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

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| SAN BERNARDINO COUNTY PUBLIC ATTORNEYS ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>COUNTY OF SAN BERNARDINO (OFFICE OF THE PUBLIC DEFENDER),<br><br>Respondent. | Case Nos. LA-CE-431-M<br>LA-CE-554-M<br><br>PERB Decision No. 2423-M<br><br>May 15, 2015 |

Appearances: Reich, Adell, Crost & Cvitan by Marianne Reinhold, Attorney, for San Bernardino County Public Attorneys Association; Kenneth C. Hardy, Deputy County Counsel, and Renne, Sloan, Holtzman & Sakai by Timothy Yeung, Attorney, for County of San Bernardino (Office of the Public Defender).

Before Huguenin, Winslow and Banks, Members.

## DECISION

WINSLOW, Member: These cases are before the Public Employment Relations Board (PERB or Board) on exceptions from both the County of San Bernardino (Office of the Public Defender) (Public Defender or County) and the San Bernardino County Public Attorneys Association (Association) from proposed decisions by administrative law judges (ALJs) which concern the Public Defender's implementation of a policy preventing the Association from appointing deputy district attorneys (DDA) to represent deputy public defenders (DPD) in employer-initiated investigatory meetings and other personnel matters.

Although these two cases, Case Nos. LA-CE-431-M and LA-CE-554-M, were litigated as separate unfair practice cases and developed separate records, they are appropriate for joint

consideration because they involve the same parties and both cases share many common facts[1] and interrelated legal issues.

The central controversy in these cases began in 2007 when the Public Defender refused to permit a DDA to represent a DPD in an investigatory interview that was reasonably perceived to potentially lead to discipline. The Association had designated the DDA in question to represent the DPD. In the course of this refusal the Public Defender announced a blanket policy prohibiting cross-representation of DPDs by DDAs in employer-initiated investigatory interviews. DPDs and DDAs are in the same bargaining unit represented by the Association. At the time in question, the Association had not designated any DPDs to represent bargaining unit members in investigatory interviews.

The first unfair practice charge, Case No. LA-CE-431-M, was filed in December 2007 in response to the newly announced policy prohibiting cross-representation, among other things. The complaint in Case No. LA-CE-431-M alleged that the policy violated the Meyers-Milias Brown Act (MMBA)[2] section 3503 and PERB Regulation 32603(b)[3] by denying the Association its right to represent employees, and interfering with employees' right to be represented by the Association, in violation of MMBA section 3506 and PERB Regulation 32603(a).[4] The complaint also alleged that the Public Defender violated MMBA

[1] At the unfair practice hearing in Case No. LA-CE-554-M, the parties jointly stipulated to use evidence from the prior ALJ hearing for Case No. LA-CE-431-M.

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

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

[4] The MMBA section 3506.5 did not take effect until January 1, 2012, after the complaints in both cases had been filed. PERB Regulation 32603 encompasses the provisions of MMBA section 3506.5.

sections 3503, 3505, and 3506, as well as PERB Regulation 32603(a), (b), and (c), by refusing, upon request by the Association, to produce the Public Defender's written policies regarding discipline of employees in the Office of the Public Defender. No unilateral change was alleged in this charge or complaint.

The complaint in Case No. LA-CE-431-M, was later amended at hearing to include an allegation that the Public Defender violated MMBA sections 3503 and 3506, as well as PERB Regulation 32603(a) and (b), by applying the policy to DPD Stephan Willms (Willms) when it prohibited the Association-designated DDA from representing Willms at an investigatory meeting upon Willms' request, and when it threatened Willms with discipline, including termination, if he failed to comply with the Public Defender's order to attend the investigatory meeting. The Association alleged that the Public Defender's actions constituted retaliation and discrimination by the Public Defender based on Willms' protected activity of requesting representation at the investigatory meeting.[5]

The second charge, Case No. LA-CE-554-M, was filed in February 2009, when the Public Defender refused to permit the Association to represent DPD Mark Drew (Drew) in an investigatory interview, and instead required Drew to attend the interview without DDA representation under threat of discipline for insubordination. The unfair practice charge and resulting complaint alleged that this conduct interfered with the Association's right to represent employees and with the employees' right to be represented, and violated MMBA sections 3502, 3503, and 3506, as well as PERB Regulation 32603(a) and (b).

This complaint also alleged that the Public Defender violated its duty to bargain in good faith when it unilaterally implemented a new policy regarding confidential

[5] Unlike in Case No. LA-CE-554-M, neither the complaint nor the proposed decision for Case No. LA-CE-431-M alleged or found a violation of MMBA section 3502.

communications that had the effect of denying cross-representation in investigatory interviews and other disciplinary proceedings, and violated MMBA sections 3503, 3505 and 3506, as well as PERB Regulation 32603(a), (b) and (c).

These combined cases thus present four issues:

1. Does the Public Defender's 2007 blanket prohibition against any cross-representation in investigatory interviews violate the MMBA by denying employees the right to be represented by their chosen employee organization and by denying the employee organization the right to represent its members?
2. Did the Public Defender violate the MMBA when it refused to permit cross-representation in particular instances and required employees to appear at investigatory interviews without the Association-designated representative under threat of discipline for insubordination?
3. Did the Public Defender violate its duty to bargain in good faith in 2007 by refusing to produce the Public Defender's written policy regarding discipline of employees in the Office of the Public Defender upon request by the Association?
4. Did the Public Defender violate its duty to bargain in good faith in 2009 when it unilaterally promulgated a new policy regarding confidential communications of DPDs?

For reasons discussed more fully below, we conclude that the Public Defender's 2007 policy banning cross-representation interferes with the right of representation. In the unique circumstances of this workplace, the Public Defender has demonstrated that its actions were justified by business necessity and occasioned by circumstances beyond its control. However, it failed to establish that it had no alternative course of action. Therefore, the Public

Defender's blanket policy violates MMBA sections 3503 and 3506, and PERB Regulation 32603(a) and (b).

We further conclude that by requiring, under threat of discipline, that individual DPDs appear at investigatory interviews without the Association-designated representative, the Public Defender violated MMBA sections 3503 and 3506 (as well as section 3502 with regards to Drew) and PERB Regulation 32603(a) and (b). As we explain below, when presented with a legitimate request for representation in an investigatory interview, the Public Defender has the option of foregoing the interview and proceeding with its investigation without the benefit of interviewing the employee. What it may not do is threaten the employee with discipline if he or she declines to be interviewed without the Association-designated representative.

We also conclude that the Public Defender breached its duty to bargain in good faith by refusing to produce the Public Defender's written policy regarding discipline of employees in the Office of the Public Defender upon request by the Association, thereby violating MMBA sections 3503, 3505, and 3506, as well as PERB Regulation 32603(a), (b), and (c).

Finally, we determine that the Public Defender's unilateral adoption of the 2009 policy prohibiting cross-representation in investigatory interviews and other disciplinary matters violated its duty to bargain in good faith in violation of MMBA sections 3503, 3505, and 3506, as well as PERB Regulation 32603(a), (b), and (c).

## PROCEDURAL BACKGROUND

### Case No. LA-CE-431-M

In Case No. LA-CE-431-M, the Association's charge alleges that the Public Defender violated sections 3503 and 3506 of the MMBA, as well as PERB Regulation 32603(a) and (b) when, both as a blanket policy and in a specific instance involving DPD Lisa Berman (Berman), the Public Defender prohibited DDAs from representing DPDs in investigatory

interviews that could reasonably lead to discipline, and indicated that it would continue to prohibit such cross-representation. The Association also alleged the Public Defender violated its duty to bargain in good faith by refusing to provide the Association with its written discipline policy applicable to DPDs.

The Office of the General Counsel issued a complaint on June 13, 2008, which alleged, in relevant part:

> 4. On or about July 20, 2007, Respondent [the Office of the Public Defender] . . . , stated that unit members employed at the Office of the Public Defender may not be represented during investigatory interviews by employees of the Office of the District Attorney.
>
> 5. By the acts and conduct described in paragraph 4, Respondent denied Charging Party its right to represent employees in violation of Government Code section 3503 and committed an unfair practice under Government Code section 3509(b) and PERB Regulation 32603(b).

The complaint also alleged that the Public Defender's refusal to produce its policy manual regarding discipline of DPDs interfered with the Association's right to represent bargaining unit employees under MMBA section 3503, constituted a failure to meet and confer in good faith with the Association in violation of MMBA section 3505 and interfered with employee rights in violation of MMBA section 3506.

On the same day the complaint issued, the Office of the General Counsel dismissed that portion of the unfair practice charge that alleged the Public Defender violated the MMBA by refusing to allow a DDA to represent Berman in the investigatory interview. In its warning letter, the Office of the General Counsel noted that when Berman requested representation by the DDA, the Public Defender gave her three options: (1) proceed with the interview without representation; (2) bring a representative who was not employed by the Office of the District Attorney (DA); or (3) forgo the interview. No interview of Berman was held. Because the

options provided by the Public Defender conformed with PERB precedent and with *National Labor Relations Board v. J. Weingarten, Inc.* (1975) 420 U.S. 251 (*Weingarten*), the warning letter concluded that the charge failed to state a prima facie case for interference with respect to Berman.

The Association was given an opportunity to amend its charge, and it did so to allege that the Public Defender's actions were in retaliation for Berman requesting a representative. The Office of the General Counsel rejected this theory of liability after concluding that the Association was unable to establish that the Public Defender had an unlawful motive in denying Berman's request. As the partial dismissal noted: "The County's blanket policy [denying cross-representation] suggests that the County's actions were not in response to Berman's specific request for deputy district attorney Laura Caldwell as a representative."

The Association did not appeal the partial dismissal. Therefore, the issue of whether Berman was denied rights under the MMBA is not before us.

The complaint as amended[6] involves two different types of challenges by the Association: (1) a *facial* challenge to the County's blanket policy as interference with protected activity (viz., requesting a union representative in investigatory interviews that could reasonably lead to discipline); and (2) a challenge to the County's *implementation* of the blanket policy with regard to DPD Willms.

The ALJ held a formal hearing on February 24 - 25, May 14, July 15 - 16, and October 5 - 7, 2009.

On December 24, 2009, the case was submitted for decision. On December 22, 2010, the parties jointly requested that the case be placed in abeyance pending settlement

[6] Prior to the administrative hearing, the Association moved to amend the complaint to include allegations concerning Willms. The motion was granted.

discussions. PERB issued a notice of abeyance the following day. Ultimately, the parties were unsuccessful in reaching a settlement and filed a joint request to remove the case from abeyance on March 23, 2011. The proposed decision issued in May 2012, to which both the Public Defender and the Association excepted.

Case No. LA-CE-554-M

The complaint in this case alleges that on February 20, 2009, the County violated sections 3502, 3503 and 3506 of the MMBA, as well as PERB Regulation 32603(a) and (b), by denying to DPD Mark Drew (Drew) an Association-appointed union representative after Drew requested representation in a meeting that he reasonably believed could lead to discipline, and by threatening Drew with discipline for insubordination should he refuse to appear at the meeting. The complaint also alleged that this conduct denied the Association's right to represent Drew in violation of MMBA sections 3503, 3506 and PERB Regulation 32603(b).

The complaint also alleges that the County violated MMBA sections 3503, 3505 and 3506, and PERB Regulation 32603(a), (b), and (c), by unilaterally changing the policy concerning the right of the Association to designate representatives to represent employees in investigatory disciplinary interviews and grievance processing as set forth in the parties' memorandum of understanding (MOU). The new policy, as alleged, decreed that employees of the Public Defender could no longer be represented during investigatory interviews or in other personnel matters by employees of the DA or by outside legal counsel of the Association.

On August 29, 2009, the County filed an answer denying the substantive allegations and asserting multiple affirmative defenses. An informal settlement conference was held on October 24, 2011, but the matter was not resolved.

On April 24, 2012, the County filed a motion to dismiss the PERB complaint for lack of jurisdiction. That motion was taken under submission.

The ALJ held a formal hearing on June 19, 2012. On January 24, 2013, the case was transferred to a second ALJ for decision due to the first ALJ's retirement. The second ALJ issued his proposed decision on March 27, 2013. The Public Defender excepted to this proposed decision.

The County's request for oral argument was granted by the Board and argument was heard on October 30, 2014, by the three-member panel of the Board designated to decide these cases.

FACTUAL SUMMARY COMMON TO BOTH CASES

The bargaining unit represented by the Association includes both DDAs and DPDs in the County, amongst other classifications.

The first MOU relevant to these cases was effective from June 25, 2005 until June 20, 2008. The MOU included the following provisions, in relevant part, which unequivocally affirm the Association's right to designate its own representative to process grievances, to represent employees during disciplinary proceedings, and to access employee personnel records when authorized by the employee.

> ACCESS TO PERSONNEL RECORDS
>
> . . . Employees currently employed by the County of San Bernardino, and/or their representatives, designated by the employee in writing, will be allowed to review the employee's personnel records during regular business hours.
>
> [¶ . . . ¶]
>
> Section 1 – Authorized Employee Representatives
>
> [The Association] may designate employees as authorized employee representatives or alternates to represent employees in the processing of grievances or during disciplinary proceedings subject to the following rules and procedures:

(a) [The Association] may designate one (1) authorized employee representative for each geographic region/division for which the District Attorney, Child Support Services and Public Defender maintain a work force, *as provided in [the Association's] by-laws.* [The Association] shall be entitled to designate two (2) alternates for each authorized employee representative; . . .

[¶ . . . ¶]

Section 2 – Handling of Grievances and Disciplinary Proceedings

(a) At the request of an employee, an authorized employee representative or alternate, or [Association] labor relations representative, may investigate a formal grievance and represent the employee at the resulting proceedings *or* *represent the employee during disciplinary proceedings* . . . .

[¶]

(c) *Employees must use the authorized employee representative* or alternate assigned to their geographic location and representation unit, except as otherwise provided herein.

(Emphasis added.)

The MOU includes a "zipper clause" specifying that the MOU provisions "constitute the complete and total contract between the County and [Association] with respect to wages, hours, and other terms and conditions of employment" and that each party "voluntarily waives the right to meet and confer in good faith with respect to any subject or matter referred to or covered in this Agreement." (MOU, pp. 26-27.)

While the charges in these cases were pending, the County and the Association negotiated a successor MOU with an effective term of June 21, 2008 until June 17, 2011. The provisions quoted above were agreed to in the successor MOU and remained substantially identical for all relevant purposes.

At the time of the events in question and when the charges were filed, the Association's "Authorized Employee Representatives" (as defined *supra*) consisted entirely of DDAs, and no deputy DPDs served as labor representatives.[7]

In July 2007, while attempting to provide representation to DPD Berman for an investigatory interview, the Association learned that the County's Public Defender, Doreen Boxer (Boxer), intended to implement a blanket policy disallowing a union representative to be present at any disciplinary interview if the union representative is employed by the Office of the DA.

Lead DDA and Association President Grover Merritt (Merritt) testified that the Association has a senior authorized labor representative who initially handles all labor, grievance, and discipline matters, and who sits on the Association's executive board.[8] The position, created in Fall of 2007, was held by DDA Sharon Caldwell (Caldwell) at the time of the hearings on both cases

DPD Susan Israel served on the Association's executive board and had served as a labor representative. However, she resigned from her position as labor representative in January 2007 after serving less than a year, because she felt untrained in labor law and believed that she could not sufficiently represent the DPDs' interests.

[7] The parties alleged conflicting reasons for why this is the case. However, we need not resolve this dispute in order to reach our holdings in either case.

[8] All board members are elected. However, according to Merritt, the labor representative is appointed by the president, subject to veto by the executive board.

Implementation of Blanket Policy Prohibiting Cross-Representation

Sometime in July 2007, Boxer requested that DPD Berman attend an investigatory interview with the Public Defender's office on or about July 20, 2007. The Public Defender was investigating various instances of misconduct Berman was alleged to have engaged in. When Berman appeared at the investigatory interview on July 20, 2007, accompanied by DDA Caldwell as her Association representative, Assistant Public Defender Lauri Ferguson (Ferguson) refused to allow Caldwell to attend the investigatory interview and refused to proceed with the interview if Berman insisted on Caldwell's presence. Ferguson explained that the interview involved matters that were "confidential," and that by having Caldwell, a member of the DA's office, present, Berman would be waiving the attorney-client privilege and work product privilege on behalf of the Public Defender, neither of which the Public Defender was willing to waive.

Caldwell objected to Ferguson's denial of representation at this meeting and informed her that no labor representatives from the Public Defender's office were available. Caldwell also stated that the Association would not hire outside representation for Berman because Caldwell was able to adequately represent Berman. Moreover, Caldwell noted that outside representation would pose the same alleged problems involving the disclosure of attorney-client communications and attorney work product.

Berman ultimately chose not to be interviewed without her representative, and the County did not insist on an interview or threaten Berman with discipline for refusing to be interviewed. As noted above, the unfair practice charge alleging that Berman was denied representation rights was dismissed. We recount the facts regarding Berman only for purposes of providing factual context to the Public Defender's subsequent actions.

DPD Willms

In or around January 2009, the Public Defender requested that DPD Willms attend an investigatory interview with the Public Defender's office. He was not informed at this time of what the interview would be about. Willms requested an Association representative, and Merritt told Boxer that it would send DDA Caldwell as Willms' authorized representative.

Boxer refused to permit Caldwell or any other DDA to represent Willms at the investigative interview, but offered to postpone the meeting in order for Willms to find a representative outside of the DA's office. By e-mail message of January 7, 2009, Boxer gave further instruction:

> If I do not receive a request to postpone the meeting . . . , the meeting will proceed tomorrow, January 8th at 1:30 . . . , and as such Mr. Willms is ordered to be present at that time and place. *Violation of this order can result in discipline up to and including termination.*

(Emphasis added.)

Willms responded with a request to postpone the meeting but reiterated his request for representation at the meeting. Boxer agreed to postpone the meeting until January 29, 2009, but ordered Willms to appear at the meeting on that date. She reiterated to Willms that no DDA would be permitted to attend the meeting, and stated that the meeting would take place whether or not the PERB charge for Case No. LA-CE-431-M had been resolved by that date. This was the second time Boxer informed Willms that no DDA would be permitted to represent him at the investigatory meeting.

On January 28, 2009, Boxer wrote to Merritt explaining the reason for the meeting with Willms. She wanted Willms' Manager, Chief DPD John Zitny (Zitny), to speak with Willms about how Willms interacted with other counsel, and how this may affect Willms' handling of three death penalty cases. Boxer stated that her office needed to review Willms' caseload with

him and discuss detailed information about death penalty cases, including one case in particular that might be reassigned. Boxer further represented that other than the question of Willms' interaction with other counsel, she had no information that Willms mishandled cases, but that in order to ensure proper representation to criminal defendants in sensitive death penalty cases, she needed Zitny to have the conversation with Willms.

Boxer testified that in one of the three cases, Caldwell was the DDA assigned as prosecuting attorney against Willms' client. According to Boxer, the discussion of Willms' handling of these cases would include witnesses, tactics and strategies he used or intended to use. In another case, Association President Merritt was the prosecuting DDA. In the third case, DDA Douglas Poston was the prosecuting DDA. He was also a possible labor representative, according to Boxer.

Merritt replied, acknowledging that management had the prerogative regarding caseloads in the homicide defense unit (HDU) (where Willms was assigned) and how HDU employees work together. Merritt concluded, "We would not presume to assert a union interest in [discussion of Willms' caseload.]" (Joint Exhibit AA.) The next morning, Willms e-mailed Boxer withdrawing his request for representation "[i]f this meeting is just between Mr. Zitny and myself." The meeting between Zitny and Willms proceeded on that basis, without representation and without objection by Willms or the Association.

Refusal to Provide Information

Prior to August 5, 2007, the Association had made at least one request to the Public Defender for a copy of the Public Defender's policy manual with respect to discipline of attorneys, on the grounds that the policy manual was relevant and necessary to the Association's representation of DPDs in their employment relationship with the Office of the

Public Defender. The record does not indicate the date of the requests made prior to August 5, 2007.

Merritt wrote a letter to Boxer, dated August 5, 2007, in which he stated, in relevant part:

> Ferguson has **refused** to supply [the Association] with a copy of your office's policy manual, that is, the pertinent portions that relate to discipline. At the time of this writing, we still do not have a copy of your office rules of conduct which purportedly can be used to impose punishment. After so refusing, Ms. Ferguson has used that ***same*** policy to form the basis of at least one letter of reprimand. . . .

(Joint Exhibit H, emphasis in original.)

In a letter from Boxer to Merritt dated August 13, 2007, (Joint Exhibit I) Boxer made no mention of the requested policy manual. Boxer indicated to Merritt on subsequent occasions that the Office of the Public Defender's policy for disciplining employees was located in "Rule Ten" of the County's policy manual, but that the Public Defender's policy manual had no policy for disciplining employees.

When asked by the County's counsel if the Association had demanded or requested a manual that was the Public Defender manual for discipline of public defenders, Boxer responded:

> Yes. Yes, they did ask for it, and we didn't give them anything because it's available publically to Mr. Merritt and his people . . . on the internet. County Line has it.

(Reporter's Transcript, Vol. IV, pp. 131:27-132:16.)

The Public Defender's Investigatory Meeting With Mark Drew

In late January or early February 2009, the Public Defender requested that DPD Drew attend a disciplinary interview on or about February 13, 2009. The Public Defender's office did not inform either Drew or the Association of any allegations against Drew prior to this interview. Drew's supervisor had previously informed Drew of some concerns about his work performance, including maintenance of case files.

On February 12, 2009, Merritt e-mailed Ferguson and Boxer that the Association was assigning Caldwell to represent Drew at the interview, for which Merritt requested a postponement. Boxer replied on February 13, 2009, granting the postponement, but objecting to a DDA serving as Drew's representative because "during the interview with Mr. Drew, our office will be discussing confidential matters relating to Public Defender cases." Boxer stated that it would be "inappropriate and unethical" for Association members to discuss the issues raised in the interview with any DDA. At the time, Drew and Caldwell were opposing counsel in a criminal matter set for trial. The meeting was rescheduled for February 20, 2009.

On the afternoon of Friday, February 20, 2009, Drew and the Association's Counsel, Marianne Reinhold (Reinhold), appeared for the interview. Before any questions were asked of Drew, Ferguson quizzed Reinhold on her fiduciary obligations to Drew and to the Association. Reinhold confirmed that she was counsel to the Association and was at the meeting at its request to represent its member. Ferguson then asserted that under Business and Professions Code section 6068, Reinhold was required to maintain Drew's confidences inviolate, which meant that she could not discuss with the Association what was discussed in the meeting, share documents, or divulge any other confidential information without a waiver from Drew, the Public Defender and the Public Defender's clients whose cases may be

discussed at the meeting. Reinhold replied that she did not envision discussing Public Defender clients with the Association, but she had a duty to her client, the Association, to inform it of her assessment of any disciplinary action taken against Drew as a result of the investigation.

Reinhold repeatedly answered Ferguson's request that Reinhold declare that there was no conflict of interest between Drew and the Association by informing Ferguson that there was none that she could envision. Ferguson further insisted as a condition to permitting Reinhold to represent Drew that Reinhold agree that she would not discuss with the Association client files, work product, work processes of the Public Defender's office, or "anything that is discussed that has to do with the internal operations of the Public Defender's Office, anything that has to do with any clients." (Joint Exhibit 4, p. 4.) With that clarification, Reinhold replied that while she had no plan to reveal to the Association confidential Public Defender client information, she "could envision a circumstance where because of my obligations to them I have to give them advice about issues, and that could result in me needing to discuss with them . . . issues that were discussed today, not what was in a particular file that Mr. Drew was handling. But when you talk about questions like process, . . . I don't include that in work product." (*Id.* at p. 4-5.)

In the name of protecting clients of the Public Defender and the integrity of the department, Ferguson refused to permit Reinhold to attend the disciplinary interview. Ferguson informed Drew that if he did not attend a disciplinary interview with Ferguson within approximately an hour without Reinhold, Drew would face discipline for insubordination.

Drew returned later in the afternoon for the interview with Ferguson without any Association representative. He made two statements about the events of earlier that day: (1) that he felt that he had no choice but to proceed with the interview without representation

because he was unable to find a private attorney given the time and cost constraints, and because he did not want to be found insubordinate; and (2) that he was not interested in being a part of the larger conflict between the Association and the County over the issue of representation. Drew said he wanted to address Ferguson's issues and go back to doing his job as a DPD.

Ferguson provided Drew with additional time to find a fellow DPD to represent him during the interview. The meeting adjourned briefly, but Drew was unable to find a DPD to represent him. At the time, the Association had not designated any DPDs as its representatives under the MOU. The meeting between Ferguson and Drew proceeded without Association representation.

Ferguson questioned Drew over a variety of subjects, including whether Drew ever discussed with Merritt, Caldwell, or Reinhold any specific confidential information relating to cases assigned to him or anything relating to the confidential work product or other confidential information of the Public Defender's office. She also questioned him about his work performance, specifically his alleged failure to annotate or otherwise document his work in his case files and the need to complete such annotations. These issues had been documented in one of Drew's prior performance evaluations.

There was little discussion of Drew's actual work on any case assigned to him, but Ferguson questioned him about his failure to appear in court on time. At the meeting's conclusion, Ferguson assured Drew that, because he appeared for the interview, he would not be considered insubordinate.

Confidential Information Policy And Potential Conflict Policy

On March 11, 2009, Boxer sent a letter to Merritt about the parties' "dispute over whether the Association has the right to appoint Deputy District Attorneys to represent Deputy

Public Defenders in personnel matters." (Joint Exhibit 6.) She reiterated her concerns about the disclosure of confidential client and work product information and what she described as "an inherent conflict of interest." Boxer included drafts of two new policies: "Confidential Information in Attorney Personnel Actions" (Confidential Information Policy) and "Potential Conflict Situations Due To Defined Relationships" (Potential Conflict Policy) and invited the Association to "meet to discuss" the drafts and other issues regarding the parties' dispute. The parties met on March 19, 2009, but did not resolve their dispute.

On March 24, 2009, Boxer sent a memorandum entitled "Duty of Confidentiality" to all attorneys in the Public Defender's office. Attached were the two policies referred to in Boxer's March 11, 2009, letter to Merritt, although the final Confidential Information Policy differed slightly from the March 11, 2009 version.

The final version of the Confidential Information Policy goes beyond the previous unwritten policy banning cross-representation in investigatory interviews. The new policy precludes attorneys in the Public Defender's office from disclosing information to anyone outside the office without written consent of the Public Defender, except when it is necessary to do so in personnel matters, and in those cases, the DPD may only disclose confidential information to a designated representative if that representative is: (1) another DPD that is a designated Association representative without any conflicts of interest and who agrees not to disclose any confidential information outside of the Public Defender's office; or (2) to a privately hired attorney that has no conflicting interests and who agrees not to share confidential information with the Association or any other entity.

The final version of the Potential Conflict Policy states, in relevant part, that "It is the opinion of this office that the representation of any Public Defender attorney by a member of the District Attorney's Office in a personnel matter creates a conflict of interest under current

law and ethics rules." The policy further directs that public defenders shall not be represented in a personnel matter where it is reasonably foreseeable that such representation may create a conflict of interest or create the appearance of conflict or result in the disclosure of confidential information. (Joint Exhibit 7.)

Read together, these policies prohibit cross-representation in *any* personnel matter and prohibit even outside counsel from representing DPDs unless that attorney agrees not to share confidential information with the Association. Additionally, the Confidential Information Policy prohibits non-attorneys from representing DPDs.[9]

This policy thus broadens the class of personnel actions for which cross-representation will be prohibited beyond the blanket policy (which solely covered investigatory interviews) to encompass other disciplinary actions, such as *Skelly* hearings, disciplinary arbitrations or civil service hearings.[10]

The Association was not provided with copies of the final versions of these policies, and the Association did not agree to these policies at any time relevant to these cases.

## PROPOSED DECISIONS

Case No. LA-CE-431-M

After reviewing the holding of *Weingarten, supra,* 420 U.S. 251, establishing the right of employees to representation during disciplinary interviews, and *Rio Hondo Community College District* (1982) PERB Decision No. 260 (*Rio Hondo*), in which PERB adopted

[9] "Confidential information," according to the policy, includes client secrets that DPDs come to possess from any source, as well as information that might cause public embarrassment to the client, or disclosures that could reasonably lead to the discovery of such information by a third party.

[10] The term "*Skelly* hearing" refers to a pre-disciplinary hearing that complies with due process requirements set forth in *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194. Association Counsel Reinhold represented Berman in a *Skelly* hearing.

*Weingarten,* the ALJ concluded that the Public Defender's policy denying cross-representation in all situations would "prevent the bargaining unit from functioning altogether. The Association could never represent DPDs, because the Association includes DDAs." (Proposed Dec., p. 6.) The ALJ considered the Public Defender's argument that its policy was necessary because of what the Public Defender described as an inherent conflict of interest between DPDs and DDAs, which the Public Defender argues can only be managed by a blanket policy against DDAs representing DPDs. He also considered the Association's argument that the issue can be managed by the DDA simply recusing himself or herself from handling or discussing any criminal case involving a representation matter.

The ALJ rejected both arguments, concluding that in order for the Association and the Public Defender to do their respective jobs, the Public Defender must allow DDAs to represent DPDs, except where an investigatory interview is inseparable from the review of case files containing client communications and attorney work product. To the extent there are issues that are not separable from client communications, attorney work product and other case file issues, the ALJ concluded that the Public Defender should give the Association a written explanation of why this is so in the particular case and then offer to discuss that explanation with the Association. If, after any discussion with the Association, the Public Defender determines in good faith that certain issues are inseparable from case file issues, the ALJ concluded that the Public Defender may prevent DDAs from representing DPDs as to those issues.

With respect to the Berman matter, the ALJ concluded that the conduct she was accused of was "separable from client communications, attorney work product, and other casefile issues." (Proposed Dec., p. 7.) Therefore, according to the ALJ, the County should

have allowed Caldwell to represent Berman as to those non-case file issues, and its refusal to do so violated the MMBA.[11]

On the issue of retaliation against Willms, the ALJ noted that to demonstrate employer discrimination or retaliation against an employee in violation of MMBA section 3506, the charging party must show that: (1) the employee exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210.)

The ALJ concluded that since Willms chose a representative who was both reasonably available and physically able to represent him, Willms' choice was protected conduct. Boxer's threat to terminate Willms was adverse action that grew directly out of Willms' protected act of choosing a representative, and thus violated the MMBA.

With respect to the Association's request for the County's policy manual regarding discipline of DPDs, the ALJ determined that the County's failure to provide the requested information violated the MMBA.

Case No. LA-CE-554-M

PERB's Jurisdiction

As an initial matter, the Public Defender argued that PERB does not have jurisdiction to resolve alleged violations of the MMBA if those claims implicate attorneys' professional

[11] As noted earlier, the allegation that the Public Defender violated the MMBA by denying Berman the right to be represented in an investigatory interview was not before the ALJ. The proposed remedy did not specifically order the Public Defender to make her whole by offering a new interview, or any other remedy. Because the ALJ did not have jurisdiction to consider a matter previously dismissed, we construe his discussion of Berman to be for the purposes of placing the Public Defender's denial of representation to her in the context of its blanket policy. In light of this procedural posture, we do not affirm or adopt his statement that the Public Defender should have allowed Caldwell to represent Berman.

responsibilities. Only the courts can police attorneys' ethical conduct and any remedy PERB might impose would be an unconstitutional regulation of the practice of law, according to the Public Defender.

Relying on *City of San Jose v. Operating Engineers Local Union No.* 3 (2010) 49 Cal.4th 597 (*San Jose*), the ALJ determined that the allegations in the PERB complaint—that the Public Defender unlawfully denied representation rights and unilaterally changed existing policy within the scope of representation—would, if proven, violate the MMBA. Because the alleged conduct is arguably prohibited by the MMBA, PERB has initial exclusive jurisdiction under *San Jose.* The ALJ rejected the Public Defender's assertion that a PERB decision would amount to an unauthorized regulation of the practice of law, concluding the Public Defender had not shown that a cease-and-desist order would cause attorney unit members to compromise client representation.

Representation Rights

Based on *Weingarten*, *supra*, 420 U.S. 251 and *Rio Hondo*, *supra*, PERB Decision No. 260, the ALJ found that all of the elements of a *Weingarten/Rio Hondo* violation were met in this case: Drew requested Association representation for an investigatory interview; he reasonably believed that discipline could result from the meeting; and the Public Defender denied Drew's request to be represented by Reinhold.

Citing *San Bernardino City Unified School District* (1998) PERB Decision No. 1270 (*San Bernardino*), the ALJ noted that once an employee asks for representation at an investigatory meeting, the employer has three options: it may grant the request for representation; it may discontinue the interview and investigate through other means; or it may inform the employee that he or she has the option of continuing with the interview without representation or declining the interview.

Once Drew confirmed that he could not secure Association representation, other than Reinhold, the County did not exercise any of the legally permissible options under *San Bernardino, supra,* PERB Decision No. 1270. Instead, it insisted on conducting the interview with Drew whether he was represented or not, ordering him to participate unrepresented under threat of discipline. The ALJ concluded that this conduct interfered with Drew's right to representation and with the Association's right to represent its members.

Having concluded that protected rights were harmed, the ALJ then shifted the burden of producing evidence to the Public Defender to justify its conduct under *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M (*Stanislaus*), citing *Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797 (*Tulare).* Under these precedents, if the employer's conduct is inherently destructive of MMBA-protected rights, the employer's conduct will be excused only if it can show that it was occasioned by circumstances beyond its control and that it had no alternative course of action. (*State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S, p. 11 (*DPA*), citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*), pp. 10-11.)

The ALJ concluded that Ferguson's insistence that Drew could only be represented by a fellow DPD, even though none were available, was a total denial of the right to be represented by the Association. The ALJ found this conduct to be "inherently destructive" of MMBA-protected rights. In the ALJ's view, the Public Defender's decision to conduct an investigation was prompted by something beyond its control, i.e., Drew's work performance issues. The ALJ then assessed whether the Public Defender had any alternative to denying these protected rights.

Based on the transcript of the interview between Drew and Ferguson, the ALJ determined that the primary purpose of the interview was to discuss Drew's work performance, e.g., his alleged failure to properly document his work and his late court appearances. No specific details of any cases handled by the Public Defender were discussed. Therefore, the ALJ concluded that no confidential information was disclosed in the interview, and no confidential attorney work product was discussed during the interview.

Neither did the Drew interview include a discussion of the Public Defender's work product in the context of a criminal proceeding, according to the ALJ. He rejected the Public Defender's claim that "work product" includes procedures for documenting attorney work, as such documentation was not shown to constitute impressions, conclusions, opinions, research or theories of the DPD.[12]

Even if confidential client information or attorney work product had been a subject of Drew's interview, the ALJ concluded that the Public Defender had other alternatives to a complete denial of his right to representation. For example, the Public Defender could have canceled the interview or given Drew the option of foregoing the interview, or given him the choice (as opposed to the command) of proceeding with the interview without a representative. If there was the possibility of confidential client information being revealed, Drew could have sought the informed consent of his clients, according to the ALJ. Or the Public Defender could have excluded confidential information from the discussion.

For these reasons, the ALJ concluded that the Public Defender failed to prove that it had no other option than to deny Drew his right to Association representation. This denial interfered with Drew's right to be represented and with the Association's right to represent.

[12] Penal Code section 1054.6 (citing to California Code of Civil Procedure, § 2018.030) defines the scope of attorney "work product" in a criminal proceeding as any "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories."

The Public Defender's insistence that Drew participate in the interview under threat of insubordination also interfered with Drew's right to be represented.

Unilateral Change In Policy Concerning Representation

With regard to the charge of unilateral change, the ALJ cited to *Oakland Unified School District* (2005) PERB Decision No. 1770 (*Oakland*), in which PERB held that "[t]he zipper clause in a contract generally precludes unilateral changes in any negotiable topics during the life of the agreement." (*Id.* at pp. 7-8.) In that case, PERB found that a union was free to use a negotiated zipper clause as a "shield" to resist unilateral policy changes during the life of the agreement. (*Id.* at Proposed Dec., p. 47.)

The ALJ found that the Public Defender provided notice that it was considering adopting the Confidential Information Policy and the Potential Conflict Policy and offered to meet prior "to discuss" final implementation. Under the circumstances of this case, however, the Association was under no obligation to request bargaining over the proposed changes because the parties' MOU contains a "FULL UNDERSTANDING, MODIFICATION AND WAIVER", or "zipper" clause, whereby "the County and [the Association] for the life of this Agreement, each voluntarily waives the right to meet and confer in good faith with respect to any subject or matter referred to or covered in this Agreement." The MOU provided the Association the right to designate authorized representatives to represent employees in grievances and disciplinary proceedings and gave those representative access to employee personnel records. The ALJ found that the Association was therefore under no obligation to negotiate over issues already covered by the MOU, and the Public Defender was not free to unilaterally change the policies contained in the MOU and that were within the scope of representation and not within a managerial prerogative.

According to the ALJ, the Public Defender's policy actually prevents all current Association representatives from representing DPDs in disciplinary proceedings, because there were no DPDs appointed as labor representatives, a fact of which the Public Defender was well aware at the time it implemented the policy.[13] The ALJ concluded that the policy significantly and adversely affects Association members' working conditions, because DPDs must face the possibility of discipline without any Association representation.

According to the ALJ, the mere fact that the Public Defender's office has ethical obligations to its clients does not override the Public Defender's obligations under the MMBA. Moreover, the Public Defender's position that it needs operational discretion free from collective bargaining is undermined by the fact that it has already negotiated with the Association over this very issue and memorialized those negotiations in the "AUTHORIZED EMPLOYEE REPRESENTATIVES" clause of the MOU. The ALJ found no evidence that these negotiations adversely affected the Public Defender's operations. Accordingly, the ALJ concluded that the strong interests in protecting employee rights and bargaining over issues traditionally considered to be within the scope of representation outweigh the Public Defender's need for unrestricted decision-making authority.

The ALJ ordered the Public Defender to rescind the March 24, 2009, Confidential Information Policy and to cease and desist from denying members the right to be represented in investigatory meetings.

[13] According to the ALJ, the policy relevant to this case was the "Confidential Information in Attorney Personnel Actions." However, the second policy, "Potential Conflict Policy," also declares that representation of a public defender by a DDA in a personnel matter constitutes a conflict of interest. We therefore consider both policies at issue here.

## POSITIONS OF THE PARTIES

Both parties excepted from the proposed decision in Case No. LA-CE-431-M, and the Public Defender excepted from the proposed decision in Case No. LA-CE-554-M. We summarize their arguments below.

### Case No. LA-CE-431-M

#### The Public Defender's Exceptions

The Public Defender disputes PERB's jurisdiction to resolve this dispute, claiming that the exercise of such jurisdiction would result in PERB regulating the practice of law by DDAs and DPDs, and would interfere with the discretionary authority, independence and ethical duties of the Public Defender and the DA. Constitutional rights of criminal defendants are also necessarily implicated by PERB's exercise of jurisdiction in this case, according to the Public Defender. Because these issues are outside of PERB's jurisdiction, the Public Defender urges the complaints against it should be dismissed.

The Public Defender asserts that the ALJ failed to make numerous findings: e.g., that DDA representation of DPDs in any investigative or disciplinary proceeding will chill the attorney-client relationships maintained by the Public Defender and undermine the trust of its clients, undermine the DA's relationships with law enforcement, victims and the public, and adversely affect the defense and prosecution functions. The Public Defender also objects to the ALJ's alleged failure to consider the dominance of DDAs in the Association.

According to the Public Defender, the ALJ ignored the risks created by the disclosure of confidential Public Defender case file information to DDA-representatives and the conflicts of interest and ethical violations that cross-representation would create. In the view of the Public Defender, ordering cross-representation interferes with the independence of the Public Defender and with the discretionary authority of the DA.

The Public Defender also excepted to the ALJ's failure to discuss the "legitimate business reasons" test for interference with protected rights, as articulated in *Tulare, supra,* 167 Cal.App.3d 797, his failure to cite to authority for the proposition that recusal by a DDA who has represented a DPD will resolve the ethical dilemmas arising from such representation, and his failure to sufficiently consider the decisions in *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294 (*Upland*); and *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625 (*ALADS*).

The Public Defender also excepted to the ALJ's protocol for determining the conditions under which cross-representation could occur. In the Public Defender's view, its blanket rule prohibiting DDAs from representing DPDs in investigatory interviews is required to assure not only the confidentiality of criminal defense clients, but to assure the proper functioning of the criminal justice system in the County. The Public Defender's arguments will be examined in greater detail below, but its main contention is that permitting DDAs to represent DPDs in investigatory hearings poses too great a risk that confidential client information or work product information will be revealed to the DA's office. Even aside from these risks, the Public Defender asserts that permitting DDAs to represent DPDs will undermine the frail trust the Public Defender must establish with its clients.

With respect to the Willms matter, the Public Defender excepted to the ALJ's conclusion that Willms and the Association engaged in protected activity, claiming that it is not protected activity for a DPD to insist on being represented by a DDA in an investigatory interview, because of the inherent conflict between the two offices.

The Public Defender asserts that the ALJ erred in concluding that it failed to respond to the Association's request to produce discipline policies of the Office of the Public Defender.

According to the Public Defender, the ALJ erred in failing to determine that the Public Defender had no discipline policy other than "Rule Ten" of the County's personnel rules.

The Association's Exceptions and Response to the Public Defender's Exceptions

The Association also objects to the ALJ's protocol, but for opposite reasons from those asserted by the Public Defender. According to the Association, a rule that restricts DDAs from representing DPDs during investigatory meetings in which case files and other client information are discussed is too restrictive. Instead, the Association urges that DDAs be permitted to represent DPDs in disciplinary meetings, provided that each attorney ensures on a case-by-case basis that the actual representation of their clients is not compromised.

The Association urges PERB to assert jurisdiction over this matter, since it involves activities that are arguably protected (the Association designating representatives) or prohibited (the County restricting who the Association may designate) under the MMBA. According to the Association, the objections the Public Defender raises to PERB's jurisdiction are precisely the issues that could constitute a "legitimate business reasons" defense under *Tulare, supra,* 167 Cal.App.3d 797 further supporting PERB's jurisdiction over the matter. The Association agrees that the *Weingarten/Rio Hondo* test, as stated by the ALJ, is the correct standard to determine whether a denial of representation has occurred.

The Association argues that the Public Defender's blanket policy prevented Berman and other DPDs from participating in an investigatory interview with a representative from the Association and interfered with the Association's right to represent employees.

According to the Association, *Upland, supra,* 111 Cal.App.4th 1294 and *ALADS, supra,* 166 Cal.App.4th 1625, are not applicable here because both determined rights of police officers under the Public Safety Officers Procedural Bill of Rights Act (POBOR), and did not address rights under the MMBA. Moreover, the Association contends that in neither *Upland*

nor *ALADS* did the court sanction or otherwise approve of any restrictions on classes of individuals who could serve as representatives in disciplinary meetings.

The Association asserts that there is no ethical rule that would prohibit DDAs from representing DPDs altogether, and urges PERB to reject the ALJ's proposed decision to the extent it prohibits DDAs from representing DPDs in any disciplinary meeting in which client information is discussed, in favor of a standard that would allow DDAs and DPDs to evaluate their ethical responsibilities on a case-by-case basis.

The Association further argues that because of the scarcity of DPD representatives, if PERB affirms the ALJ's standard, there is a significant risk that DPD employees facing discipline for issues related to, for example, their handling of client matters will not have a meaningful right to representation, as required by the MMBA, because these disciplinary meetings may require some discussion of confidential client information. Therefore, the Association urges PERB to adopt a more flexible approach that relies on the mechanisms already set forth in the State Bar of California Rules of Professional Conduct.

Case No. LA-CE-554-M

Public Defender's Exceptions

As in Case No. LA-CE-431-M, the Public Defender disputes PERB's jurisdiction to resolve the dispute, and excepts to the ALJ's ruling to the contrary.

The Public Defender excepts to multiple findings of fact made by the ALJ regarding the separate nature of the offices of the DA and Public Defender, the nature of Drew's investigative interview, the Association's ability to hire private counsel to represent Drew, the allegedly crucial nature of investigatory interviews of DPDs, the failure to find that the Association deviated from a past practice of assigning DPD representatives to represent DPD

attorneys in investigative interviews,[14] and the failure to find that the Public Defender is obligated to conduct a reasonable investigation when it suspects employee misconduct.

The Public Defender further excepts to the ALJ's conclusion that it unilaterally changed its policies embodied in the "Access to Personnel Records" and "Authorized Employee Representatives" MOU language by implementing the "Confidential Information Policy" and the "Potential Conflict Policy," despite the language of the MOU's "zipper clause." The Public Defender alleges that it merely "memorialized what was already past practice." (Respondent's Statement of Exceptions, p. 10.)

Association's Response to Exceptions

The Association's response to the County's exceptions is similar to its response in Case No. LA-CE-431-M: it defends PERB's jurisdiction to resolve the disputes in this case because the allegations involve activity that is arguably protected or prohibited by the MMBA. The Association also argues that PERB should uphold the ALJ's proposed decision that the Public Defender interfered with the protected rights of Drew and the Association by compelling Drew to participate in the investigatory interview under threat of discipline, and that the Public Defender violated its obligation to meet and confer in good faith by unilaterally imposing the Confidential Information Policy and the Potential Conflict Policy.

## DISCUSSION

PERB's Jurisdiction

PERB has initial exclusive jurisdiction over the issues raised in the complaints for both cases. MMBA section 3509(b) states, in relevant part:

[14] The Public Defender did not file an unfair practice charge against the Association alleging unilateral change in policy. (See *Standard School District* (2005) PERB Decision No. 1775 [employee organization can be liable for unilateral change in policy].)

> (b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter *within the exclusive jurisdiction of the board* . . . .

(Emphasis added.)

The California Supreme Court held in *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946 (*El Rancho*) that PERB has exclusive jurisdiction over activities arguably protected or prohibited by the Educational Employment Relations Act (EERA)[15] (*Id.* at 953, 960.) In *San Jose, supra,* 49 Cal.4th 597, 606, the Supreme Court applied the *El Rancho* jurisdictional holding to the MMBA.

The Public Defender's denial of employees' request for union representation, its attempts to restrict the Association's ability to designate representatives for its bargaining unit members, and its threats of discipline against Willms and Drew, all fall within the "arguably prohibited" prong of the *San Jose* test. Willms' and Drew's requests for union representation at investigatory interviews and the Association's designation of representatives for such interviews are rights arguably protected by the MMBA. Moreover, PERB has initial exclusive jurisdiction to determine whether alleged conduct such as refusing to provide information relevant to the Association's representation duties and unilaterally changing policies within the scope of bargaining violates the duty to bargain in good faith. (*San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 8, 14.)

The Public Defender's assertion that the Rules of Professional Conduct prohibit PERB from resolving the MMBA is more appropriately characterized as a defense to its ban on cross-representation than an impediment to our jurisdiction. We are mindful of the tension between

[15] EERA is codified at Government Code section 3540 et seq.

attorneys' rights under the MMBA and their ethical responsibilities. (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 532 (*Woodside*).) While we do not presume to rule on the scope of the Rules of Professional Conduct, the Business and Professions Code or other regulations concerning the practice of law, neither will the fact that attorneys have obligations under those rules defeat PERB's jurisdiction to resolve alleged violations of the statutes which PERB administers, including the MMBA. As *Woodside,* held, publically employed attorneys have rights under the MMBA. Since 2001, when the MMBA was brought under PERB's jurisdiction, it remains our duty to adjudicate those rights.

Our assertion of jurisdiction does not interfere with the ability of the Supreme Court of California or the State Bar of California to regulate the practice of law under the State Bar Act (Bus. & Prof. Code § 6000 et seq.), the Rules of Professional Conduct or the California Rules of Court, because resolution of this dispute does not regulate the practice of law.[16] This decision does not relieve any individual attorney from conforming to the Rules of Professional Conduct and other regulations concerning the practice of law. Nor is any attorney compelled by this decision to compromise his or her duties under the rules and statutes governing the practice of law, and as we explain below, nothing in this decision prohibits the Public Defender from electing not to conduct an interview in the first instance if it determines the risk of information leaking to the DA is unacceptable.

For these reasons, we conclude that PERB has initial exclusive jurisdiction to adjudicate these cases.

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[16] Under the constitutional doctrine of separation of powers, the courts have inherent and primary regulatory power over the practice of law. (See *Brydonjack v. State Bar* (1929) 208 Cal. 439, 443). PERB has no power to regulate the practice of law.

## DISCUSSION OF MERITS OF CASE NO. LA-CE-431-M

### The Blanket Policy Prohibiting Cross-Representation

We first address whether the Public Defender's 2007 blanket policy refusing to allow DDAs to represent DPDs during investigatory interviews interfered with the Association's right to represent employees in violation of MMBA section 3503, and interfered with employee rights to be represented by the Association, in violation of MMBA section 3506.[17] We consider this policy as it was applied by the Public Defender to Willms and Drew, i.e., an absolute prohibition on cross-representation in investigatory interviews, coupled with the directive that the employee submit to the interview, regardless of whether he secured representation satisfactory to the Public Defender.

As a general matter, it is well settled that attorneys do not shed their right to join, form, and participate in the activities of their chosen employee organizations by virtue of their public employment. (*Woodside, supra,* 7 Cal.4th 525, 532.) The *Woodside* opinion however, recognized that there could be a tension between attorneys' duties to clients and their rights as employees under the MMBA:

> The only realistic accommodation between the enforcement of statutory guaranties under the MMBA and the enforcement of the Attorneys' professional obligations in this situation [writ to enforce employer's duty to meet and confer over wages] is to permit a petition for writ of mandate, as would be permitted to other public employees, while at the same time holding the Attorneys to a professional standard that ensures that their *actual* representation of their client/employer is not compromised.

(*Id.* at p. 553; italics in original; emphasis added.)

[17] As noted earlier, the complaint in Case No. LA-CE-431-M did not allege that the County's unwritten blanket policy (as opposed to the written Confidential Information Policy and Potential Conflict Policy) constituted a unilateral change.

It is well-established that employees and employee organizations have rights, respectively to be represented and to represent at investigatory meetings that the employee reasonably believes will result in discipline. (*Rio Hondo, supra,* PERB Decision No. 260; *Weingarten, supra,* 420 U.S. 251; *San Bernardino, supra,* PERB Decision No. 1270, ALJ Proposed Dec. p. 63; *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382.)

Equally well-established is the right of employee organizations (and employers) to designate their representatives in the collective bargaining relationship without interference or veto by the other party. (*San Ramon Valley Unified School District* (1982) PERB Decision No. 230, p. 16.)

MMBA section 3506 prohibits public agencies from interfering with or discriminating against public employees because of the exercise of their rights under MMBA section 3502. Where the employer's conduct interferes with or tends to interfere with, restrain or coerce employees in the exercise of those activities, PERB applies the test originally articulated in *Tulare, supra,* 167 Cal.App.3d 797, and subsequently refined in *Stanislaus, supra,* PERB Decision No. 2231.[18] If the employer's conduct interferes with protected conduct, the burden shifts to the employer to articulate a legitimate justification for its conduct. The scrutiny with which the employer's conduct will be examined depends on the severity of the harm. As noted in *Stanislaus*, in pertinent part:

> 3. Where the harm to employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly.

[18] See also *City of Monterey* (2005) PERB Decision No. 1766-M, applying *Tulare* test where employer denied an employee right to union representation in a civil service hearing.

> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available.

(*Stanislaus*, pp. 22-23; citing to *Carlsbad*, *supra*, PERB Decision No. 89, pp. 10-11.)

There can be little doubt that the County's across-the-board prohibition of cross-representation in *any* investigatory meetings is inherently destructive of both employees' right to be represented and the Association's right to represent unit members. In the circumstances of this case where the Association has appointed no DPDs as labor representatives, the Public Defender's policy prevents attorneys in the Office of the Public Defender from ever being represented by Association representatives in investigatory interviews or other disciplinary proceedings.[19]

The harm here is three-fold: (1) Individual employees are deprived of the representatives whom their Association deems best suited to represent them in investigatory interviews, and are in fact deprived of any representation; (2) the Association is prohibited by the employer from determining who its labor representatives will be; and (3) the Association is deprived of its right to represent bargaining unit members. The Public Defender's policy is

[19] We note that the Public Defender's policy seems to permit representation by outside attorneys (although makes no mention of other alternatives, such as representation by non-attorney Association staff), which policy was reiterated by the Public Defender at oral argument in this case. The Public Defender, however, conditions this limited exception on the outside attorney agreeing to keep Public Defender clients' (i.e., criminal defendants) confidences and not reveal such confidential matters to DDAs who comprise much of the leadership of the Association. This concession differs from the policy the Public Defender actually implemented in the case of Drew, where the Public Defender insisted that his outside counsel agree to keep the personnel matters involving DPDs confidential and specifically not divulge those matters to the Association, or its DDA officers and representatives. Drew was the only DPD who sought attorney representation. He was not able to obtain outside counsel who was willing to agree to the confidentiality requirements with respect to the Association.

inherently destructive of protected rights because it is a complete denial of the employees' right to representation and the Association's right to represent.

The implementation of this policy first as to Willms and then as to Drew, further underscores that its inherently destructive quality. Rather than utilizing its options described in *Weingarten, supra,* 420 U.S. 251; *Roadway Express, Inc.* (1979) 246 NLRB 1127, 1128 (*Roadway Express*), and *San Bernardino, supra,* PERB Decision No. 1270, to forego an employee interview when presented with a demand for union representation, the Public Defender insists on having its proverbial cake and eating it too by forcing the employee to attend the interview without representation.

Under the *Weingarten* and *Rio Hondo* options, both the employer and the employee are presented with certain choices, each of which carries its own set of risks. An employer may abandon the interview when presented with an employee request for representation. When an employer exercises that option, it foregoes the possibility of discovering exculpatory evidence or considering policy reasons not to discipline an employee before investing significant resources in preparing for the disciplinary procedures.[20] Likewise, if an employee exercises his or her option not to be interviewed, he or she loses the potential for early exoneration.

In this case, the Public Defender argues it should be relieved of this Hobson's choice because of the unique circumstances of the inherent conflict of interest between the functions of the DA and the Public Defender. We now turn to that argument.

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[20] Under *Weingarten, supra,* 420 U.S. 251; *Roadway Express, supra,* 246 NLRB 1127 and *San Bernardino, supra,* PERB Decision No. 1270, when an employee requests representation in an investigatory interview, the employer may exercise one of three options: (1) it may grant the employee's request for representation; or (2) it may discontinue the interview; or (3) offer the employee the choice of proceeding with the interview without union representation or having no interview.

The Public Defender's Justification For Denying Cross-representation

Having found that the Public Defender's blanket prohibition on cross-representation in all investigatory meetings, combined with its insistence that employees participate in such interviews without representation, is inherently destructive of rights guaranteed to both employees and their organizations, the burden shifts to the Public Defender to prove that the policy was occasioned by circumstances beyond its control and that no alternative course of action was available. For reasons discussed below, we conclude that the Public Defender has demonstrated that its policy was necessitated by circumstances beyond its control, namely the failure of the Association to appoint any DPDs as labor representatives. However, the Public Defender has failed to show that no alternative course of action was available. Consequently, we conclude that its policy and the way it was implemented violates the MMBA.

As an initial matter, we agree that the Public Defender has a legitimate reason to exclude DDAs from investigatory meetings, at least where the Public Defender's client confidential information or Public Defender work product is likely to be revealed. It may also be justified in preventing such cross-representation where the representing DDA is the opposing counsel to the DPD in a criminal case, or in other situations in which the rules of professional responsibility or rules of court require that the representation be disclosed to the Public Defender's client, and/or that either attorney would be forced to disqualify himself or herself from further representation in the criminal case. The ban on cross-representation advanced these legitimate employer interests.[21] The Public Defender's justifications for its policy are all based on the inherent adversarial relationship between the interests of the client

[21] However, not all investigatory interviews involve review of Public Defender client files or the revelation of client confidences, or the divulging of work product. As we explain further below, we believe the Public Defender improperly extended the definition of work product, at least with respect to the Drew interview.

of the DA (the state) and the clients of the Public Defender—one seeks to prosecute alleged criminal conduct, and the other is dedicated to defending against such prosecution.

The Public Defender urges the Board to take a broad view of client confidentiality. According to the Public Defender, an attorney's duty of confidentiality requires him or her not only to keep confidential matters revealed by the client, but all information obtained during the course of representation that would be embarrassing or potentially detrimental to the client. Thus, client confidences include not only information that might literally be in case files of the Public Defender, but any information that would interfere with the ability of the Public Defender to represent its clients.[22]

Likewise, the Public Defender reasonably asserts that the attorney work product of DPDs must not be revealed to the DDAs during the course of an investigatory meeting, but takes an overly broad view of what constitutes work product. The Public Defender asserted that the work product privilege extended to what it considered "work processes" and anything that touches on the internal operations of the Public Defender's office, such as a DPD's poor record-keeping practices. Penal Code section 1054.6 (citing to California Code of Civil Procedure, § 2018.030) defines "work product" more narrowly as any "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." We agree with

[22] The Public Defender relies on *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001 (*Carroll*) in support of this contention. In that case, the police officers association made a request under the California Public Records Act for the public defender's data base, showing not only client files, but allegations of police violations of Fourth Amendment rights and investigations into police misconduct. The court held that the data base was not a public record, and even if it were, it was exempt from disclosure because the public interest in not disclosing the record outweighs the interest in disclosure. Because *Carroll* was decided under the Public Records Act, we do not find it persuasive in resolving the labor law issues before us in this case. More to the point, our resolution of the alleged violations of the MMBA in this case does not turn on a determination of what in the Public Defender's files is confidential.

the ALJ that the Public Defender failed to show how internal office procedures for documenting work fell within the definition of "work product."

Even in the absence of confidential information or work product potentially being revealed to the DDA, the Public Defender asserts that the ban on cross-representation in investigatory interviews is justified based on the inherently incompatible and adversarial nature of the respective duties and obligations of DA and Public Defender.[23] The Public Defender asserts that the relationship between a DDA representing a DPD who is being investigated or disciplined establishes a relationship akin to an attorney-client relationship. If the DPD who is being investigated or disciplined becomes dependent on or beholden to the DDA who represents him or her, the Public Defender implies that the DPD will be less zealous in representing his or her client because the DPD will want to curry favor with the DDA.

The Public Defender also points to the standards of the National District Attorneys Association which state that a prosecutor should avoid representation of a person who is charged or indicted and "any agent or close relative of that person." (Resp. Ex. 15.) Because DPDs are agents of a person who has been indicted, the Public Defender asserts this standard supports its decision to ban cross-representation.

The Public Defender is also concerned that in the course of representing a DPD in a disciplinary investigation, the DDA could learn of adverse information such as health issues, drug or alcohol abuse, tardiness, dishonesty, or other weaknesses that the DDA may exploit to the benefit of the prosecution in a criminal case. Conversely, a DDA may be tempted to refrain from vigorously representing a DPD in a disciplinary matter because he or she is particularly effective in criminal cases and his or her termination would benefit prosecutors. In

[23] For example, a prosecutor may not represent or assist in the defense of any person accused of a crime. (Govt. Code, § 26540.)

sum, the Public Defender broadly asserts that the Office of the DA has no right to information that touches upon the effectiveness of representation by the Public Defender.

The Public Defender also asserts that without a ban on cross-representation, obtaining and maintaining client trust in its DPDs would be impossible. As Michael Judge, the Public Defender of Los Angeles County, explained, many public defender clients believe that public defenders are not real lawyers, or that they are beholden to the DA in the hope of future promotion to that office. Boxer echoed this view. She testified that public defender clients believe that their DPDs just want to dump their cases so they can have lunch with the DDA. Were public defender clients to learn that their DPDs (or DPDs in general) were represented by DDAs in personnel matters, client trust in their DPDs would be further eroded or impossible to establish. This policy concern, of course, has nothing to do with whether client confidences are actually revealed to DDAs.

According to the Public Defender, cross-representation also intrudes on the discretionary authority of the DA because the DA will have to assure that the DDA who represented a DPD in an investigatory interview is not assigned to a case in which that DPD represents the accused. This not only creates an administrative record-keeping burden, according to the Public Defender, but more importantly, it impermissibly encroaches on prosecutorial discretion, which includes making attorney assignments. (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1387.)

In our view, these are all valid concerns, none of which can be addressed by merely leaving it to individual DDAs and DPDs to assess their ethical duties.

The Association's proposal to leave it to the individual DPD and DDA to "evaluate their ethical responsibilities on a case-by-case basis," does not address the Public Defender's broader policy concerns discussed above, other than client confidentiality and attorney work

product. Nor does the Association explain what should happen if either the DPD or the DDA determines that ethical considerations preclude the cross-representation in a particular case, given that the Association has no DPDs that serve as labor representatives.

The Association also suggests that the Public Defender's concerns with actual conflicts, e.g., where Public Defender client confidential information is divulged during the disciplinary investigation, can be ameliorated by simply assigning a different DDA to the criminal case, or by obtaining a waiver of confidentiality from the criminal defense client.

We are persuaded by the Public Defender's explanations why this is an impractical accommodation. Keeping track of which DPDs and which DDAs are assigned to which criminal cases would likely prove exceptionally burdensome. As explained by an expert witness, Mark Tuft, any past representation relationship between a DDA and a DPD would have to be disclosed to the DPD's client and to the court (R.T. Vol. IV, p. 81; Vol. VI, pp. 61-66.) Such disclosure is likely to cause the criminal defendant to file a motion for a new defense counsel or a motion to disqualify the DDA. If no disclosure is made, any conviction could be at risk on the ground that the defendant received ineffective assistance of counsel.

By the same token, voluntary recusal by DDAs who participate in an investigatory meeting on behalf of a DPD is not a viable option, as it could create considerable disruption to the criminal justice system. For example, if a DDA who had spent years on a capital murder case faced the need to recuse himself or herself after receiving confidential information in the course of representing a DPD, the resulting delays would risk grave harm to the interests of the defendant and the public.

Nor are we persuaded that the conflict of interest problem can be solved, as suggested by the Association, simply by requiring DPDs who are represented by DDAs to disclose such relationship to their clients and presumably obtain consent from the client. Such a solution

does nothing to address the Public Defender's legitimate concern that the fragile trust between public defenders and their clients would be eroded if and when the clients learn that their attorney is being represented in a personnel matter by a DDA. It in fact would seem to exacerbate the problem. Moreover, it seems highly unlikely that clients would grant such waiver, given the frail trust they repose in the Public Defender.

In light of these circumstances, unique to this workplace, the Public Defender presents persuasive policy reasons justifying its blanket policy against cross-representation. This conclusion, however, does not end our inquiry.

Because this policy is inherently destructive to protected rights of both employees and the Association, we consider under the third prong of the *Stanislaus/Carlsbad* test, whether the Public Defender's policy was occasioned by circumstances beyond its control and whether any alternative course of action was available. Because the Public Defender had no power over whom the Association appointed as stewards or representatives, or over the fact that the Association had not appointed any DPDs as labor representatives, it is clear that the policy was occasioned by circumstances beyond the employer's control.

However, there were obvious alternatives available to the Public Defender. For purposes of assessing the alternatives available to the Public Defender, we look not only to the Public Defender's initial iteration of the 2007 policy, but also to the way the Public Defender applied the policy to Willms and Drew. It was in the application of the policy that the Public Defender revealed its broader scope, specifically the Public Defender's insistence on proceeding with the investigatory interview, even if it banned the Association representative from that interview.

When presented with a situation in which a DDA seeks to represent a DPD in an investigatory interview that would result in client confidences or attorney work product being

revealed to the DDA, the Public Defender could simply decline to proceed with the interview and continue its investigation by other means.[24] Alternatively, the Public Defender could redact sensitive information from materials involved in the investigatory interview.

Another alternative suggested by the Public Defender at oral argument would be to permit a third-party attorney to represent the DPD in the investigatory interview on the condition that the attorney agree not to reveal the confidences of Public Defender clients or Public Defender work product to any DDAs, including those who serve in leadership positions in the Association. The viability of this alternative, of course, is dependent on the attorney agreeing to the conditions, and we do not presume to direct the Association to agree to them. Nor do we presume to direct the Association to limit itself to representing employees only with attorneys.

What the Public Defender may not do is seek to secure for itself the benefits of an investigatory interview with an employee suspected of wrongdoing by compelling the employee's attendance at the interview, while it denies the employee and the Association their respective representation rights, including the employee's right to decline to be interviewed without threat of insubordination. (See, e.g., *Slaughter v. National Labor Relations Board*, 876 F.2d 11, 13 (3d Cir. 1989) amended *sub nom. Slaughter v. National Labor Relations Board* (3d Cir. Aug. 14, 1989): "In Weingarten, the Supreme Court held that Sec. 7 of the National Labor Relations Act (the Act) protects an employee's right to refuse to submit to an investigatory interview without a union representative present.")

[24] The Public Defender could dispense with the investigatory interview for any of the reasons it has asserted here as justification for its ban on cross-representation. However, in doing so, it invites argument from the employee and/or Association in a disciplinary proceeding that the Public Defender denied the employee due process by avoiding the investigatory interview when there was no compelling reason to do so.

The Public Defender argues that *San Bernardino, supra,* PERB Decision No. 1270, was incorrectly applied by the ALJ because an employer's use of the option to dispense with the interview would preclude the need for PERB to inquire whether the employer's regulation of the right to representation was reasonable or whether extenuating circumstances justify an employer's rejection of the designated representative. The Public Defender also asserts that because of the inherent conflict of interest between the Public Defender and the DA, it should be exempt from the *Weingarten/San Bernardino* framework, i.e., it should not have to choose between foregoing the interview and permitting a DDA to represent a DPD.

We disagree with both arguments. The ALJ correctly characterized and applied the rule in *San Bernardino, supra,* PERB Decision No. 1270, a rule that has long governed and qualified the right of representation. That rule incorporates the employer's extenuating circumstances by permitting it to dispense with the interview. The fact that foregoing an employee interview carries certain risks will presumably act as a check on an overly broad interpretation of extenuating circumstances.[25] While we recognize the uniqueness of this bargaining unit and the representation quandaries presented by the failure of the Association to appoint DPDs as labor representatives, and readily acknowledge the good reasons the Public Defender has in excluding DDAs from many investigatory interviews with DPDs, the solution to that problem does not lie in carving an exception to the *Weingarten* framework, for that framework already contains the exception. The employer may simply forego the interview.

In sum, although the Public Defender has presented ample justification for its ban on cross-representation, a policy that was necessitated by circumstances beyond its control, it has

[25] By the same token, the fact that an employer may decline to interview the employee may inspire the Association in this case to appoint labor representatives who are not DDAs.

nevertheless failed to show that it had no alternative to the inherent destruction the ban caused to representation rights under the MMBA.

For these reasons, we hold that the County's 2007 policy banning cross-representation in this particular workplace violates the MMBA.

We now turn to the application of the policy in the individual cases of Willms and Drew.

Denial of Representation Rights To DPD Willms

The ALJ concluded that the Public Defender retaliated and discriminated against Willms by threatening him with discipline or termination, a threat that "grew promptly and directly out of the protected conduct" (of asking for representation in an investigatory interview.) (Proposed Dec., p. 10.) In the ALJ's view, the County's directive and threat of discipline was done in retaliation against Willms for his invoking his *Weingarten/Rio Hondo* rights.

As noted earlier, when confronted with Willms' request for Association representation in the investigatory interview, the Public Defender could either grant the request, or inform the employee that it will not permit the representative to be present, and the employee has the option of attending the interview without a representative or decline to be interviewed. Or the employer may dispense with the interview entirely. (*San Bernardino, supra,* PERB Decision No. 1270, ALJ Dec., p. 63.) Not included in those options is the employer's persistence in proceeding with the interview without the employee's representative present. (*California State University, Long Beach* (1991) PERB Decision No. 893-H.) Nor may the employer threaten the employee with additional discipline for declining to attend the interview without representation.

Regardless of whether the Public Defender's prohibition on cross-representation was justified, Willms ultimately had the right to decline to be interviewed or to submit to the interview unrepresented. The Public Defender was never privileged to threaten Willms with insubordination after failing to give him those options. It was this threat that we find to have violated the MMBA.[26]

The Public Defender argues that *Upland, supra,* 111 Cal.App.4th 1294; *ALADS, supra,* 166 Cal.App.4th 1625, absolve it of liability with respect to Willms.

The *Upland* decision held that under the POBOR, a police officer did not have the discretion to delay an investigatory interview indefinitely based on the unavailability of his attorney. The *ALADS* decision (again under POBOR) upheld a "no-huddle" rule prohibiting officers involved in shootings from meeting collectively with a single attorney prior to investigatory meetings, but upheld the right of each officer to meet with the attorney individually.

Neither *Upland, supra,* 111 Cal.App.4th 1294 and *ALADS, supra,* 166 Cal.App.4th 1625 considered the scope of an employee's right to representation afforded by the MMBA, or the rights of employee organizations under the MMBA to represent employees in their employment relations. Both cases involved rights under POBOR, a law that describes and confers due process rights on individual law enforcement and other public safety officers.

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[26] Unlike the ALJ's analysis, we conclude that the Public Defender's treatment of Willms was an interference with his rights, rather than retaliation against him for asserting those rights. The Public Defender applied its blanket policy prohibiting cross-representation to Willms. There is no evidence that it was motivated to retaliate against him in particular because he requested representation. The nature of a blanket policy—one applicable in all situations—belies an illegal motive to retaliation against a particular employee. See *DPA, supra,* PERB Decision No. 2106a-S for a discussion of the difference between retaliation against employees for engaging in protected activities and interference with employees in the exercise of protected rights. Regardless of whether the Public Defender retaliated against Willms or interfered with his protected rights (and that of the Association), the remedy would be the same.

Because the rights involved in *Upland* and *ALADS* are distinct from those conferred by the MMBA and with which we are concerned in this case, we do not find either POBOR case apposite to the dispute before us.

Even were we to ignore the different underlying statutory source, we are not persuaded by the County's argument based on these cases. The County argues that, like in *Upland, supra,* 111 Cal.App.4th 1294 , the representative selected by the Association was "unavailable" because DDA representation of a DPD would pose an inherent conflict of interest or violate the participating attorney's ethical responsibilities. The County, in essence, asks that we interpret the term "unavailable" to mean that the union representative is unacceptable to the employer.

We decline the County's invitation. Even in *Upland, supra,* 111 Cal.App.4th 1294, the "unavailability" of the attorney was unquestionably "physical unavailability," and we see no reason to use a different standard under the *Weingarten/Rio Hondo* test. See also *In re Anheuser-Busch, Inc.* (2001) 337 NLRB 2, holding that requested union representative was available, even though he was on a short lunch break.

We find persuasive this decision explicitly linking "availability" with physical "presence." Since Caldwell's physical presence made her "available" to represent Willms, the County (under the *Weingarten/Rio Hondo* framework) was obligated to give Willms the choice of proceeding without representation or foregoing the interview, and to refrain from threatening Willms with discipline for failure to attend the interview.

The fact that Willms and the Association ultimately withdrew their request for representation does not shield the County from liability. The violation occurred when the County threatened Willms with discipline for insubordination, regardless of Willms' or the Association's subsequent action.

Failure To Provide Policy Manual

We affirm the ALJ's conclusion that the County violated the MMBA by failing to honor the Association's request to provide the Association with the policy manual with respect to DPD discipline.

The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (*Stockton Unified School District* (1980) PERB Decision No. 143.) PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of the requested information. (*Trustees of the California State University* (1987) PERB Decision No. 613-H.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

Notwithstanding the liberal standard, an employer can refuse to release information that is otherwise "necessary and relevant" if, for example, it will impose burdensome costs on the employer, or the release will compromise employee privacy rights. (*Los Rios Community College District* (1988) PERB Decision No. 670, p. 13 (*Los Rios*); *Modesto City Schools and High School District* (1985) PERB Decision No. 479, p. 11.) However, the employer must affirmatively assert its concerns, and then both parties must bargain in good faith to ameliorate those concerns. (See, e.g., *Los Rios*, pp. 10-12 [employer bargained in good faith by offering to delete social security numbers from requested document].) The employer cannot simply ignore a union's request for information.

When asked by the Public Defender's counsel if the Association had demanded or requested a manual that was the Public Defender manual only for discipline of public defenders, Boxer responded: "Yes. Yes, they did ask for it, and we didn't give them anything because it's available publically to Mr. Merritt and his people . . . on the internet."

Boxer's concession that the Public Defender refused the Association's request to provide a physical document relevant to the Association's role as collective bargaining representative is not excused by Boxer's assertion that the information is on the internet. The Public Defender presented no evidence of what may or may not have been "on the internet" at the time of the request, whether it was responsive to the Association's request, whether it was up to date, or whether it conveyed what the Public Defender intended to convey to the Association.

Because of the insufficiency of the Public Defender's evidence on this point, we hold that the Public Defender's response did not satisfy its duty to provide the Association with the requested information that Boxer concedes was in the County's possession at the time of the request.

DISCUSSION OF MERITS IN CASE NO. LA-CE-554-M

Mark Drew

As it did with Willms, the Public Defender ordered Drew to attend an investigatory interview once the Public Defender determined that his representative, Marianne Reinhold, was unacceptable. Drew was threatened with a charge of insubordination if he did not attend an investigatory interview. As it did with Willms, the Public Defender failed to give Drew the option of forgoing the interview. For the reasons discussed above, at pages 46-47, we find that the Public Defender violated Drew's *Weingarten/Rio Hondo* rights, thereby interfering with Drew's right to representation and with the Association's right to represent employees.

The Public Defender contends that there was no interference with protected rights because by the time Drew's interview occurred, the Association was aware of the Public Defender's opposition to DDAs being informed of confidential information discussed during personnel meetings, and cites to *Upland, supra,* 111 Cal.App.4th 1294 for support. As

explained earlier at page 49, *Upland* provides no guidance in this case. Moreover, the Public Defender's alleged advanced notice that it would ignore the *Weingarten/Rio Hondo* framework is no defense to an actual violation of the law. Advance notice does not obligate either the Association or Drew to accommodate that violation of Drew's and the Association's rights. Regardless of whether or not confidential or other sensitive information was disclosed during the interview with Drew, the Public Defender's order, under threat of discipline, that he attend the investigatory interview even without requested representation, violated the *Weingarten/Rio Hondo* requirements.

Likewise, the Public Defender points to no authority supporting its contention that it was legally obligated to interview Drew as part of its disciplinary investigation, thus excusing its threat to discipline him for insubordination if he failed to attend the interview. Neither the *Weingarten/Rio Hondo* framework, nor any other PERB or National Labor Relations Board authority, supports the Public Defender's argument.

The Public Defender also points to no authority suggesting that the *Weingarten/Rio Hondo* framework applies with any less force to DPDs and DDAs than to any other classification of employees protected under the MMBA. As noted above, the Public Defender can avoid the disclosure of confidential information by simply foregoing the employee interview under the *Weingarten/Rio Hondo* framework if the Association appoints a DDA to represent a DPD. This fact, coupled with the unquestionable "availability" of Drew's union representative, render the Public Defender's arguments unavailing.

Unilateral Change of Representation Policy in MOU

The Public Defender excepts to the ALJ's finding that it unilaterally changed the representation policy of the MOU on two grounds: (1) that the Public Defender's adoption of the two written policies merely reflected the past practice of the parties, and (2) that the Public

Defender's written policies were justified by a legitimate business reason given the serious constitutional and ethical issues implicated by the Association's failure to designate DPDs as representatives, and the relative ease with which the Association may appoint DPDs to represent other DPDs.

We agree with the ALJ's conclusion that the Public Defender unilaterally changed a policy within the scope of representation when it implemented its Confidential Information Policy in March 2009. An employer may not implement changes in a collective bargaining agreement (CBA) without first obtaining the consent of the employee organization. (*Glendale City Employees Assn. Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 335; *Calexico Unified School District* (1983) PERB Decision No. 357, ALJ Proposed Dec., p. 11, fn. 6 (*Calexico*).) This is true whether the parties have agreed to a "zipper clause" or not. In this case, where the parties had agreed that there would be no further negotiations during the life of the MOU on matters referred to or covered in the MOU, there was additional justification for the Association to refuse to engage in any negotiation over the Public Defender's attempt to change the terms of the MOU mid-term. (*Oakland, supra,* PERB Decision No. 1770.)

The Public Defender's argument that the parties' past practice regarding DPD-DDA cross-representation trumps the wording of the MOU and the "zipper clause" is unavailing. PERB decided in *Stockton Unified School District* (2005) PERB Decision No. 1759 that when parties' past practice conflicts with the wording of their CBA, each party "still maintains the right to adhere to and enforce the contractual language of the CBA." (*Id.* at pp. 3-4.) More significantly, the Association's right to represent the bargaining unit members derives from EERA, not the MOU. Regardless of any alleged past practice between the parties, the Association was within its rights to insist that its statutory right to represent the members of the bargaining unit be honored.

The Public Defender's position that it is excused from the obligation to bargain over the Confidential Information Policy and Potential Conflict Policy because of "legitimate business reasons" is unsupported by the law or the facts of this case.

PERB has recognized that under exceptionally limited circumstances, an employer may be excused from negotiating on the basis of true emergency that provides a basis for claiming that a business necessity excused a unilateral change. (*Cloverdale Unified School District* (1991) PERB Decision No. 911). However, to establish "operational necessity" or "business necessity" as a defense to a unilateral change, the employer must establish an actual financial or other emergency that leaves no alternative to the action taken and allows no time for meaningful negotiations before taking action. (*Calexico, supra,* PERB Decision No. 357, ALJ Proposed Dec., p. 20.) The alleged necessity must be the unavoidable result of a sudden change in circumstance beyond the employer's control. (*Lucia Mar Unified School District* (2001) PERB Decision No. 1440, ALJ Proposed Dec., p. 46.) Thus, a unilateral change was permitted in *Sonoma County Organization, Etc. Employees v. County of Sonoma* (1991) 1 Cal. App.4th 267, where a strike created an unforeseen situation calling for immediate action with an imminent and substantial threat to public health or safety. The court noted that "emergency" is not synonymous with expedient, convenient, or in the best interest of the employer.

The Public Defender's alleged "legitimate business reasons" do not rise to the required level of an unforeseen and unavoidable result due to a sudden change in circumstance beyond the employer's control. The Public Defender knew of the circumstances that led to it implementation of its blanket rule as early as 2007, viz. that the Association had not appointed any DPDs to be labor representatives. Between then and 2009, when it unilaterally implemented its new and expanded policy, the Public Defender cites no evidence of any

exigent circumstances that could justify its unilateral action. We therefore reject the Public Defender's claim that it was excused from the duty to bargain in good faith by a business necessity.

## REMEDY

Having concluded that the Public Defender's 2007 policy prohibiting representation in investigatory interviews of DPDs by DDAs is inherently destructive of employee and Association rights guaranteed by the MMBA, and that the Public Defender has failed to demonstrate that it had no alternative to implementing this policy, we will order the Public Defender to cease and desist from maintaining that policy and from requiring employees to attend investigatory interviews without Association representation. (*Omnitrans* (2010) PERB Decision No. 2143-M.)

PERB's remedial authority also includes the power to order the offending party to take affirmative actions to effectuate the purposes of the MMBA. (*City of Redding* (2011) PERB Decision No. 2190-M.) Thus, we will order the Public Defender to rescind and expunge any discipline of Willms or Drew based on the unlawfully implemented policy. We also order that the Public Defender remove from any files it maintains concerning Willms and Drew any documents that refer to their requests for representation in investigatory interviews at issue in this case.

In cases where the employer has unilaterally changed negotiable terms and conditions of employment, it is appropriate and within PERB's authority to order a return to the status quo ante by rescinding the unilateral change. (*County of Sacramento* (2009) PERB Decision No. 2045-M.) We therefore order the Public Defender to rescind its Confidential Information Policy and Potential Conflict Policy implemented in March 2009, and rescind and expunge any discipline based on these policies and make any and all affected employees whole.

We also find that the Public Defender violated the MMBA when it failed to honor the Association's request to provide the Association with the policy manual with respect to DPD discipline and will order it to provide the information forthwith.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in Case Nos. LA-CE-431-M and LA-CE-554-M, it is found that the County of San Bernardino (Office of the Public Defender) (Public Defender or County) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3502, 3503, 3505, and 3506 and Public Employment Relations Board (PERB or Board) Regulation 32603(a), (b), and (c) (Cal. Code Regs., tit. 8, § 31001 et seq.

(1) By implementing a policy in 2007 that denied to deputy public defenders the right to be represented by the Association and required employees to attend investigatory meetings without representation under threat of insubordination;

(2) By threatening Stephan Willms (Willms) and Mark Drew (Drew) with insubordination if they failed to participate in an investigatory meeting that they reasonably expected could lead to disciplinary action, and by ordering them to continue with that meeting without representation under threat of discipline for insubordination;

(3) By unilaterally changing in 2009 the term of the parties memorandum of understanding that permitted the Association to select representatives for investigatory meetings and other disciplinary matters;

(4) By failing to provide the San Bernardino County Public Attorneys Association (Association) with the policy manual with respect to discipline of attorneys in the Office of the Public Defender.

Pursuant to section 3509(b) of the Government Code, it hereby is ORDERED that the County, its governing board and its representatives and the Office of the Public Defender shall:

A. CEASE AND DESIST FROM:

1. Promulgating or implementing any policy that requires bargaining unit members to attend investigatory interviews without representation by Association-appointed representatives;

2. Threatening Association members Willms, Drew or any other bargaining unit members with discipline for failing to appear at an investigatory interview if they request representation by the Association;

3. Failing to negotiate in good faith by failing to provide the Association with requested information relevant to its representation rights and duties viz., the policy manual with respect to discipline of attorneys in the Office of the Public Defender;

4. Unilaterally changing terms of the parties MOU concerning the Association's right to designate representatives in the personnel matters including investigatory meetings.

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

1. Restore the status quo ante and rescind the unilaterally implemented March 24, 2009, policies entitled "Confidential Information in Attorney Personnel Actions" and "Potential Conflict Situations Due To Defined Relationships," and any other policies that require unit members to attend investigatory interviews without representation by Association-appointed representatives;

2. Provide the Association with the policy manual with respect to discipline of attorneys in the Office of the Public Defender;

3. Rescind the January 7, 2009, e-mail threatening to terminate Willms if he did not appear at the investigatory interview scheduled for January 8, 2009, and remove all copies of the e-mail from Willms personnel file;

4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the County Office of the Public Defender are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the bargaining unit represented by the Association. Pursuant to *City of Sacramento* (2013) PERB Decision No. 2351 and other applicable authority, the County shall identify and include in its electronic posting any and all affected employees who are no longer employed by the County as of the date of posting, or use personal delivery or some alternative means of notification reasonably devised to ensure that any and all affected employees who are no longer employed by the County are advised of their rights and remedies under this Decision. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material;

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. Respondent 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 the Association.

Members Huguenin and Banks 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-431-M and LA-CE-554-M, *San Bernardino County Public Attorneys Association v. County of San Bernardino (Office of the Public Defender)*, in which all parties had the right to participate, it has been found that the County of San Bernardino violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by (1) by denying the San Bernardino Public Attorneys Association (Association) and its members Mark Drew and Stephen Willms the right to represent and be represented during meetings where there was a reasonable expectation of discipline and ordering Drew to continue with that meeting without representation under threat of insubordination; (2) by unilaterally changing a policy concerning the Association's right to select its representatives for Deputy Public Defenders in personal actions, including investigatory meetings; and (3) by failing to provide relevant information requested by the Association.

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

A. CEASE AND DESIST FROM:

1. Promulgating or implementing any policy that requires bargaining unit members to attend investigatory interviews without representation by Association-appointed representatives;

2. Threatening Association members Willms, Drew or any other bargaining unit members with discipline for failing to appear at an investigatory interview if they request representation by the Association;

3. Failing to negotiate in good faith by failing to provide the Association with requested information relevant to its representation rights and duties, viz., the policy manual with respect to discipline of attorneys in the Office of the Public Defender;

4. Unilaterally changing terms of the parties memorandum of understanding concerning the Association's right to designate representatives in personnel matters, including investigatory meetings.

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

1. Restore the status quo ante and rescind the unilaterally implemented March 24, 2009, policies entitled "Confidential Information in Attorney Personnel Actions" and "Potential Conflict Situations Due To Defined Relationships," and any other policies that require unit members to attend investigatory interviews without representation by Association-appointed representatives;

2. Provide the Association with the policy manual with respect to discipline of attorneys in the Office of the Public Defender;

3. Rescind the January 7, 2009, e-mail threatening to terminate Willms if he did not appear at the investigatory interview scheduled for January 8, 2009, and remove all copies of the e-mail from Willms personnel file.

Dated: _____

COUNTY OF SAN BERNARDINO (OFFICE OF THE PUBLIC DEFENDER)

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.