

COUNTY OF ORANGE AND
ORANGE COUNTY MANAGERS ASSOCIATION
(Case No. LA-IM-110-M)

FINDINGS OF FACT AND
RECOMMENDED TERMS OF SETTLEMENT

November 9, 2012

FACTFINDING PANEL

Impartial Chairperson: David G. Miller
Association Representative: Paul Crost
Employer Representative: Steve Danley

DRAFT

REPRESENTATIVES

For the Employer: Bruce Barsook, Esq. of
Liebert Cassidy Whitmore

For the Association: Marianne Reinhold of
Reich, Adell & Cvitan

HEARING DATE: October 26, 2012

BACKGROUND AND DISCUSSION

The parties to the impasse and, therefore, this procedure are the County of Orange (County or Employer) and the Orange County Managers Association (Association or OCMA). The parties stipulated to the following facts:

1. The County is a public agency within the meaning of Government Code section 3501, subdivision © of the Meyers-Milias-Brown Act.
2. OCMA is a recognized employee organization within the meaning of Government Code section 3501, subsection (b) of the Meyers-Milias-Brown Act, and has been formally acknowledged by the County as the

representative for all county employees in the Administrative Managers bargaining unit.

3. The parties to this Factfinding have complied with the Meyers-Milias-Brown Act with regard to the selection of the Factfinding panel and are timely and properly before the Panel.
4. The parties have complied with all the requirements for the selection of the Factfinding panel and have met the statutory time limitations applicable to this proceeding.
5. The issues which are appropriately before the Factfinding panel are as follows:
 - a. Term of the Memorandum of Understanding
 - b. [deleted]
 - c. [deleted]
 - d. Article VII: Reimbursement Programs (Optional Benefits) *
 - e. Article X: Grievance Procedure and Disciplinary Appeals*
 - f. Article XIV: Insurance (Health)
 - g. Article XVI: Retirement
 - h. Article XX: Compensation (Performance Pool)

[* The Panel believes these items are easily resolved between the parties and, therefore, will not cover them.]
6. The parties reached an impasse in bargaining on August 24, 2012, following the OCMA membership's rejection of the parties' Tentative Agreement.
7. The parties participated in a mediation with mediator Michele Keith, but were unable to resolve their dispute.
8. OCMA requested factfinding on September 25, 2012.

9. On October 8 2012, the County and OCMA agreed to appoint David G. Miller as the chair of the Factfinding panel.
10. On October 9, 2012, PERB and David G. Miller were notified of Mr. Miller's selection as chair of the Factfinding panel.

Pursuant to Government Code Section 3505.4 (d) the panel is required to 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 public 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 recommendations.

PRIOR TENTATIVE AGREEMENTS

During the negotiating cycle leading up to impasse the parties reached two tentative agreements. The first one was arrived at in late May 2011. It did not go to the Board of Supervisors until November 2011 at which time the Board did not ratify. The second one was reached in June 2012 and this time the Association membership did not ratify. Formal declaration of impasse followed.

It would be natural for the parties to look to factfinding for purposes of providing something better, certainly something different, from their prior failed tentative agreements. The undersigned panel chairperson takes a different view which may be summarized as follows: Good labor relations policy is not advanced by one side or the other substantially improving or diminishing their gains or concessions following rejection of tentative agreements. This is so because to reach a tentative agreement both parties frequently maximize their authority in order to reach a settlement. It does not serve the process or the parties well if after such stretching one party or the other then uses the rejected tentative agreement as a base from which to gain further concessions. Accordingly, the panel chairperson has incorporated into these findings many of the components found in the previous tentative agreements.

Furthermore, some of the chairman's recommendations may not adopt a position argued for by either the County or the Association. This is not 'final offer' arbitration and the Chairman finds no legal requirement to recommend the precise position asserted by one party or the other.

THE ISSUES

There are four major issues which, following mediation, stood between the parties and total agreement: 1. Term of Agreement, 2. Retirement, 3. Pay for Performance, and 4. Health Insurance.

TERM OF AGREEMENT

We deal with this issue first because the duration of the agreement governs the timing for implementing some of the other recommendations.

The parties' most recent Memorandum of Understanding (as extended) (MOU) expired January 3, 2011. The County proposes an MOU through the first payroll period in January 2013. The Association proposes an MOU through the second payroll period in January 2013. Both parties' proposals seem to relate to the impact, if any, of the MOU expiration date on the 2012 Pay for Performance Plan. If this assumption is correct than the parties should, insofar as possible, attempt to reflect their intentions in contract language rather than rely on an implied continuance or expiration of the P4P. As a practical matter if the parties settle, ratification will take place no earlier than December leading to an MOU of a month's duration before the County and Association return to the bargaining table. An additional year serves at least three purposes: 1. restores some stability to labor relations; 2. gives the parties time to work on issues such as revising the Pay for Performance Plan and 3. permits a staggered implementation of some elements of the recommendations which follow. Even with the passage of Proposition 30 2013 probably does not hold much promise for substantial economic gains by public employees and, therefore, OCMA does not relinquish much by foregoing negotiations in 2013. Further, pursuant to recommendations which follow OCMA will be participating, along with the County, in meaningful P4P negotiations during 2013.

Recommendation for Term of Agreement: January 4, 2011 through the first payroll period of January 2014.

RETIREMENT

The County is subject to the County Employees Retirement Law of 1937. Pursuant to that law County employees' retirement is handled through the Orange County Employees Retirement System (OCERS). The bargaining unit consists of General Members and Safety Members—each group subject to different retirement plans and options. For many years the County has paid (picked up) a substantial portion of the employees' contribution to retirement.

When the County adopted an improved retirement program—2.7% at 55—employees agreed to pay the increase in employee contributions over the amount required under the previous plan. Employees also pay portions of the contributions required by Government Code Section 31678.3(d).

The County proposes to cease paying the employee portion of the contribution and, instead, to require the employees to pay.

The County also proposes that current general member employees may elect either a “1.62 at 65” or “2.7 at 55” retirement benefit option. The Association does not appear to oppose this option.

The County also proposes that newly hired employees be enrolled in a lower cost retirement plan: For general employees, 1.62% at 65 based on 3 year average highest salary (FAS), a 2% COLA and a 2% defined contribution match; for safety employees, 2% at 50 with 3 year FAS and 2% COLA.

These proposals may have to be adjusted to conform to new state law in the form of the 2012 Public Employees Pension Reform Act (PEPRA) which affects participants in many California public retirement systems including those under the 1937 Act. We leave it to the legal experts to advise the

parties of their respective obligations under PEPRA. Suffice to say the law deals with retirement plans which public employers may offer and with cost-sharing of contributions. Further the law reflects increasing statewide concern over the substance of public employee retirement programs, the cost of same and the need for employees to pay a portion of the retirement costs. Applicable law also appears to require agreement and a Memorandum of Understanding to implement such changes.

The County presents financial reasons in support of its proposed changes; additionally, the County presents a philosophical argument (matter of principle) in support of requiring employees to pay their retirement contributions.

As a general financial proposition the County has suffered from the consequences of the country and state's financial recession. Additionally the County is still in the process of emerging from bankruptcy which pre-dated the recession. Its bankruptcy obligations of 10-11 million dollars per year will be paid off by 2015-16. About 91% of the County's general revenues come from property taxes; this amount was lower before the State swept up the Vehicle License Fees (VLF). The County and State are disputing a portion of the VLF. The property taxes were hit by the deflation of the housing bubble following the collapse of 2008. Property tax revenues have been relatively flat since 2009-10 and even decreased slightly in 2010-11. Sales tax revenues took a big decline in 2009 but have been on the plus side since then. It is not clear whether they are yet back up to 2008 levels.

The County has already experienced substantial increases in its retirement costs and projects continuation of this upward trend for the future. The increases have come even though the workforce is lower by over a thousand employees from staffing levels for the preceding five years.

As an economic matter both employee and employer benefit economically more from the employer paying the employee retirement contribution than providing a salary increase. For the employer it is cheaper because wage increases carry with them automatic 'roll-ins' such as retirement, workers' compensation, unemployment insurance, etc. Thus, for example, if the employer agrees to pay \$100 of the employee's contribution it costs the employer \$100. If the employer agrees to provide an employee with a wage increase of \$100, that increase could cost the employer as much as \$130 or more. From the employee's standpoint the employer pickup puts a greater percentage of net dollars back into the paycheck than a straight wage increase. When the Association agreed to the County's paying a portion of employee retirement it did so in lieu of all or a portion of any salary increase offered in that year or during the term of the agreement.

The County also argues that it is a philosophical matter of principle that employees pay for their retirement. While it's true that the employees are paying for something they earn and will benefit from in the future, the County's reliance on 'principle' or 'philosophy' is of recent vintage in light of its longstanding policy of paying a portion of employees' retirement contribution. The County presented evidence of the practice of comparable jurisdictions; as I read the exhibits, both San Diego County and San Bernardino County pay all or a portion of the employee contributions. Thus, the County failed to provide a compelling case for requiring its employees to commence paying all the required employee contribution; more compelling is the County's overall financial issues and, in light of factors below, I will recommend changes along the lines proposed by the County. This is so primarily because OCMA has a history (to be detailed more below under Pay for Performance) of trying to help the County's

finances and, more important, because OCMA agreed to this change in the 2011 tentative agreement inexplicably rejected by the Board of Supervisors.

Please note: by agreeing to pay for their retirement contributions employees' net take home pay is reduced.

The Recommendation in this section is only partial; the balance of the Retirement issue will be covered under Pay for Performance.

Recommendation for Retirement Plans : Effective the first payroll period in January 2013 General employees who are on the payroll as of December 31, 2012 will be eligible to elect either the 1.62% at 65 or the 2.7% at 55 retirement formula (this may be subject to resolving a pending tax issue). Employees newly hired on or after January 1, 2013 shall be provided the following retirement formula: General Members—one of either 1.62 % at 65 or PEPRA 2% at 62. Safety Members—2.7% at 57. [Details for both General and Safety members, including plan options, are subject to interpretation of PEPRA].

The balance of the Retirement Recommendation appears in the next section.

PAY FOR PERFORMANCE

The County's Pay for Performance Plan (P4P) dates back only a few years and was developed collaboratively by affected managers with encouragement from then County Chief Executive Officer Mauck who approached employee representatives in 2006. In January 2007 a subgroup of seven employees began developing the elements, options and potential costs and payouts for a P4P program. The employees were not necessarily participating on behalf of OCMA but more as individual managers.

Their efforts resulted in MOU language creating a Performance Pool to be based on performance. Only employees who received evaluation ratings of

“Exceeds Expectations” or “Exceptional” would be eligible for performance pool compensation. The Board agreed to fund the performance pool at 2.5% of unit salaries on or around January 5 of each contract year. By way of hypothetical example: An employee receiving a rating of “Exceeds Expectations” or “Exceptional” for his/her 2009 performance would receive anywhere from 1% to 4% (typically not exceeding 5%) allocated by department heads and payable in January 2010. The increase would apply to the affected employee’s salary adjusting upward the employee’s range, but not necessarily the entire range applicable to the particular classification; this practice is referred to as “base building”.

The County proposes to eliminate or, at a minimum, substantially modify the P4P Plan. The County argues that the Association bargaining unit has done better than most units over the preceding financially demanding five years. For that reason and in light of the County’s general financial problems the P4P monies should not go to base building. The County also argues that the plan is not working the way it intended because, on yearly average, about 85% of the bargaining unit has earned P4P.

The Association opposes eliminating P4P because for many of its members, already at the top of their salary ranges, it may be the only way to earn annual increases. The unit consists of managers who are highly compensated. The projected average compensation cost for a unit position exceeds \$157,000 for 2012-13. The Association also argues that it has made substantial concessions over the past four years indicating its willingness to help the County during this economic crisis. Indeed the evidence supports the Association’s position. In the contract extension agreement of September 2009 the Association agreed to defer a 2009 2% merit increase for nine months, to defer a 2010 2.5% merit increase for nine months, and to

forego altogether a 2009 3% general salary increase. County Staff's report presenting ratification of the agreement to the Board estimated that the agreement saved the County approximately \$11,090,000.

After the agreement expired in January 2011 the County did not initially fund the P4P to provide payment for 2010 performance. In settlement of an Association grievance the County agreed in November 2011 to fund P4P. Again in January 2012 the County did not fund the P4P for 2011 performance. In response the Association initiated litigation on or about July 3, 2012 now pending in Orange County Superior Court as *Orange County Managers Association v. County of Orange* (Case No. 00581261). In its June 15, 2012 negotiations proposal the County offered to settle the litigation by paying 2.5% for P4P in the form of a one time lump sum off schedule bonus not to be used for base building and provided further that no payment will be made for the 2012 evaluation year.

The following recommendation includes elements of both Retirement and Pay for Performance. Further it contemplates settling the pending litigation because (1) the County previously introduced litigation settlement into the negotiations and (2) bilateral settlements generally sit better with the parties than a continuing adversarial process where a third party imposes the result. The recommendation does not reflect a view of the merits of the lawsuit or its likely outcome were it to be litigated to conclusion. The recommendation also takes into account that some compensation should be provided in return for agreeing on a new retirement plan and for employees' net take-home pay loss in agreeing to pick up the cost (or a portion thereof) of their retirement contribution.

Recommendation for Retirement Contribution and Pay for Performance:

- a. General Employees: Effective the first payroll period in January 2013 or the first full payroll period following final ratification, whichever is the later, general employees will pay the full employee contribution (pick up #1). Effective the first payroll period in July 2013 general employees will pay the full employee contribution (pick up #2).
- b. Safety Employees: Effective the first payroll period in January 2013 or the first full payroll period following final ratification, whichever is the later, Safety employees will pay 5% of applicable compensation for employee contribution to retirement. Safety employees will pay an additional higher amount of employee contribution effective when AOCDS unit members begin to pay such higher amount.
- c. Pay for Performance: Except as specifically provided below, funding of the Pay for Performance (P4P) Pool will be suspended during the term of the Agreement; there will be no P4P payments made during the term of this Agreement except as specifically provided for below or as already made. No later than two weeks following final ratification of this Agreement, the parties shall meet and confer over modifications to the P4P plan; the meeting and conferring shall include focus on the following components of a P4P plan:
 1. Modifying the performance goals, standards and/or factors so that fewer than the current 85% of the bargaining unit are likely to qualify for the maximum percentage amounts;
 2. Modifying or eliminating the base building and range increase

aspects of the program.

Effective the first payroll period of January 2013, or the payroll period following ratification, whichever is later, the County shall provide 2.5% for the P4P plan; one half shall be utilized for base-building, the other half shall be paid in one-time lump sum amounts off schedule. The parties shall execute standard settlement, release and waiver language resulting in dismissal with prejudice of the lawsuit in Case No. 0058121.

HEALTH INSURANCE

The County received a number of recommendations from the Mercer Group regarding health insurance. The recommendations included reducing the County's contribution for a single employee from 95% to 90% along with other cost-saving recommendations. The Association did not voice strong objections to the County's proposal to implement the Mercer recommendations provided that the Association was being treated similarly with other employee associations.

Recommendation for Health Insurance: Implement the Mercer recommendations or such other health insurance modifications as may be implemented for County employees when such recommendations or modifications are implemented for a majority of County employees.

GENERAL

Items previously listed as tentative agreements should also be included.

Dated November 9, 2012.

Respectfully Submitted on November 13, 2012.

David G. Miller, Chair

Paul Crost, OCMA Representative

Concur () Dissent ()

Concur in part; dissent in part ()

Steve Danley, County Representative

Concur() Dissent ()

Concur in part; dissent in part ()