant to the conflicts of interest provisions of California's political reform act, (Gov. Code, §§ 87100 et seq.) including individual director disclosure of economic interests as defined in the WIB conflict of interest code and State statute; and (2) give public notice of, and conduct, WIB directors meetings in accordance with the public meeting statute applicable to local governmental agencies. (Gov. Code, §§ 54950 et seq.)

Unlike officials of a private corporation, WIB directors are not free of, but rather subject to, review and ratification of their actions by local and state government officials. As outlined above, mandatory provisions of federal and state statutes and regulations, as well as provisions of the Agreement between WIB and the County subject WIB directors' actions to such governmental control: (1) WIB's corporate directors are appointed by County and certified by the Governor of California; (2) WIB's president/CEO is appointed by and serves at the pleasure of these governmentally-designated directors, and the appointment must be ratified by the County; (3) WIB director meetings are subject to requirements of the California "open meeting" statute applicable to local agencies; (4) WIB directors are subject to the California "conflict of interest" regime applicable to local agency officials; (5) WIB prepares five-year strategic plan and all associated documents, with a public hearing thereon, for submission to and approval of the County, and the Governor, and the plan must be consistent with California's plan adopted by the CWIB; (6) activities funded under the local plan must meet the mandatory specifications therefor in federal and state statute; (7) the local plan implementation is subject to mandatory performance review by the County and the State; (8) WIB provides the County all State and federal reports and audits regarding programs, operations or complaints; (9) WIB maintains a contracts management system in conformity with contract policies determined by the County; (10) WIB obtains approval or concurrence of the County for all contracts; (11) WIB provides the County all finalized contract documents; (12) WIB uses County purchasing services; (13) WIB obtains County approval for program grants over $50,000; (14) WIB reimburses the County for its costs as grant recipient; (15) County reviews and approves WIB's annual operating budget; (16) County receives, holds and disburses for WIB all WIA grant funds from the State or federal government; (17) County allocates and accounts for all WIA funds; (18) County pays authorized WIB payrolls, subcontractors and vendors; (19) County establishes fiscal policies and reporting procedures to

be used by WIB; (20) County procures and participates in all audits of WIB; (21) County monitors WIB reporting of all fiscal data to State and federal government; (22) County approves all proposed changes in the local plan or in the manner of providing service; and (23) County monitors all WIB grant funded activities.

Notwithstanding the NLRB's determinations of November 8, 2013 and February 7, 2014, that WIB is a political subdivision under NLRA section 2(2), WIB urges that it is not a political subdivision and thus not exempt from NLRB jurisdiction section 2(2). WIB urges that it cannot be a political subdivision pursuant to alternative (2) of the NLRB's test for exemption, viz: "political subdivisions [are] entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." (*Hawkins County, supra*, 402 U.S. 600, 604-605, citing "About the Rights of the Public Employee," 1 Lab. L. J. 604, 612-615 (1950).) In support of this claim, WIB cites to its Bylaws which provide that removal of a WIB director shall be upon a vote of the other directors, not by action of a governmental appointing power or the general electorate. Thus, reasons WIB, it is different in a crucial manner from *Hawkins County*, where the district's commissioners were subject to removal by a governmental authority or by the general electorate.

We conclude that WIB makes too much of this distinction. We explain.

In *Hawkins County, supra*, 402 U.S. 600, the court applied the NLRB's own test to the record facts in the case, reaching a different result than had the NLRB. The court found sufficient basis to exempt the respondent district from NLRB jurisdiction under alternative (2) of the NLRB's test, viz: "administered by individuals who are responsible to public officials or to the general electorate." (*Id.*) The court concluded that district commissioners were "responsible to public officials" because they were subject to the State's "General Ouster

Law, which provides procedures for removing public officials from office for misfeasance or nonfeasance. [Citation omitted.] Proceedings under the law may be initiated by the Governor, the state attorney general, the County prosecutor, or ten citizens." (*Hawkins County*, *supra*, 402 U.S. 600, 607.)

Here, the NLRB regional director and NLRB Office of Appeals concluded, and we have found based on the record before us, that in the overall circumstances, WIB directors are responsible to public officials, including but not limited to, the County board of supervisors, which retains numerous powers and rights vis-à-vis WIB. We examine the NLRB Office of Appeals' determinations.

In its determination of November 8, 2013, the NLRB Office of Appeals stated:

> The evidence indicates that the Workforce Investment Act authorizes the expenditure of Federal funds for job training programs and, pursuant to this legislation, Governor's Executive Order D-9-99 established the California Workforce Investment Board to implement the Act in California. The California Workforce Investment Board designated Solano County as a Service Area. The bylaws of the Workforce Investment Board of Solano County set forth the procedure for the selection of Directors in Article VI Section C which reads as follows, "The Solano County Board of Supervisors shall appoint and the Governor of the State of California shall certify the initial WIA Directors of the Corporation in accordance with the provisions of State and Federal law. Future vacancies will be appointed by the Solano County Board of Supervisors and certified by the Governor of the State of California." As noted in the appeal, Directors are removed by their colleagues on the WIA Board of Directors. But these vacancies are then filled by the process set forth in the above-quoted language.
>
> With regard to the question of whether an entity is exempt from NLRB jurisdiction as a political subdivision, the relevant inquiry is whether it was either created directly by the State or whether it is administered by individuals who are responsible to public officials or the general electorate. [Citation omitted.] In the case on appeal, both standards for exclusion are met in that it was created pursuant to an executive order of the Governor of California and its Directors are appointed by public officials. While as an administrative matter these Directors are subject to removal by their colleagues rather than outside public officials, the overall circumstances clearly indicate that the Directors of

> this entity are responsible to public officials. Accordingly, the NLRB lacks jurisdiction over this entity and further proceedings are unwarranted.

(Denial Ltr., November 8, 2013, Workforce Investment Board Cases 20-CA-099516, 102391, 103982, pp. 1-2, emphasis added.[23]) Likewise, in its determination of February 7, 2014, the NLRB Office of Appeals stated:

> Contrary to the assertions on appeal, the Acting Regional Director properly found that the Employer was a Section 2(2) political subdivision under the National Labor Relations Act. Consequently, this Agency does not have jurisdiction to review the charge. In this regard, the appeal raises the same jurisdictional issues which were earlier addressed in our November 8, 2013, letter denying the appeal of the Union in 20-CA-099516, 102391, and 103982. As noted in those cases, the Employer was established by federal law and the executive order of the Governor of California. It receives federal funds and its directors are appointed by the Solano County Board of Supervisors. As noted in the November 8, 2013, denial letter, Directors are subject to removal by their colleagues on the WIA Board of Directors. However, these Directors are themselves public officials in the sense that they were appointed by public officials. Moreover, any vacancies created by a removal of a Director are filled by appointment from the Solano County Board of Supervisors. Further, as the evidence in the prior cases disclosed, the Solano County Board of supervisors retains numerous powers and rights pertaining to the Employer's operations.
>
> Accordingly further proceedings are unwarranted.

(Denial Ltr., February 7, 2014, SEIU [WIB] Case 20-CB-107268, pp. 1-2, emphasis added.)

WIB opposes the NLRB Office of Appeals' determinations regarding NLRB jurisdiction, and urges that we reach a different conclusion. We decline. Although these

[23] We take official notice of this determination by the NLRB Office of Appeals in a matter involving, and relied upon herein by, the parties before us. (*The Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H; *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C; *Fire Fighters v. City of Vallejo, supra,* 12 Cal.3d 608; PERB Regulation 32320(a)(2).)

determinations lack res judicata effect,[24] we conclude that the NLRB Office of Appeals' determinations are well-reasoned. Accordingly, we conclude as did the NLRB Office of Appeals, that WIB's claims under *Hawkins County, supra*, 402 U.S. 600, 607, are unavailing.

In sum, we have determined that WIB is a public agency within the MMBA and subject to PERB's jurisdiction and that we will not disturb the NLRB Office of Appeals' well-reasoned determinations that the WIB is a political subdivision of the State of California within NLRA section 2(2).

We next address SEIU's factfinding request.

Sufficiency of SEIU's Factfinding Request

WIB objects to the determination that the dispute over "mid-term layoffs" is subject to factfinding under MMBA. WIB raises three distinct claims, which are: (1) the dispute as alleged is vague; (2) the layoffs in question were for economic uncertainty and thus are beyond the scope of representation, and SEIU failed to demand bargaining over negotiable impacts or effects thereof; and (3) a determination that an issue is within the scope of representation is a necessary precedent to a determination that factfinding thereon is appropriate. We address WIB's claims.

As noted by the Office of the General Counsel, PERB's role in reviewing a factfinding request is limited. (Admin. Deter., pp. 4-6.) MMBA section 3505.4 and PERB Regulation 32802, read together, posit as sufficient conditions for factfinding under MMBA, the following: either participation in mediation, or absent mediation a declaration of impasse by one of the parties, plus a request by the exclusive representative for factfinding, accompanied by a statement that the parties have been unable to effect a settlement. Such a

[24] *Warehousemen's Union Local No. 206 v. Continental Can Co., Inc.* (9th Cir. 1987) 821 F.2d 1348, 1351.

limited showing is sufficient under MMBA section 3505.4 and PERB Regulation 32802 to implicate a public agency's obligation to participate in factfinding.[25]

In reviewing a factfinding request PERB relies on the parties' representations concerning the status of their bargaining and or mediation discussions and does not assess an employer's defenses to its duty to bargain. Nor does PERB determine whether the party seeking factfinding has articulated with sufficient clarity its position on the issue. These are matters properly left to clarifying discussions between the parties[26] and for resolution in an unfair practice proceeding if either party files a charge. To inject such issues into a factfinding investigation would encourage both delay and gamesmanship, thus defeating the principal purpose of factfinding, namely, through intervention of a neutral to assist the parties in reaching a voluntary and prompt[27] resolution of their differences and thereby promote "full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (MMBA, § 3500.)

For these reasons, and those set forth in the administrative determination, we find unpersuasive WIB's claims concerning SEIU's factfinding request.

CONCLUSION

For the reasons set out above, as well as those set forth in the administrative determination, we dismiss WIB's appeal.

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[25] *County of Contra Costa* (2014) PERB Order No. Ad-410-M; *San Francisco*, *supra,* PERB Order No. Ad-415-M.

[26] *County of Santa Clara* (2013) PERB Decision No. 2321-M and *Rio Hondo Community College District* (2013) PERB Decision No. 2313; both citing *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, pp. 8-10.

[27] *San Francisco*, *supra,* PERB Order No. Ad-415-M, p.13 (factfinding is a time-sensitive process).

ORDER

The administrative determination in Case No. SF-IM-134-M is hereby AFFIRMED.

Members Winslow and Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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January 2, 2014

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Re: *Workforce Investment Board of Solano County and Service Employees International Union Local 1021*
Case No. SF-IM-134-M
Errata to Administrative Determination Dated December 10, 2013

Dear Interested Parties:

It has been brought to my attention that my Administrative Determination, dated December 10, 2013, in this matter contains an inadvertent clerical error. At page seven, the first full paragraph under the heading "Right to Appeal," erroneously stats that the "County" may file an appeal. The corrected paragraph is as follows.

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

I apologize for any confusion this may have caused.

Sincerely,

Laura Z. Davis
Senior Regional Attorney

LD
cc: Lee Axelrad

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December 10, 2013

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Re: *Workforce Investment Board of Solano County and Service Employees International Union Local 1021*
Case No. SF-IM-134-M
Administrative Determination

Dear Interested Parties:

On November 26, 2013, the Service Employees International Union, Local 1021 (SEIU 1021) filed a request for factfinding (request) with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.[1] SEIU 1021 asserts that it and the Workforce Investment Board of Solano County (WIB) have been unable to effect a settlement in their current negotiations over midterm layoffs. SEIU 1021 alleges that the parties reached impasse on November 6, 2013.

On December 3, 2013, SEIU 1021 provided further information in support of its request. On December 4, 2013, the WIB filed a position statement, opposing the request for factfinding.

On December 5, 2013, PERB approved SEIU 1021's request and informed the parties in an e-mail message that the determination would subsequently be memorialized in writing.

Factual Background Relating to PERB's Jurisdiction and Prior Proceedings

On October 21, 2013, PERB's Office of the General Counsel issued a complaint in PERB Unfair Practice Case number SF-CE-1067-M, *SEIU Local 1021 v. Workforce Investment Board of Solano County*. This case is presently scheduled for hearing before an Administrative

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

Law Judge. Documents filed in connection with that case provide the following pertinent facts.

The WIB is covered by its own written bylaws. It is governed by a 39-member Board of Directors who are appointed by the Solano County Board of Supervisors, and approved by the Governor. Members of the Board of Directors are not elected, and may be removed only by a vote of the others on the Board of Directors. The Solano County Board of Supervisors does not have authority to remove them. Members serve a fixed term, normally five years, or as provided by legislation.

The purpose of the WIB, according to the bylaws, is: "... to administer and operate workforce development programs as a public/private partnership between community and business interests." In other words, WIB helps individuals find jobs by coordinating with numerous employers and employment-related services in the County. It derives its authority from the federal Workforce Investment Act. It also appears that the WIB for Solano County is one of many local WIBs overseen by the State Workforce Investment Board, a State executive branch agency.

For approximately 13 years, SEIU and the WIB have been signatories to a series of collective bargaining agreements (CBAs). The current CBA is in effect through September 30, 2013. The CBAs express the assumption of the parties that they are subject to the National Labor Relations Act (NLRA) and therefore under the authority of the National Labor Relations Board (NLRB). For example, CBA Section 1, Recognition, defines the bargaining unit by reference to the NLRB.

On April 26, 2013, SEIU 1021 filed an unfair labor practice charge (against the WIB) with the NLRB which was dismissed on May 30, 2013. In a letter dated November 8, 2013, the NLRB denied SEIU 1021's appeal of the Regional Director's refusal to issue a complaint, asserting that the WIB appeared to be a political subdivision of a state and therefore excepted from NLRB jurisdiction, as discussed in *Pilsen Wellness Center* (2013) 359 N.L.R.B. No. 72.

Factual Background and Positions of the Parties Regarding Factfinding Request

On November 6, 2013, Stephen Cutty, Field Representative for SEIU 1021, sent a letter to Robert Bloom, President of the WIB, stating as follows:

> I am requesting Mediation from State Mediation and Conciliation Services immediately to resolve our differences in this proposed imposition of layoffs of Bargaining Unit Personnel. If you do not wish to engage in the mandated Mediation Process under the Meyers-Milias-Brown Act then I am demanding a "Fact Finding" panel be enabled immediately.

On November 13, 2013, Bloom sent a letter in reply to Cutty. The WIB took the position that: (1) the MMBA does not apply to the WIB; and (2) that the WIB's decision to carry out layoffs

due to financial adversity does not require bargaining. Bloom further stated: "under the MMBA it is within WIB's rights to unilaterally decide to lay off some of its employees to reduce its labor costs," and "the two layoffs we discussed will proceed consistent with the in-place WIB/SEIU Collective Bargaining Agreement and longstanding past practices."

According to the WIB, Cutty and Bloom had several discussions regarding the WIB's proposal to lay off two positions: (1) a Program Assistant II; and (2) an Employability Specialist II (case manager) position. The most recent meeting between Cutty and Bloom on this subject was on November 6, 2013. The WIB contends that it is not obligated to bargain over this layoff decision, and, it alleges, SEIU 1021 has not identified any negotiable effects over which it wanted to bargain.

According to the WIB, the proposed layoffs were actually implemented. The two employees were notified of their layoffs on November 8, 2013, and the layoffs took effect on November 15, 2013.

In a letter to PERB dated December 3, 2013, Matthew Gauger, attorney for SEIU 1021, provided copies of the November 6 and November 13 letters. Mr. Gauger's letter states as follows:

> Together, these documents [the November 6 and November 13 letters] constitute a declaration of impasse. Further, Mr. Cutty verbally declared impasse at the November 6 meeting with the employer. To the extent that these documents and Mr. Cutty's statement are inadequate to establish impasse, please consider this letter a declaration of impasse on behalf of the Union.

In its position statement dated December 4, 2013, the WIB contends that: (1) its decision to lay off employees is not subject to bargaining and SEIU 1021 has not identified any negotiable effects which would be subject to bargaining; and (2) there has not been any adjudication of the issue of the application of the MMBA and PERB's jurisdiction, and so invocation of the factfinding process is improper or, at least, premature.

Discussion

A. Jurisdiction Over the WIB

PERB has jurisdiction over employees of public agencies, as defined by the MMBA. (Gov. Code, § 3501(c).) The WIB contends that the question of jurisdiction is presently unresolved because there has been no adjudication of the issue yet, and that this issue will be decided in connection with the pending unfair practice charge. The WIB also alleges that it is continuing to pursue an appeal with the NLRB on the jurisdiction issue.

In *El Camino Hospital District* (2009) PERB Decision No. 2033-M, the Board held that the El Camino Hospital was a public employer within the meaning of the MMBA. The charge in that

case was originally filed with the NLRB, which declined jurisdiction based upon the *Hawkins* political subdivision exception. (*NLRB v. Natural Gas Utilities District of Hawkins County* (1971) 402 U.S. 600 [*Hawkins*].) PERB found that the El Camino Hospital was governed largely by the El Camino Hospital District. The District appointed five of the Hospital's governing board members, and had the authority to remove the sixth appointee. PERB found that the board members were "responsible to public officials."

In *Central Contra Costa Transit Authority* (2012) PERB Decision No. 2263-M, PERB held that a local transit authority was a public agency or, alternatively, a governmental subdivision, within the meaning of the MMBA. PERB also noted in that case that an agreement between the parties cannot confer jurisdiction upon PERB, and that the absence of jurisdiction cannot be overcome by established practices of the Board.

Here, the WIB is governed by board members appointed by the Solano County Board of Supervisors. The Board of Supervisors does not have authority to remove WIB Board members, but otherwise it appears that these are public officials. In addition, because WIB appears to have a relationship with the State Workforce Investment Board, WIB might be considered a governmental subdivision of that agency. Accordingly, SEIU 1021 makes a threshold showing that the WIB is a public agency within the meaning of the MMBA and therefore within PERB's jurisdiction for, at least, the limited purposes of the instant factfinding request.

B. Declaration of Impasse

MMBA section 3505.4, subdivision (a),[2] provides as follows:

> The employee organization may request that the parties' differences be submitted to a factfinding panel . . . If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. . . .

PERB Regulation 32802 provides as follows:

> (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall

[2] The factfinding provisions were added to the MMBA by Assembly Bill 646 (Stats. 2011, Ch. 680, § 2) and amended by Assembly Bill 1606 (Stats. 2012, Ch. 314, § 1.) The amendment, which added the language about either party providing written notice of declaration of impasse, was intended to be technical and clarifying of existing law. (Stats. 2012, Ch. 314, § 2.)

> be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
>
> (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or
>
> (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

The parties did not submit the bargaining dispute to mediation or select a mediator. Therefore, SEIU 1021's factfinding request is based upon its written notice of a declaration of impasse. The WIB has not disputed the timeliness of the factfinding request. SEIU 1021's correspondence of November 6, 2013, demands mediation or factfinding and therefore indicates that an impasse had been reached. The WIB's letter of November 13, 2013, states that it does not believe the matter is subject to bargaining and that it will proceed to implement the layoffs. On December 3, 2013, SEIU 1021's attorney sent a letter to PERB and to the WIB stating that its letter of November 6 was intended as a written declaration of impasse. To the extent there was any doubt remaining, SEIU 1021's December 3, 2013, letter unequivocally stated that it was declaring impasse. In addition, the WIB implemented the proposed layoffs on November 8, 2013, with an effective date of November 15, 2013. To the extent that SEIU 1021's November 6 letter was unclear, SEIU 1021's December 3 letter, and the fact of implementation, clearly establish a written notice of declaration of impasse within the meaning of section 3505.4.

C. The Parties' Dispute or Differences

The WIB argues that its decision to lay off two employees is not subject to bargaining, because it is a matter of managerial prerogative that need not be negotiated with the union in advance. (*International Association of Firefighters, Local 188 v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259.)

In its factfinding request, SEIU 1021 states that the "type of dispute" over which it is requesting factfinding is "midterm layoffs." As the WIB points out, this description is vague and it is not entirely clear what subjects SEIU 1021 expects to bargain or present to a factfinding panel. It may turn out that some aspects of the dispute are bargainable and others are not. However, PERB's role in reviewing a factfinding request under PERB Regulation 32802 is a limited one: PERB may only determine "whether the request satisfies the requirements of this Section."

As stated above, MMBA section 3505.4, subdivision (a), provides that "the employee organization may request that *the parties' differences* be submitted to a factfinding panel . . . If *the dispute* was not submitted to mediation, an employee organization may request that *the*

parties' differences be submitted to a factfinding panel." (Emphasis supplied.) There is no language in this statute (or in the other statutes governing factfinding) that limits the types of "differences" or "disputes" that may be submitted to a factfinding panel. By this language, and considering the legislative history and PERB's interpretation of factfinding procedures under comparable statutory schemes,[3] the Legislature did not place explicit limits on the nature of the dispute or differences to be submitted to factfinding.

Thus, once an employee organization requests the parties' "differences" be submitted to factfinding, and the procedural aspects of the factfinding sections are met, then participation in factfinding is mandatory. The plain language of the factfinding sections do not distinguish or limit the types of disputes that arise in collective bargaining negotiations that may be submitted to factfinding. If the Legislature intended to limit the types of disputes or differences that could be submitted to a factfinding panel, it could have done so explicitly. It did not.

Next Steps

The instant request satisfies the requirements of PERB Regulation 32802 in that it was timely filed, based upon a written notice of declaration of impasse, and identifies the type of "dispute" or "differences" to be examined at factfinding. At this stage of the proceedings, PERB's inquiry is complete. Each party must select its factfinding panel member and notify this office in writing of his/her name, title, address and telephone number no later than December 17, 2013.[4] Service and proof of service are required.

The résumés of seven factfinders, drawn from the PERB Panel of Neutrals, are being provided to the parties via electronic mail.[5] The parties may mutually agree upon one of the seven, or may select any person they choose, whether included on the PERB Panel of Neutrals or not. In no case, however, will the Board be responsible for the costs of the chairperson.

If the parties select a chair, the parties should confirm the availability of the neutral, *prior* to informing PERB of the selection.

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[3] For example, under long-standing case law, PERB and the courts have interpreted the impasse provisions under EERA and HEERA as applying to negotiations other than just those for an MOU. (Compare §§ 3548-3548.8 [EERA], with §§ 3590-3594 [HEERA], and §§ 3505.4-3505.7 [MMBA].)

[4] This deadline, and any other referenced, may be extended by mutual agreement of the parties.

[5] The seven neutrals whose résumés are being provided are Claude Ames, Norman Brand, Jerilou Cossack, Ruth Glick, William Gould, Joe Henderson, and Nancy Hutt..

Unless the parties notify PERB, on or before December 17, 2013, that they have mutually agreed upon a person to chair their factfinding panel, PERB will appoint one of these seven individuals to serve as chairperson.

Right to Appeal

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

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

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

Service

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

Extension of Time

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

Sincerely,

Laura Z. Davis
Senior Regional Attorney

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