STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SEIU LOCAL 721, Charging Party, v. COUNTY OF RIVERSIDE, Respondent.	Case Nos. LA-CE-443-M LA-CE-447-M LA-CE-482-M PERB Decision No. 2119-M June 24, 2010

Appearances: Weinberg Roger & Rosenfeld by Alan G. Crowley and James Rutkowski, Attorneys, for SEIU Local 721; The Zappia Law Firm by Edward P. Zappia and Brett M. Ehman, Attorneys, for County of Riverside.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Chair: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by SEIU Local 721 (SEIU) and the County of Riverside (County) to the proposed decision of an administrative law judge (ALJ). The consolidated complaint in Case Nos. LA-CE-443-M and LA-CE-447-M alleged that: (1) the County unlawfully applied its local representation rules when it denied SEIU's petition to represent employees of the County's Temporary Assignment Program (TAP); and (2) two County officials made two separate statements to SEIU representatives that TAP employees would get a union when the officials died, retired or the County went out of business. The ALJ found the County reasonably concluded that TAP employees lacked sufficient community of interest to constitute an appropriate bargaining unit but found the County's other five reasons for denying SEIU's petition unlawful. The ALJ also concluded that both County officials' statements constituted interference with employee rights.

The complaint in Case No. LA-CE-482-M alleged that during a public meeting, members of the County Board of Supervisors discussed eliminating TAP in response to SEIU's continuing efforts to organize TAP employees. The ALJ concluded that these statements interfered with employee rights.[1]

The Board has reviewed the proposed decision and the record in light of the parties' exceptions and responses thereto, and the relevant law. Based on this review, the Board dismisses the allegation that the County unlawfully applied its local rules to deny SEIU's petition. The Board also concludes that the statements by County supervisors interfered with the rights of both employees and SEIU under the Meyers-Milias-Brown Act (MMBA)[2] and that the statements by County officials interfered with SEIU's right to represent employees.[3]

FACTUAL BACKGROUND

The County's Temporary Assignment Program

The County created TAP in 1998 to provide temporary employee services to County departments on an as-needed basis. The program, which is administered by dedicated staff

[1] The ALJ also concluded that one County official's use of the phrase "my favorite union" to refer to another union during a conversation with SEIU representatives did not interfere with employee rights. Though SEIU made this allegation in its charge in Case No. LA-CE-443-M, the allegation did not appear in the complaint. Because neither party excepted to the ALJ's ruling on this allegation, we do not consider it here. (PERB Reg. 32300(4)(c); PERB regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

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

[3] The parties requested oral argument in this matter. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453; *Monterey County Office of Education* (1991) PERB Decision No. 913.) Based on our review of the record, all of the above criteria are met in this case. Therefore, the parties' requests for oral argument are denied.

within the County Human Resources Department, operates much the same as a private temporary employment agency. According to the County, TAP saves the County over $8 million per year by greatly reducing the County's reliance on outside temporary agencies.

When a county department (or one of several local government entities that contracts with the County for TAP employees) needs a position filled temporarily, it submits a job order to the TAP office. The job order form contains checkboxes for required skills, arranged into categories including clerical, accounting, medical, industrial, maintenance, and food service. TAP matches an available employee to the skills listed in the job order and assigns the employee to the worksite. If TAP does not have an employee with the requested skills, it arranges for a temporary employee through an outside employment agency.

A prospective TAP employee fills out an application and undergoes an interview, background check and physical before being placed on the TAP roster of available employees. At the time of hire, a TAP employee is given orientation and a TAP employee handbook. The handbook provides information on subjects such as salary, payroll procedures, the TAP 401(A) retirement plan, and the County's anti-harassment policies.

Upon hire, a TAP employee is assigned a "TAP supervisor." According to TAP Services Manager Cynthia Maddox (Maddox), TAP supervisors are not really supervisors, but rather recruiters who assign TAP employees to various departments and keep track of them for accounting purposes. Maddox testified that TAP supervisors do not manage or control TAP employees' work, nor do they evaluate or discipline TAP employees.

While on assignment, TAP employees work side-by-side with the department's permanent employees and are supervised by the department supervisor or manager. The TAP employee handbook states that if the employee is going to be late or absent, he/she needs to contact both the worksite supervisor and the TAP supervisor. The employee is also to call the

TAP supervisor if the tasks actually performed on the assignment are different than those in the job order. Maddox testified this notice is requested to ensure the employee is being properly paid for actual duties performed.

When an assignment ends, a TAP employee notifies the TAP supervisor and waits for the next assignment. Payroll data in the record shows that most TAP employees are called back for multiple assignments. No single TAP assignment may last more than six months but many employees have been on the TAP roster for over a year. According to County Human Resources Director Ronald Komers (Komers), approximately 50 percent of TAP employees become permanent employees.

By far the most common position filled by TAP employees is office assistant. According to SEIU's petition, the next top positions filled by TAP employees are law/legal, certified nursing assistant (CNA), accounting, animal services, custodian, health, and departmental aide. In addition to a large number of office assistants, the authorization cards attached to SEIU's petition show TAP employees working as groundskeepers, law clerks, IT system administrators, food service workers, auditors, behavioral health specialists, laboratory assistants, housekeepers, pharmacy technicians, medical assistants, groups counselors, security guards, lifeguards, licensed vocational nurses (LVN), and registered nurses (RN). For payroll purposes, all TAP employees share the same job code, 13871.

The County also employs per diem and medical on-call employees. These employees are also on the TAP roster but do not share the 13871 job code. SEIU's authorization cards include cards signed by per diem pharmacists, LVNs, CNAs, and RNs.

TAP employee wages vary from $8 to $135 per hour. By agreement with two of the employee organizations representing County employees, TAP employees are paid 5.5 percent less than permanent employees performing the same duties. In turn, TAP charges the

requesting department the TAP employee's wages plus 29 percent. TAP employees do not receive paid sick or vacation leave. They do not receive health benefits but may purchase coverage for dependents. TAP employees do not receive California Public Employee Retirement System pension benefits until they work 1,000 hours in a fiscal year. Until then, they make a mandatory contribution of 3.75 percent of their base salary to the TAP 401(A) defined benefit pension plan.

The County's Employee Relations Resolution (ERR) and Current Bargaining Units

Pursuant to MMBA section 3507, subdivision (a), the County adopted an ERR that governs employee representation matters. The most recent version of the ERR was adopted in 1999.

Section 7 of the ERR, entitled "Criteria for Establishing an Appropriate Employee Representation Unit," states in full:

> In the determination of appropriate employee representation units, the following factors, among others, are to be considered:
>
> 1. Community of interest among the employees.
>
> 2. The history of employee relations in a unit and among other employees of the County.
>
> 3. The effect of the unit on efficient operations of County Service and sound employee relations.
>
> 4. Dividing any classification among two or more units is to be avoided wherever possible.
>
> 5. The existence of common skills and duties, comparable working conditions or similar educational requirements.
>
> 6. Each unit should be the largest feasible group of employees having an identifiable common or related interest without reference to geographical locations or the same supervisors.

7. No unit shall be established primarily on the basis of the extent to which employees in the proposed unit have organized.

Section 8(a) of the ERR lists eleven existing County bargaining units: Supervisory; Professional; Law Enforcement; Inspection and Technical; Trades, Crafts and Labor; Supporting Services; Prosecution; Registered Nurses; Para-Professional; Public Safety; and Law Enforcement Management. SEIU represents four units – Professional, Registered Nurses, Para-Professional, and Supervisor – that are covered by the same collective bargaining agreement. The Inspection and Technical, Supporting Services, and Trades, Crafts and Labor units are represented by Laborers International Union North America, Local 777 (LIUNA). The Riverside Sheriffs' Association represents the Law Enforcement and Public Safety units. The other two units are represented by independent employee organizations.

Section 10 of the ERR is entitled "Modifications of Units." It provides in relevant part:

> 1. A registered employee organization may propose the modification of an established unit by filing a request with the Human Resources Director, accompanied by proof that its represented members comprise 15 percent of the employees in the unit. The Human Resources Director may also propose a modification.
>
> 2. No such proposal shall be submitted except between July 1 and September 1, for immediate determination.
>
> 3. The Human Resources Director shall give notice of the proposed modification in writing to the affected organizations of the unit or units and shall post notice in a place or places to which affected employees will have access.
>
> . . . . . .
>
> 5. Within 15 days after the notice to employees are posted, any other registered employee organization may challenge the appropriateness of the proposed unit or units and request a different unit or units. The challenge shall be filed with the Human Resources Director and must be accompanied by proof that the represented members of the organization comprise 15

> percent of the employees, within any unit proposed by the challenging organization.

SEIU's Representation Petition

On March 11, 2008, SEIU filed a petition with the County seeking creation of a new bargaining unit to be represented by SEIU. The petition sought a unit that would consist of "all TAP employees (excluding managers, supervisors, and confidentials)." The petition was silent regarding per diem employees. Attached to the petition was a detailed analysis from SEIU's law firm explaining how a TAP bargaining unit met the ERR criteria for an appropriate unit.

SEIU submitted 889 authorization cards in support of the petition. The cards were collected between August 2007 and March 2008. The parties stipulated that SEIU organizers verified each employee's identity and witnessed each of the card signatures. The authorization cards included several signed by per diem employees.

In its petition, SEIU contended that the cards represented a majority of TAP employees, based on two methods: (1) a total of 1,564 different TAP names were counted from payroll data received from the County for payroll periods from July through September 2007, of which 797 had signed cards; and (2) 1,109 names were counted from those lists who worked an average of more than four hours per week, of which 591 had signed cards.

Upon receiving the petition, Komers directed staff to review the authorization cards to see exactly which employees SEIU was seeking to represent. Employee Relations Division Manager Thomas Prescott reviewed the documentation for proof of majority support and instructed one of his staff to examine the authorization cards for validity, i.e. signature, date, employed at time of signature, etc.

On April 4, 2008, the County rejected SEIU's petition for the following reasons:

1. TAP employees lack a community of interest.

2. TAP employees have no reasonable expectation of continued employment.

3. There is no history or past practice of representation of TAP employees.

4. The ERR does not permit recognition of a new unit.

5. Recognition of the TAP unit could violate the County's duty to be impartial.

6. Potential fraud in the authorization cards.

Komers testified that his community of interest determination was based on the diversity of skills, duties and educational background among TAP employees, and the fact that, unlike regular temporary employees, TAP employees are task-based and usually do not perform all of the duties of an established classification.

County Officials' Comments Regarding SEIU's TAP Organizing Drive

On March 11, 2008, SEIU organizer Alejandra Valles (Valles) and several TAP employees, accompanied by local press, presented the representation petition to Komers at City Hall. Later that day, Valles and SEIU organizer George Daniels (Daniels) met with Komers in his office to discuss the petition. Valles testified that Komers told her he would not allow SEIU to represent TAP employees because he knew LIUNA was also interested in representing them, that TAP employees did not fit into any of the existing County bargaining units, and that he wanted to avoid a public fight over the petition. Komers could not recall any details of this meeting.

On March 21, 2008, Valles and Daniels met with Komers in a human resources department conference room to discuss the petition. Before entering the conference room, Komers asked Valles and Daniels to give him five minutes to call his "favorite union," LIUNA. Komers began the meeting by stating that approximately 15 percent of the authorization cards submitted by SEIU were invalid for various reasons. When Valles asked

him which cards he was referring to, Komers said he did not have that information available. He then told Valles that the TAP representation issue was complicated "because so many unions were involved" and that the ERR requires 15 percent of any existing bargaining unit to agree to a unit modification. After Valles reminded Komers that it was illegal for him to favor one union over another, he thanked Valles for a recent state audit, stating that he could not certify SEIU until the County had complied with the audit. Valles responded that the audit would allow the County to do some housekeeping of its TAP records. Valles testified that Komers became upset at this point and said the certification process would be "long and drawn out." Komers testified he told Valles and Daniels that the ERR did not allow him to establish a TAP bargaining unit without consulting with other County employee organizations and that, whether he certified SEIU or rejected the petition, there would be PERB hearings and appeals by the County.

Komers then said, "You will get certification the day that I die or retire." Valles drew big quotation marks on her notepad and asked Komers to repeat his statement. Komers responded, "Are you quoting me?" to which Valles responded, "Yes I am." Komers then said he "did not mean it that way" but offered no further explanation. Komers testified he meant the legal process would take so long that, because he was 64 years old, it would not be complete until after he retired or died.

On March 31, 2008, Valles, SEIU organizer Grand Lindsay (Lindsay) and Reverend Paula Cripps of Clergy and Laity United for Economic Justice (CLUE), a community organization, met with Komers in a human resources department conference room. Valles again asked for information about invalid authorization cards. Komers did not give any details about the cards and stated that the County was still conducting its legal analysis. (Komers testified that he meant the County still had not determined whether the ERR allowed creation

of a TAP bargaining unit.) Valles testified that when she asked what Komers meant by his statement that TAP employees would get a union when he died or retired, he at first denied making the statement, then admitted he had and abruptly ended the meeting. Komers testified he told Valles that if SEIU's purpose of meeting with him was to get sound bites for the press, the meetings would not be productive; he did not testify as to how the meeting ended.

On the morning of April 22, 2008, approximately three weeks after the County denied SEIU's petition, Lindsay and SEIU Political Coordinator Bennie Tinson (Tinson) were in the atrium outside of the Board of Supervisors' chambers prior to a public meeting of the board. Tinson introduced Lindsay to County Chief Executive Officer (CEO) Larry Parrish (Parrish). Lindsay asked if Parrish would meet with SEIU regarding the denial of its petition. Parrish responded that he would be dead or the County would be out of business before TAP employees got a union. When Lindsay asked if Parrish would be willing to sit down with SEIU to discuss the issue, Parrish responded that he did not like to waste time and the issue "will never move as long as I am with the county or in my lifetime."

During its public meeting on September 2, 2008, the County Board of Supervisors heard public comment about the TAP organizing effort.[4] Former TAP employee Mai Moss told the board that it was illegal for the County to pay TAP employees less than permanent workers who did the same job and that the County had failed to pay former TAP employees the money in their 401(A) pension plan accounts. Next, Pastor Jaime Kim of CLUE read a letter supporting SEIU's efforts to organize TAP employees.

[4] County and SEIU witnesses testified that during 2007 and 2008, SEIU representatives and TAP employees regularly appeared at board meetings to comment on TAP issues.

Supervisor John Tavaglione (Tavaglione) then commented:[5]

> Thank you Mr. Chair and, you know, this debate of temporary workers trying to be organized under SEIU has been going on for quite some time and its been quite bothersome to be, watching their approach and what I think they believe is an entitlement, that they, as temporary workers should in fact be given the opportunity to be part of a Union.

Following comments about his personal use of temporary employment agencies in the past, Supervisor Tavaglione stated:

> So, you know, this debate in my view, I can tell you from this one Board Member, is not going to go anywhere. I think it's time, and I'd be happy to put something on the agenda, but Mr. Komers I think it's time that we look at reverting back to going to the private sector for temporary employees. If the employees feel, if temporary employees feel entitled for benefits, feel entitled to to, in fact, when I was hiring temporary employees, they didn't receive any benefits. Some of you receive exclusive care, as you mentioned, some 401K, some of you I think one of the ladies mentioned some additional benefits you received, then if that's something that you want, I don't think that Riverside County should in fact be providing that. I think we should be going back to the easy way, if you will. Yes there will be less control, because we are going to be working with, if we decide to go that route, we will be working with the private sector, but I think Mr. Komers, I'd like to hear my colleagues thoughts on this, but I think we ought to put strong consideration into our temporary employment going private again.

Supervisor Jeff Stone (Stone) then said:

> Mr. Chair, Supervisor Tavaglione took the words right out of my mouth. I agree whole heartedly. I also have a business where I need to hire a pharmacist on a moments notice and frankly I hire a service and they take care of all the benefits and they just make sure that when I need a pharmacist, they make sure he's there on the days that I need it and they take care of all the workmen's comp issues and it's just an easy format. I think we've been very generous with temporary employees and I think they've been

[5] These quotations are taken from the County's transcript of the September 2, 2008 board meeting. Both parties stipulated that the transcript is an accurate account of the meeting.

> dedicated, done a very good job for the County. They have opportunities to be hired by the County and I believe we do hire about 25 percent of them that prove themselves to be great employees that have really enjoyed and accelerated in their positions. But I think that if the Union continues to want to push this that I agree that it was a cost saving measure for the County to use temporary employees until such time that we could hire them on a full time basis and right now with the economy the way it is, we're not doing hiring so I would be very happy being a temporary employee and just being grateful that I even have a job in today's environment and not pushing a cash-strapped county, or city or other municipality for more expense at this time. So I agree that we should [send] a message to our Human Resources Director that we should explore private sector agencies to fulfill the temporary needs of this County, do a careful evaluation of the temporary employees that are employed by this County, those that have been with us for more than two years and have proven themselves to be essential for County services should be considered full-time employment and those that are not, we should seek the services of a private sector entity and fulfill the needs we can without this unnecessary impact on the County that is costing us legal, legal staff time and also causing bad will between temporary employees and the Board with the political attacks by members of the Union which I think are unfounded. We try to keep a very positive relationship with the Unions and I've been especially sensitive to nursing issues and nursing staffing and I've shown myself to be a very reasonable person as most of the Board members here I believe are as well. But we don't have deep pockets for 20,000 plus employees in this stage of the economy and those that can qualify for full-time employment should be given full review and if this issue continues to propagate, I think that we should look to the private sector and refill these positions.

Chairman Roy Wilson (Wilson) concurred in the supervisors' comments and said, "I think it's worth revisiting this issue Mr. Komers."

DISCUSSION

1. County's Denial of SEIU's Representation Petition

The complaint alleged that the County denied SEIU's petition to represent TAP employees based on an unlawful application of its local rules and thus unreasonably withheld recognition from SEIU. As noted above, the ALJ concluded the County did not unreasonably

or unlawfully deny SEIU's petition because, in making its unit determination decision, the County properly applied the community of interest factor in section 7 of the ERR. For the reasons below, we agree with the ALJ's conclusion.

MMBA section 3507, subdivision (a) authorizes local public agencies to "adopt reasonable rules and regulations" for the administration of employer-employee relations, including the determination of "an appropriate unit" of employees for collective bargaining purposes. (MMBA sec. 3507, subd. (a)(4).) MMBA section 3509, subdivision (c) grants PERB the authority to "enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections." When evaluating a unit determination made pursuant to such a local rule, PERB must consider whether the public agency's determination is reasonable. (*City of Glendale* (2007) PERB Order No. Ad-361-M; *Alameda County Assistant Public Defenders Assn. v. County of Alameda* (1973) 33 Cal.App.3d 825, 830.)

The party challenging a local agency's unit determination decision bears the burden of demonstrating that the decision was not reasonable. (*Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338.) If reasonable minds could differ over the appropriateness of the determination, PERB should not substitute its judgment for that of the local agency. (*Id.* at pp. 338-339.)

Neither the MMBA nor the County's ERR defines "community of interest." To determine whether a community of interest exists among employees in a petitioned-for unit, PERB typically considers: job function and duties, wages, method of compensation, hours, employment benefits, shared supervision, qualifications, training and skills, and contact and interchange with other employees. (*San Diego Community College District* (2001) PERB

Decision No. 1445.)[6] PERB examines the totality of the circumstances to determine "whether employees share substantial mutual interests." (*Ibid.*)

Examining these factors for TAP employees, we find that some weigh in favor of finding a community of interest. TAP employees' wages and benefits are unlike those of the County's permanent employees but are consistent across all TAP positions. Although TAP employees are paid anywhere from $8 to $135 per hour, all are paid 5.5 percent less than permanent employees performing the same duties. TAP employees do not receive paid sick or vacation leave. They do not receive health benefits but may purchase coverage for dependents. TAP employees make a mandatory contribution of 3.75 percent of their base salary to the TAP 401(A) defined benefit pension plan, unless they have worked over 1,000 hours in the fiscal year, in which case they pay into CalPERS. Because they have a common wage and benefit structure, TAP employees share a "substantial mutual interest" in collectively negotiating these subjects.

On the other hand, several factors weigh against finding a community of interest among TAP employees. The criterion relied upon most by the County is the diversity of job duties performed by TAP employees. As noted, TAP employees work as office assistants, groundskeepers, law clerks, IT system administrators, food service workers, auditors, behavioral health specialists, laboratory assistants, housekeepers, pharmacy technicians, medical assistants, group counselors, security guards, lifeguards, LVNs, and RNs. Some of these positions require college education and professional licensing, while others are unskilled or semi-skilled positions with minimal education and training requirements.

[6] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act (NLRA) and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

While a "miscellaneous" unit of employees with varied job duties may be appropriate under the MMBA, it is not unreasonable for a local agency to place employees with different qualifications, skills and job duties into separate bargaining units. (See *County of Alameda*, *supra*, 33 Cal.App.3d at p. 832 [finding it "incongruous that assistant public defenders should be grouped in a bargaining unit with auditors, planners, rodent and weed inspectors"].) Indeed, permanent employees who perform the same job duties as TAP employees are spread across several different County bargaining units: office assistants are in the Supporting Services unit, group counselors are in the Public Safety unit, LVNs are in the Para-Professional unit, and RNs are in the Registered Nurses unit. Thus, the County could reasonably conclude that a unit of TAP employees who performed those same duties was not appropriate.

Additionally, TAP employees do not share common supervision. SEIU relies heavily on the fact that employees have regular contact with "TAP supervisors." However, despite their title, these individuals are recruiters who place TAP employees according to departmental requests; they do not train, evaluate or discipline TAP employees. Those functions are performed by the supervisor to whom the TAP employee reports at the worksite.

SEIU excepts to the ALJ's conclusion on the community of interest issue on the ground that the ALJ improperly included per diem employees in the proposed bargaining unit. SEIU contends that some of the positions listed in the proposed decision as TAP employees, such as psychiatrists, deputy public defenders, and graphic arts illustrators are actually per diem employees. The record is unclear whether these positions can only be filled by per diem employees or if they are also open to TAP employees. Nonetheless, to the extent the ALJ relied on these positions to support her conclusion, we find the error harmless because the TAP positions listed on the authorization cards submitted by SEIU with its petition support the conclusion that the petitioned-for unit lacked sufficient community of interest.

SEIU also contends that it was improper for the County to consider per diem employees in its unit determination because SEIU only sought to represent employees with the 13871 job code. However, SEIU's petition merely stated it wanted to represent a unit of TAP employees. The petition did not mention per diem employees nor did it reference the 13871 job code. Moreover, the authorization cards submitted with the petition included cards signed by per diem employees. Thus, it was reasonable for the County to conclude SEIU was seeking to represent per diem employees in the petitioned-for TAP unit and to consider those positions in its unit determination.

Based on the totality of the circumstances, it was reasonable for the County to conclude that the petitioned-for unit of TAP employees lacked sufficient community of interest to constitute an appropriate bargaining unit. Accordingly, we conclude the County lawfully applied its local rules to SEIU's petition and therefore did not unreasonably deny recognition to SEIU. In light of this conclusion, we need not address whether the other reasons the County gave for its denial were lawful and/or reasonable.

2. Statements By County Officials

The complaint in Case Nos. LA-CE-443-M and LA-CE-447-M alleged that the County interfered with employee rights and denied SEIU its right to represent employees by: (1) Komers' March 21, 2008 statement that TAP employees would "get a union the day I die or retire;" and (2) Parrish's April 22, 2008 statement "I will be dead or we'll go out of business before the TAP workers get a union." The complaint in Case No. LA-CE-482-M alleged that the County Board of Supervisors' comments about TAP during its September 2, 2008 public meeting interfered with employee rights and denied SEIU its right to represent employees.

The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons.

(*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.)

Employer speech causes no cognizable harm to employee rights unless it contains "threats of reprisal or force or promise of a benefit." (*Chula Vista City School District* (1990) PERB Decision No. 834.) Whether the employer's speech is protected or constitutes a proscribed threat or promise is determined by applying an objective rather than a subjective standard. (*California State University* (1989) PERB Decision No. 777-H.) Thus, "the charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights." (*Regents of the University of California* (1983) PERB Decision No. 366-H.) Further, statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. (*Los Angeles Unified School District* (1988) PERB Decision No. 659.)

Additionally, the Board has placed considerable weight on the accuracy of the content of the speech in determining whether the communication constitutes an unfair labor practice. (*Alhambra City and High School Districts* (1986) PERB Decision No. 560; *Muroc Unified School District* (1978) PERB Decision No. 80.) Thus, where employer speech accurately

describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, the Board will not find the speech unlawful.

Statements by an employer that employees' organizing efforts are futile because the employer will not recognize or bargain with the union have been found to interfere with employee rights under the NLRA.[7] (*BCE Construction, Inc.* (2007) 350 NLRB 1047, 1052; *Overnite Transportation Co.* (1989) 296 NLRB 669, 671, enfd. 938 F.2d 815 (7th Cir. 1991).) A statement that unionization will result in adverse consequences to employees, such as layoffs or plant closure, interferes with employee rights unless the statement is capable of proof based on objective facts outside of the employer's control. (*Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M; *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 618-619; *NLRB v. River Togs, Inc.* (2d Cir. 1967) 382 F.2d 198, 202.)

It is undisputed that TAP employees engaged in protected activity by signing authorization cards and otherwise participating in SEIU's organization efforts. We must therefore determine whether County officials' statements interfered with TAP employees' right to engage in this protected activity and, if so, whether the County established a legitimate business justification for the statements.

a. Komers' March 21, 2008 Statement

Komers did not deny that on March 21, 2008, he told SEIU organizers Valles and Daniels "You will get certification the day that I die or retire." Komers made this statement immediately after saying certification would be "long and drawn out" because the process would involve many parties and the County would pursue PERB and court appeals of any challenge to its certification decision. When Valles questioned Komers about the "die or

[7] The NLRA is codified at 29 U.S.C. section 151 et seq.

retire" statement, he said he "did not mean it that way" but offered no further explanation during this meeting or the March 31, 2008 meeting.

Viewed in the context of the overall conversation during these two meetings, Komers' "die or retire" statement implied that further efforts by SEIU in support of the TAP representation petition would be futile because the County would delay the certification process through consultations with other employee organizations and administrative and court appeals of the County's ultimate decision. Had this statement been made to County employees, it would have interfered with their right under MMBA section 3502 to "participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

Nonetheless, we cannot make such a finding because there is no evidence in the record that any County employee was aware of Komers' statement. Komers made the statement to two SEIU organizers in a private meeting in a conference room. No County employees (other than Komers) were present at the meeting and there is no evidence that Valles or Daniels told any employee of Komers' statement. SEIU cites no authority, nor have we found any, in which an employer's statements to union organizers in a private meeting interfered with employee rights. Accordingly, we dismiss the allegation that Komers' March 21, 2008 statement interfered with employee rights in violation of MMBA section 3506 and PERB Regulation 32603(a).

Komers' statement did, however, interfere with SEIU's rights. MMBA section 3503 grants recognized employee organizations, like SEIU, "the right to represent their members in their employment relations with public agencies." PERB Regulation 32603(b) makes it an unfair practice for a local agency to "[d]eny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5,

or by any local rule adopted pursuant to Government Code section 3507." PERB has held that employer conduct that interferes with, or tends to interfere with, an employee organization's right to represent employees constitutes a denial of that right. (*San Marcos Unified School District* (2003) PERB Decision No. 1508; *State of California (Franchise Tax Board)* (1992) PERB Decision No. 954-S.)

Here, Komers' "die or retire" statement indicated that further organizing of TAP employees by SEIU would be futile. This statement would tend to discourage SEIU from continuing its efforts to organize TAP employees. That SEIU was not in fact discouraged from continuing its organizing efforts does not alleviate the coercive nature of Komers' statement. (*Regents of the University of California* (1998) PERB Decision No. 1263-H; *Chula Vista City School District, supra.*) Additionally, the County has provided no legitimate business justification for Komers' statement. Therefore, we find that Komers' March 21, 2008 statement interfered with SEIU's right to represent employees in violation of MMBA section 3503 and PERB Regulation 32603(b).

b. Parrish's April 22, 2008 Statement

SEIU representatives Lindsay and Tinson testified that County CEO Parrish told them on April 22, 2008, that he would be dead or the County would be out of business before TAP workers got a union. This comment was made in response to Lindsay's attempt to initiate discussions with Parrish about the denied TAP representation petition. Parrish did not testify at the hearing.

Because Parrish's statement was made to two SEIU representatives outside the presence of any County employee (other than Parrish himself), and the record contains no evidence that Lindsay or Tinson related his statement to any County employee, we cannot find that Parrish's statement interfered with employee rights. However, Parrish's statement would

tend to discourage SEIU from continuing its efforts to organize TAP employees by indicating that further organizing efforts would be futile. The County has provided no legitimate business justification for Parrish's statement. Consequently, we find that Parrish's April 22, 2008 statement interfered with SEIU's right to represent employees in violation of MMBA section 3503 and PERB Regulation 32603(b).

c. County Supervisors' Comments at September 2, 2008 Public Meeting

During 2007 and 2008, SEIU representatives and TAP employees regularly gave public comment about TAP issues at County Board of Supervisors meetings. At the September 2, 2008 meeting, a former TAP employee commented on problems with TAP. Following her comment, a local pastor read a letter urging the County to recognize SEIU as the exclusive representative of TAP employees.

Supervisor Tavaglione then commented that the SEIU organizing effort had been "burdensome" and workers believed they had "an entitlement" to be unionized. He then stated that the debate over organizing TAP employees "is not going to go anywhere" and suggested Komers look into reverting to hiring temporary employees from outside employment agencies.

Supervisor Stone then said that TAP employees should be grateful to have a job in difficult economic times, that "if the Union continues to want to push this" the County should look at hiring temporary employees from an outside employment agency instead of using TAP, and that the County does not "have deep pockets for 20,000 plus employees in this stage of the economy." Chairman Wilson agreed that Komers should revisit the issue of TAP versus outside employment agencies.

These statements were made in direct response to negative comments about the program from a former TAP employee and a plea by local clergy to recognize SEIU as TAP employees' exclusive representative. The public comments were an integral part of SEIU's

ongoing efforts to secure representation for TAP employees, an effort that obviously frustrated some of the supervisors. Their statements that the County should look into using more temporary employees from outside employment agencies was clearly a direct response to the TAP organizing efforts, as indicated by comments such as the effort being "burdensome" and costing the County substantial legal fees, that TAP employees felt entitled to union representation, and that they should be grateful to have a job in hard economic times. Viewed in the overall context of the TAP organizing campaign, we find that the supervisors' statements constituted unlawful threats to reduce or eliminate TAP if employees continued with their organizing efforts. These statements would tend to coerce employees into ceasing their organizing efforts for fear of losing their jobs.

In its exceptions, the County contends that the supervisors' statements were merely open debate over the continued financial viability of TAP, in that certification of SEIU as TAP employees' exclusive representative would reduce or eliminate the cost-effectiveness of TAP for the County.[8] For the following reasons, the County has failed to establish that the supervisors' speech was protected or that there was a legitimate business justification for their statements.

First, the County cites no authority, nor have we found any, for the proposition that a public official's statements during a public meeting are immunized from scrutiny under collective bargaining statutes. On the contrary, PERB has held that a local agency may be held

[8] The County also asserts in its exceptions that the ALJ impermissibly based her finding of interference solely on double hearsay testimony by SEIU witness Lindsay. The County overlooks the fact that it stipulated to introduction into evidence of a transcript of the September 2, 2008 board meeting (produced by the County itself) and further stipulated that the transcript accurately reflects the County's recording of the meeting. The County's assertion is therefore meritless.

liable under the MMBA for the conduct of its governing body in official proceedings. (*City of Monterey* (2005) PERB Decision No. 1766-M.)

Second, the supervisors' statements that TAP would become prohibitively expensive if SEIU was certified as TAP employees' exclusive representative were not based on objective facts outside of the County's control. The County presented no evidence that the board of supervisors was aware of the consequences of unionization of temporary workers in other counties or municipalities. Rather, the statements appear to be based on speculation about what would happen if the County certified SEIU.

In this respect, the supervisors' statements are similar to those PERB found unlawful in *Office of Kern County Superintendent of Schools* (1985) PERB Decision No. 533. There, the superintendent told employees that retention of the California School Employees Association as their exclusive representative in a decertification election would result in the automatic reduction of fringe benefits because the employer would be required to take a "hard line" stance in collective bargaining. The Board held that this consequence did "not inherently flow from a collective bargaining relationship" and was easily within the power of the employer to prevent. Here, the cost of TAP would remain within the County's control even if TAP employees were represented because the County is not bound to agree to SEIU's salary and benefit proposals and is not obligated to propose salary and benefit increases that would undermine the program's financial viability.

Because the supervisors' September 2, 2008 statements tended to coerce TAP employees and SEIU into abandoning their organizing efforts, and the County has provided no legitimate business justification for the statements, we conclude that the County interfered with employee and SEIU rights in violation of MMBA sections 3502, 3503 and 3506, and PERB Regulation 32603(a) & (b).

ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the County of Riverside (County) did not unlawfully deny a petition brought by SEIU Local 721 (SEIU) to represent employees in the County's Temporary Assignment Program (TAP) on the basis that TAP employees lack a sufficient community of interest to constitute an appropriate bargaining unit. Those portions of the complaint in Case Nos. LA-CE-443-M and LA-CE-447-M relating to the County's denial of the petition are hereby DISMISSED.

It is found that on March 21 and April 22, 2008, the County, through its agents Ronald Komers and Larry Parrish, unlawfully threatened agents of SEIU that SEIU would never be recognized as the bargaining representative of TAP employees. By this conduct, the County interfered with employee organization rights in violation of the Meyers-Milias-Brown Act (MMBA) section 3503 and PERB Regulation 32603(b). The allegation that this conduct interfered with employee rights in violation of MMBA section 3506 and PERB Regulation 32603(a) is hereby DISMISSED.

It is also found that on September 2, 2008, the County, through agents John Tavaglione, Roy Wilson, and Jeff Stone, unlawfully threatened County employees and agents of SEIU with elimination of TAP in response to SEIU's ongoing organizing efforts. By this conduct, the County interfered with employee rights in violation of MMBA section 3506 and PERB Regulation 32603(a), and interfered with employee organization rights in violation of MMBA section 3503 and PERB Regulation 32603(b).

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

A. CEASE AND DESIST FROM:

1. Telling SEIU representatives that the union's efforts to organize TAP employees are futile; and

2. Stating to employees and SEIU representatives that the County will consider elimination of TAP if union organizing efforts continue.

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 where notices to employees are customarily posted, copies of the Notice attached hereto. The Notice must be signed by an authorized agent of the County, indicating 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 SEIU.

Members McKeag and Wesley 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 Nos. LA-CE-443-M, LA-CE-447-M, and LA-CE-482-M, *SEIU Local 721 v. County of Riverside*, in which all parties had the right to participate, it has been found that the County of Riverside (County) violated the Meyers-Milias-Brown Act, Government Code sections 3503 and 3506, and Public Employment Relations Board Regulation 32603(a) and (b) (Cal. Code Regs., tit. 8, § 31001 et seq.) by: (1) telling SEIU Local 721 (SEIU) that it would never represent Temporary Assignment Program (TAP) employees; and (2) stating to employees and SEIU that the County will consider the elimination of TAP in response to SEIU's organizing efforts.

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

A. CEASE AND DESIST FROM:

1. Telling SEIU representatives that the union's efforts to organize TAP employees are futile; and

2. Stating to employees and SEIU representatives that the County will consider the elimination of TAP if union organizing efforts continue.

Dated: _____ COUNTY OF RIVERSIDE

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.