
RECEIVED
MAR 11 2019
COUNTY COUNSEL
VENTURA, CA

In the Matter of the Impasse Between	)	
	)	
COUNTY OF VENTURA,	)	
	)	**FACTFINDING REPORT AND**
Employer,	)	**RECOMMENDED TERMS OF**
	)	**SETTLEMENT**
- and -	)	
	)	**PERB Case No. LA-IM-234-M**
VENTURA COUNTY PROFESSIONAL	)	
PEACE OFFICERS ASSOCIATION	)	**March 5, 2019**
	)	
Exclusive Representative.	)	
	)	

COMPOSITION OF THE FACTFINDING PANEL:

Neutral Chair: ROBERT BERGESON, Arbitrator/Factfinder
13351-D Riverside Drive #142
Sherman Oaks, CA 91423

County Member: None Designated

Association Member: ROBERT WEXLER, Attorney
Rains Lucia Stern St. Phalle & Silver
1428 Second Street, Suite 200
Santa Monica, CA 90407-2161

PRESENTING EVIDENCE/ARGUMENT TO THE PANEL:

On Behalf of the County: No Representative

On Behalf of the Association: Richard Levine, Attorney, Rains Lucia Stern

Kristopher Acebo, Deputy Probation Officer

Damian Stafford, Labor Relations Representative
Rains Lucia Stern

BACKGROUND AND PROCEDURAL HISTORY

Ventura County Professional Peace Officers Association (Association or VCPPOA) exclusively represents a bargaining unit of deputy probation officers (DPOs) working in the County of Ventura (County) Probation Agency (Agency). Not all DPOs carry a weapon. However, those who supervise "high-risk" felons serve in what are referred to as Armed Units. The present matter

involves the Agency's implementation, without having first completed the present process, of changes to the policy which governs such officers' use of their firearms.

From the evidence in the present record, it appears that the County first notified VCPPOA it was contemplating making such changes in October 2014 and that over the next two years those parties exchanged various emails and met on a number of occasions. The Association viewed such meetings as having occurred under the auspices of the "meet and confer," or negotiations, provisions of the state Meyers-Milias-Brown Act (MMBA).[1] Whether the County believed such meetings to be formal meet and confer sessions was unknown at the time of the writing of this report because, for reasons discussed below, the County opted not to participate in this process.[2]

The following facts are set forth in *County of Ventura* (2018) PERB Order No. Ad-461-M. On February 8, 2017, the Association notified PERB that on January 19 of that year, it had declared an impasse in the parties' talks and requested PERB to move the dispute to factfinding pursuant to MMBA section 3505.4 and PERB Regulation 32802. On February 13, 2017, the County filed with PERB an objection to that Association request. The basis of the position then taken by the County was that changing the firearms policy for probation officers is an issue outside the "scope of representation" under the MMBA and, therefore, that factfinding over the matter would be inappropriate. The basis of that position, with which the County continues to adhere, is a California appellate court decision in *San Jose Peace Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d 936 (*City of San Jose*).

On February 15, 2017, PERB's Office of the General Counsel issued an administrative determination granting the Association's request for factfinding. In so doing, that office explained it is not the proper entity within PERB to decide scope of representation questions. In response thereto, the County appealed that determination to the members of the Board itself which thereafter issued Order Ad-461-M and on September 18, 2018, Robert Bergeson was appointed to serve as the

---

[1] The MMBA is codified at Government Code section 3500 et seq.

[2] As also discussed below, because evidence of what transpired prior to the parties' discussions was presented entirely by VCPPOA and because of the possibility that pre-factfinding actions of the parties may henceforth come under scrutiny of the State Public Employment Relations Board (PERB or Board), care has been taken here to summarize only such facts as would presumably be uncontested in that proceeding.

chairperson of the factfinding panel (Panel) so created. The Association subsequently appointed Attorney Robert Wexler of the law firm Rains Lucia Stern St. Phalle and Silver to serve as its member of the Panel. Apparently for strategic reasons the County notified Chair Bergeson and Association Member Wexler that it would not be appointing anyone to the Panel.

Factfinding panels are statutorily authorized to meet with representatives of the disputing parties through investigation and/or hearing and, if an agreement settling all issues cannot be reached, to make factual findings based on the evidence obtained and to recommend terms of settlement. To initiate those quasi-legislative responsibilities a hearing was scheduled by Chair Bergeson for the Port Hueneme Holiday Inn Express conference room on December 14, 2018. The County was duly noticed about that date and location and confirmed ahead of time that consistent with its decision not to participate in the factfinding process, it would not be attending the hearing. What transpired that day is summarized below.

RELEVANT FACTORS

Subsection 3505.4(d) of the Government Code provides as follows:

> In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:
>
> (1) State and federal laws that are applicable to the employer.
> (2) Local rules, regulations, or ordinances.
> (3) Stipulations of the parties.
> (4) The interests and welfare of the public and the financial ability of the public agency.
> (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable agencies.
> (6) The consumer price index for goods and services, commonly known as the cost of living.
> (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
> (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the

findings and recommendation.

Any criteria which have not been relied upon by the parties have not been considered in arriving at the findings and recommendations made herein.

PRELIMINARY COMMENTS

It should be pointed out for any lay persons reading this report that the present proceeding is unusual if not unique.

Various principles salient hereto were addressed in *Public Employment Relations Bd. v. Modesto City Schools District* (1982) 136 Cal.App.3d 881 and subsequent precedential decisions. Among them are that PERB possesses exclusive initial jurisdiction over unfair practice allegations with regard to the MMBA and other statutes it administers. Although, as mentioned, it is the Division of Administrative Law which adjudicates such matters, the scope of representation issue which the County seeks to have decided accordingly lies with that Board. As understood by Panel Chair Bergeson, the County's position continues to be as summarized in Order Ad-461-M, to wit:

> The present matter involves the content of the County's Firearm [sic] Manual, a matter that is not specifically enumerated in the MMBA. The County argues that the matter is not within the scope of representation since it addresses the use of force by sworn staff citing City of San Jose. The Association responds that because the Firearm Manual involves the use of deadly force standard applicable in the discharge of a firearm, it is a matter of employee safety and therefore within the scope of representation citing *Solano County Employees' Assn. v. Solano County* (1982) 136 Cal.App.3d 256, 260. Determining whether the Firearm Manual is within the scope of representation is therefore not a straightforward legal issue and would require not only a review of the manual itself, but could require the consideration of additional evidence to explain the meaning of its terms and the circumstances in which it will be applied.

Order Ad-461-M went on to reject the County's position that the VCPPOA's request for factfinding should be denied until such time as a ruling could be made on the scope of representation issue. Summarizing its holding in *Workforce Investment Board* (2014) Order No. Ad-418-M, PERB stated "To require a preliminary determination as to whether a matter is within the scope of representation before approving a factfinding request 'would encourage both delay and

gamesmanship, thus defeating the principal purpose of factfinding, namely through intervention of a neutral to assist the parties in reaching a voluntary and prompt resolution' [to their impasse]."

Although PERB went on to state it would not always delay approval of factfinding where the parties disagreed as to whether the underlying issue was within the scope of mandatory bargaining, it declined to do such under the circumstances. "If after seeking clarification in negotiations, the County believes the dispute is entirely beyond the scope of representation, [said PERB,] its remedy is to refuse to participate in factfinding, drawing a charge of violating MMBA section 3506.5, subdivision (c), and PERB Regulation 32603, subdivision (e)."

PERB added that "On the other hand, it is possible that by participating in the factfinding process (and with the assistance of the neutral factfinding panel chair), the County may be able to obtain sufficient clarification of the Association's position to determine that the Association's proposals do concern matters within scope." Although not mentioned by PERB, the advantages of a factfinding process containing a panel chaired by a third party neutral as well as union and management appointees have been discussed a number of times in various forums. An example is Cornell University Professor Thomas Kochan's article "The Tripartite Structure and Decision Making Process," published in Factfinding in Public Sector Disputes (UCLA Institute of Industrial Relations, August 1979). Included in benefits identified by Dr. Kochan are increased acceptability, increased quality and mediation facilitation. Although the County's reluctance to participate is understandable, the present Panel is nevertheless somewhat handicapped by the absence of a full complement of members.[3]

THE SUBSTANCE OF THE FIREARMS MANUAL

At the factfinding hearing, the Association made a number of arguments relevant to the lawfulness of the Firearms Manual insofar as it was promulgated prior to exhaustion of the factfinding process. Understandably so because it can be difficult to thoroughly separate that issue

---

3

During a pre-hearing conference call with Mssrs. Wexler and Bergeson, Deputy County Counsel Matthew Smith essentially opined that Order Ad-461-M provided the County with a veritable Hobson's Choice as to how to proceed thereafter.

from the propriety of the manual as a guide to use of force by members of the bargaining unit. Hence, it is anticipated that Panel Member Wexler may address such issues in any concurring opinion he may author. However, Chair Bergeson has endeavored to error on the side of caution and limit the following comments to strictly whether, based on the record before the Panel, changes to the manual as advocated by the Association should be made.

The County's Position

As stated above, the County opted not to participate in this proceeding and, as such, did not offer argument or evidence as to the propriety of changes made to the Firearms Manual.

VCPPOA's Position

At the inception of the factfinding hearing, the Association presented to the Panel a 12-page "opening brief." The lion's share of that brief addresses the legality of the County's conduct in enacting the firearms policy at issue. Since, to repeat, the Panel's jurisdiction does not extend to addressing that issue, the portion of the brief confined to whether the policy should remain in effect without modification will now be addressed.

According to VCPPOA, the pertinent manual is improper and potentially injurious to affected probation officers because, at Chapter 6, Section III C, it limits the use of firearms in the line of duty to "when there is a clear and present danger to the life of the officer or another person, and the officer has a reasonable belief that the use of the deadly force is necessary to prevent serious bodily injury or death to the officer or to another person." Emphasis added.

The Association particularly takes issue with the italicized phrase above in that it is not used in California Penal Code § 835a regarding use of force by a peace officer, nor under Penal Code § 196 regarding justifiable homicide by peace officers nor in Penal Code § 197 which enumerates conditions under which justifiable homicide can occur. Nor is that phrase used in jury instructions approved by the Judicial Council as to use of force by a "public officer" resulting in death. Moreover, asserts the Association, the "clear and present danger" standard does not comport with the United States Supreme Court's decision in *Graham v. Connor* (1989) 490 U.S. 386. Nor does it comport with the California Supreme Court's decision in *Hayes v. City of San Diego* (2013) 57 Cal.4th 622 that "[a]s long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the 'most reasonable' action

or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence."

Consistent with the above, the Association also objects to the Firearms Manual in that it limits the unholstering of firearms to "When the circumstances surrounding the incident create a reasonable belief that there is a substantial risk that the situation may escalate to the point where deadly force may be justified" (Chapter 6, Section III A) and where the officer is "able to articulate the facts perceived by the officer that led to the reasonable belief that there was a substantial risk that the situation might escalate to the point where deadly force may be justified" (Chapter 6, Section III B). The Association asserts that nothing in the law requires a reasonable belief of a substantial risk that the situation could escalate to a point where deadly force is necessary.

Although the Association did not necessarily so characterize it nor is it known whether the County would, for ease of explanation the objected-to policy sections will hereafter be referred to as the "substantial risk/clear and present danger" standard.

The Association further relies on testimonial and documentary evidence presented during the hearing.

Deputy Probation Officer Kristopher Acebo has served in an Armed Unit for eight years, the last four of which have been spent at Oxnard Probation and Post Release. During his testimony, Deputy Acebo opined that the Department's substantial risk requirement presents a safety hazard to officers as a " type of delay in a life-threatening situation . . ."

During Acebo's testimony, VCPPOA had him authenticate the firearms policy for the Oxnard Police Department (OPD) with whose personnel Acebo frequently interacts. As pointed out by Acebo, the OPD policy does not contain a substantial risk/clear and present danger standard. Acebo was similarly questioned about the Use of Force policy for the Ventura County Sheriff's Department. Similarly, the latter policy makes no reference to a substantial risk/clear and present danger requirement for the unholstering and discharge of a firearm. The OPD and Sheriff's Department policies appear to be in the format recommended by the Lexipol company whose products have been adopted by hundreds of California law enforcement agencies.

Rains Lucia Stern St. Phalle & Silver Labor Relations Representative Damian Stafford also testified on the Association's behalf. Stafford's law enforcement background includes 15 years as

an officer and sergeant with Inglewood Police Department, two and a half of which were in internal affairs, and 10 years with Costa Mesa Police Department. At the time of his testimony, Stafford was working with Rains Lucia Stern defending the Los Angeles County Sheriff's Department's first officer-involved fatal shooting litigation in 20 years. Among comments by Stafford was that until the present matter he had never before seen a firearms policy which encompassed unholstering one's weapon. Similar to DPO Acebo, Stafford opined that "you've got all these mental hurdles someone has to go through just to draw their weapon . . . the policy is such that it seems to tie someone's hand completely, short of actually using force." Stafford further opined that the Probation Agency's substitution of "clear and present danger" - which Stafford has also never seen before - for the usual standard of "reasonable" or "objectively reasonable" force without defining what is meant by the substituted phrase is similarly problematic because of confusion it could cause to probation officers.

Based on the above, the Association advocates the following changes be made to chapter 6 of the Department manual.

- Under Section III, entitled Unholstering and Use of Firearm, the first paragraph under subsection A should be changed to read "Except for cleaning purposes, training, inspection, and storage, the firearm should not be removed from the holster unless there's sufficient compelling reasons for doing so. In making that determination, it's not necessity [sic] for the officer to wait until an individual is actually being assaulted other [sic] otherwise under attack before the firearm can be drawn. The firearm shall be reholstered as soon as it's safe to do so."
- Under Section III, subsection B, the first paragraph should be deleted. (Subsection B contains no title.)
- Under Section III, subsection C, entitled Discharge of a Firearm, paragraph #1 should be changed to read "In addition to agency approved training, officers are authorized to discharge firearms in the line of duty when the officer has a reasonable belief that the use of deadly force is necessary to prevent serious bodily injury or death to the officer or to another person, or as otherwise authorized under the Penal Code."

Analysis and Recommendation

Included in the Association's evidence binder are a myriad of emails it exchanged with the

County prior to factfinding. Notwithstanding that it appears as though the County altered its position on the use of firearms somewhat following meetings with the Association, Panel Chair Bergeson does not see any rationale set forth therein except the occasional assertion that the subject of such discussions is outside the scope of actual bargaining under the City of San Jose case referenced above. There is accordingly nothing in the present record from which the County's reasons for changing the firearms policy might be discerned. That is not to say the County might not have a valid reason or reasons for its position in that regard; simply, that the County's procedural posture since PERB determined impasse fails to so disclose.

Had the Association failed to present any persuasive evidence, no recommendation would be made herein to support its position. However, such is not the case.

As cited above, the California Legislature has dictated through enactment Government Code subsection 3505.4(d)(5) that among relevant considerations for quasi-legislative panels of this nature is "Comparison of the . . . conditions of employment of the employees involved in the factfinding proceeding with the . . . conditions of employment of other employees performing similar services in comparable public agencies." On this record, the Association clearly prevails on that basis. Even assuming for purposes of argument that had the County participated and further assuming it had argued that the affected probation officers are substantively distinguishable from deputy sheriffs and police officers, subsection 3505.4(d)(5) does not limit comparability comparisons to employees performing identical duties, but simply to employees performing "similar" duties. An analysis of whether VCPPOA has satisfied that less than rigid standard need go no further than pointing out that the County's reliance on City of San Jose in asserting it need not bargain over the Agency's firearms usage policy is essentially an acknowledgment these probation officers are akin to San Jose police.

To repeat, on this record there is nothing to support the County's implicit contention that the instant employees should be governed by a substantively different firearms policy than that which covers Ventura County Sheriff's deputies and OPD officers and is likely the norm for law enforcement within California. Given that the changes to the Probation Agency's policy advocated by the Association would appear to make it consistent with that of such comparable agencies, it is recommended that the advocated changes be implemented.

enforcement within California. Given that the changes to the Probation Agency's policy advocated by the Association would appear to make it consistent with that of such comparable agencies, it is recommended that the advocated changes be implemented.

Respectfully submitted,

Date: 3/5/19

Robert Bergeson
Neutral Factfinder

I concur.

Date: March 4, 2019

Robert Wexler
Association Appointed Factfinder

Addendum from Chair Bergeson: Association Member Wexler played no part in the preparation of this report and his concurrence is based solely on receipt of a draft thereof and subsequent notification to Mr. Bergeson that he would sign the draft as the final report of the two-member factfinding panel.