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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CITY OF ESCONDIDO,

Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS  
BOARD,

Respondent,

ESCONDIDO CITY EMPLOYEES  
ASSOCIATION,

Real Party in Interest.

D070462

(PERB Case Nos. 618-M and  
2311a-M)

Appeal of Public Employment Relations Board Decision No. 2311a-M.<sup>1</sup>

Reversed.

Jeffrey R. Epp, City Attorney, Michael R. McGuinness and Allegra D. Frost,

Deputy City Attorneys, for Petitioner.

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<sup>1</sup> The record refers to two decisions made by the Public Employment Relations Board (PERB), *Los Angeles Community School District* (1987) PERB Dec. No. 618 [11 PERC ¶ 18075] and *City of Escondido* (2013) PERB Dec. No. 2311a-M. The decision at issue here is No. 2311a-M.

J. Felix De La Torre, Wendi L. Ross and Yaron Partovi for Respondent.

Hayes & Ortega, Dennis J. Hayes and Tracy J. Jones for Real Party in Interest.

City of Escondido (City) appeals a decision by PERB finding the City violated the Meyers-Milias-Brown Act (Gov. Code,<sup>2</sup> § 3500 et seq.; Act), for failing to provide notice and negotiate in good faith the City's decision to transfer work from the bargaining unit employees who were laid off to employees outside of the bargaining unit.<sup>3</sup> The City contends substantial evidence does not support PERB's conclusion that the City made a firm and final decision to transfer work out of the bargaining unit on or before March 3, 2010. In addition, the City argues the Escondido City Employees Association (Association) was aware that the City planned to use part-time employees to handle work that had previously been tasked to full-time employees who were going to be laid off, but did not request the opportunity to negotiate the subject transfer of work at a meeting between the City and the Association on March 15, 2010.

We determine that the City's arguments are well founded; therefore; we reverse PERB's decision.

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<sup>2</sup> Statutory references are to the Government Code unless otherwise specified.

<sup>3</sup> The City also challenges PERB's back pay order requiring the City to reinstate three of the five most senior employees laid off and to provide back pay and benefits from the layoff date until the date of the offer of reinstatement. Because we reverse PERB's finding that the City violated the Act, we do not reach PERB's back pay order. Accordingly, we do not discuss this issue further here.

## FACTUAL AND PROCEDURAL BACKGROUND

The City is a public agency within the meaning of section 3501, subdivision (c). The Association is a recognized employee organization under section 3051, subdivision (b).

In January 2010, the City employed full and part-time code enforcement officers. The City's code enforcement officers were responsible for ensuring citizens and businesses within the City were in compliance with various municipal codes relating to land use. Full-time code enforcement officers were members of the Association as part of the administrative, clerical, and engineering (ACE) bargaining unit. At this time, the City employed six full-time complaint enforcement officers and eight part-time code enforcement officers. Two senior complaint enforcement officers supervised the full-time and part-time code enforcement officers.

The senior code enforcement officers were not part of the ACE bargaining unit. Also, part-time code enforcement officers were not members of the Association.

Because of financial difficulties, on March 3, 2010, the City made the decision to terminate the employment of all full-time code enforcement officers when the City council approved a recommendation to reduce the City's general fund budget by almost \$1 million. The next day, the City notified the Association that Russell Lane, Sandra Moore, Stephen Jacobson, Eric Field, Dan Hippert, and Brian Gustafson were being laid off effective March 31, 2010. The City also indicated that its intent was to negotiate the impact of the layoffs with the Association.

On March 15, 2010, the City and the Association met to negotiate the effects of the layoff. They agreed that, instead of being laid off, Moore could "bump" to the lower classification of code enforcement assistant consistent with the parties' memorandum of understanding (MOU).<sup>4</sup> The City rejected the Association's proposal to allow other full-time code enforcement officers slated for termination to bump into lower positions because the City believed such bumps would be inconsistent with the MOU.

During the March 15 meeting, the City's representative explained that code enforcement work would continue following the layoffs. The representative acknowledged that all proactive enforcement activity would cease and stated that the remaining active cases would be reassigned to the department manager, the senior code enforcement officer, and part-time code enforcement officers. The Association disputed that the City could adequately continue its code enforcement functions using part-time code enforcement officers due to their lack of expertise. The City and the Association additionally discussed severance benefits for the individuals to be laid off and reached a tentative agreement that reaffirmed the following language from the MOU:

"The City will continue to accomplish work internally within the City workforce and assign such work among various City departments. When extraordinary or specialty work must be accomplished, the City will seek the most cost effective resources to accomplish such work either through temporary employees or outside professionals."

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<sup>4</sup> The MOU provides that an employee may bump to a "lower job previously performed for which they [sic] meet the minimum qualifications and the employee is capable of performing the essential functions of the position."

The City went forward with the layoffs as planned on March 31, 2010. However, in addition to retaining Moore, the City promoted Gustafson to code enforcement manager. The three other code enforcement officers (Jacobson, Lane, and Field) were laid off. Each terminated employee received a negotiated severance package, including an 18-month reemployment list and paid administrative leave before the effective date of the layoff.

After the March 2010 layoffs, the City significantly reduced code enforcement division services. The code enforcement division ceased providing proactive enforcement, focused on complaint based enforcement, and no longer provided certain mobile home park inspections. Gustafson was responsible for all mobile home park inspections after the layoffs. Cases had to be prioritized with some active cases closed, others reassigned to part-time code enforcement officers, and some cases were simply ignored. After layoffs, the case load in the code enforcement division decreased by at least 30 percent. Because of the reassignment of work, part-time code enforcement officers received additional training.

On July 7, 2010, the Association filed an unfair practice charge. In that charge, the Association alleged that the City engaged in an unlawful prohibition of protected activity and retaliation for protected activity in violation of the Act. Specifically, the Association contended that the City issued a directive to Russell Lane, the Association's president, prohibiting him from speaking to Association members regarding potential layoffs and the City did not allow Lane to bump down to a part-time code enforcement officer position. On July 14, 2011, the Association filed an amended unfair practices

charge alleging additional facts and a new claim regarding the unlawful unilateral transfer of work out of the ACE bargaining unit. On October 11, 2011, the Association again amended its charge.

PERB partially dismissed the Association's charge and issued a complaint on the remaining charges. The Association appealed the partial dismissal and PERB reversed, finding the Association properly alleged the City violated the Act by transferring work outside of the ACE bargaining unit without negotiating with the Association. Thus, PERB amended the complaint to include that charge.

On September 16 and 17, 2013, the complaint was heard by an administrative law judge. The parties filed posthearing briefs, including supplemental briefs.

On November 17, 2014, the administrative law judge issued a proposed decision. In that proposed decision, the judge found the City violated the Act by: (1) unilaterally transferring work from full-time code enforcement officers to nonbargaining unit employees, including part-time code enforcement officers; and (2) interfering with Lane's ability to communicate regarding Association matters during the work day. The judge dismissed the allegation that the City had discriminated against Lane by laying him off. To remedy the unlawful transfer of work, the judge's proposed order required the City to (1) stop unilaterally transferring bargaining unit work without first meeting and conferring with the Association; and (2) offer immediate reinstatement to three of the five most senior full-time code enforcement officers who were laid off, with back pay from the date of their layoff to the date of reinstatement, offset by interim earnings.

The City filed exceptions to the proposed decision, arguing that the administrative law judge incorrectly concluded that the City's layoff decision coincided with the decision to transfer work and incorrectly found that the City had failed to provide the Association with notice and opportunity to bargain the decision to transfer work. In addition, the City objected to the remedial order (reinstatement and back pay).<sup>5</sup> The Association also excepted to the judge's proposed remedy of reinstating and awarding back pay to only three of the five affected employees. The Association additionally argued that the administrative law judge's remedial order improperly neglected to award the Association agency fees or dues for those employees who had been terminated.

PERB then considered the proposed decision and the parties' various briefs, issuing a decision on May 11, 2016 (PERB Decision No. 2311a-M). The Board adopted the administrative law judge's findings of fact and conclusions of law. However, PERB granted the Association's exception concerning dues and fees, and amended the judge's remedial order to award the Association lost dues and fees for some of the employees who had been laid off.

The City filed its petition for writ of extraordinary relief. We found that a summary denial of the petition was not warranted; thus, we issued a writ of review.

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<sup>5</sup> The City also excepted to the administrative law judge's conclusion regarding the interference and discrimination allegations. However, because these allegations are not raised in the City's appeal, we do not discuss these issues further.

## DISCUSSION

We recognize the expertise of administrative boards like PERB and view them as quasi-judicial agencies. Accordingly, we give PERB's decisions great deference.

(*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804 (*Banning*); *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 856.) As our high court said in *Banning*:

"PERB has a specialized and focused task — 'to protect both employees and the state employer from violations of the organizational and collective bargaining rights guaranteed by the [EERA].' [Citation.] As such, PERB is 'one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.' [Citation.] '[T]he relationship of a reviewing court to an agency such as PERB, whose primary responsibility is to determine the scope of the statutory duty to bargain and resolve charges of unfair refusal to bargain, is generally one of deference' [citation] and PERB's interpretation will generally be followed unless it is clearly erroneous." (*Banning, supra*, at pp. 804-805.)

We must affirm factual determinations of boards if supported by substantial evidence (*Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1978) 24 Cal.3d 335, 353) and give deference to their interpretations of the statutes falling within their expertise (*San Lorenzo Education Assn. v. Wilson* (1982) 32 Cal.3d 841, 850).

Here, the City challenges PERB's conclusion that the City unilaterally transferred full-time code enforcement work out of the bargaining unit in violation of section 3505

and PERB Regulation 32603, subdivision (c)<sup>6</sup> on several grounds. We focus on just two of the City's many arguments: (1) there is no substantial evidence supporting the finding that the City made a firm, final, simultaneous decision to lay off full-time code enforcement officers and transfer their work to part-time employees and (2) the Association was informed of the City's intent to transfer work out of the bargaining unit when it met with the City on March 15, 2010, but the Association did not request the opportunity to negotiate that issue.

The Act imposes on local public agencies a duty to meet and confer in good faith with representatives of recognized employee organizations regarding matters within the scope of representation, which includes wages, hours, and terms and conditions of employment. (§§ 3504, 3505.) An unlawful unilateral change is a per se violation of an agency's duty to bargain in good faith. (*San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813, 819.) To establish an unlawful unilateral change, a party must demonstrate that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*County of Santa Clara* (2013) PERB Dec. No. 2321-M at p. 13.)

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<sup>6</sup> California Code of Regulations, title 8, section 32603, subdivision (c).

A decision to eliminate or reduce services, and/or lay off employees is not within the scope of representation. (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 275 [layoffs]; *City of Richmond* (2004) PERB Dec. No. 1720-M at pp. 2-3 [29 PERC ¶ 31] [reduction in services].) However, if a public entity is eliminating bargaining unit positions and reassigning bargaining unit work to nonbargaining unit employees, the public agency must first negotiate over that decision with the employee representative. (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 668.) The underlying rationale for the negotiability of transfer decisions is that the employer is not completely eliminating services or changing the scope or direction of its operations, but simply changing the identity of the personnel who will be assigned to perform the work. (*City of Sacramento* (2013) PERB Dec. No. 2351-M at p. 15.)

Nevertheless, not all decisions to transfer unit work are subject to a bargaining obligation. In *Eureka City Schools* (1985) PERB Decision No. 481 at page 15 [PERC 9 ¶ 16060], PERB concluded that a change in the distribution of duties between unit and non-unit employees, where there is an established practice of overlapping duties, does not give rise to a duty to bargain. This caveat in the requirement to bargain is known as the *Eureka* exception. The City argues that the *Eureka* exception applies here. Not surprisingly, PERB and the Association argue it does not. Yet, we need not resolve this dispute because we find a more fundamental problem with PERB's final decision here. There is no substantial evidence to support PERB's conclusion that the City made a firm and final decision to transfer unit work from full-time code enforcement officers to part-

time code enforcement officers on or before March 3, 2010 when the City decided to layoff full-time code enforcement officers.

In its decision, PERB concluded the City's "decision to layoff the full-time code enforcement officers had to have been made prior to or simultaneously with the decision to transfer work outside of the bargaining unit." In support of this conclusion, PERB cited to the following testimony of Albert Bates<sup>7</sup> that it believed indicates that the City's true intention as of the March 3, 2010 City Council meeting was to ultimately transfer the full-time work to the part-timers:

"Q: After the March 2010 layoffs, did the City of Escondido cease providing the services that the full-time code enforcement officers provided?"

"A: Partly, yes. Mostly, no. The yes part that was ceased was we stopped our proactive enforcement. The part we didn't cease was, again, the cases, the complaints still came to us, and the cases still had to be worked. And the part-time officers had to pick up, you know, and be trained in those duties and pick up that activity in terms of the cases they worked.

"Q: So after the March 2010 layoffs, were the part-time officers performing the work that the full-time officers had performed prior to the layoffs?"

"A. Yes."

PERB also relied on additional testimony from Bates that, after the March 2010 layoffs, he trained part-time code enforcement officers to perform work that the full-time code enforcement officers had performed. Bates additionally explained that, after the

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<sup>7</sup> The City employed Bates from February 19, 1991 through December 30, 2011. Bates began his employment as a code enforcement officer and finished as a senior code enforcement officer.

layoffs, he was the only person employed by the City who was trained to investigate substandard housing complaints. Bates further testified that he held off on performing mobile home inspections after the layoffs in the hope that the City would reinstate Moore to handle them because part-time code enforcement officers were not trained to conduct them.

In addition, Bates testified that even with the City's decision to cease proactive code enforcement activities, there remained certain duties (especially involving hazardous and unhealthy business conditions) that the City could not ignore. For example, Bates inherited supervising business licensing, which he knew very little about. Because Bates was "begging" for help, the City reinstated Moore as a full-time code enforcement officer sometime after the layoffs.

PERB found:

"Given these facts, the only likely scenario is that the City believed it needed to transfer the non-proactive full-time duties to part-timers at the time it decided to lay off the full-time code enforcement officers. The fact that the work first went to Bates, a senior code enforcement officer, to divvy up should not alter the analysis, since the City was on reasonable notice that the remaining senior code enforcement officers would be unable to shoulder all of the former full-time non-proactive work and would have to delegate the work to the only other people in the City who could perform these tasks - the part-timers."

We disagree with PERB's conclusion. Moreover, in their briefs before us, neither PERB nor the Association explain how any of these facts support the conclusion that the City made a firm decision to transfer work out of the ACE bargaining unit on or before March 3, 2010. The facts PERB relied on to reach its final decision merely discuss what

happened after the March 31, 2010 layoffs and how the City struggled to complete the reduced workload.<sup>8</sup>

We see nothing in the facts relied on by PERB that even supports an inference that the City made a firm decision to transfer work out of the ACE bargaining unit at the same time or before March 3, 2010. There is no indication in the record that Bates played any role in the City's decision to lay off employees and reduce essential services as a result of financial difficulties. These facts in no way indicate that, as of March 3, 2010, the City understood and appreciated the amount of work that would be left for the existing employees after the layoffs. As such, we determine that PERB's conclusion that the City made a firm and final decision on or before March 3, 2010 to transfer work out of the bargaining unit is pure speculation and not supported by substantial evidence.

Underscoring our conclusion is the circumstances of the March 15, 2010 meeting between the City and the Association. At the meeting, the City representative, Barbara Redlitz, discussed with Association representatives how the City planned to continue with code enforcement without full-time code enforcement officers. Redlitz informed the

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<sup>8</sup> At oral argument, PERB's counsel heavily relied on a slide that was part of the City's budget subcommittee meeting on January 25, 2010. The subject slide was entitled, "Code Enforcement" and attributed an annual savings of \$685,000 to a reduction in the code enforcement department. The slide further discussed service reduction because of the "[r]educed capability due to loss of full-time Code Officers." It also mentioned that complaints would have to be prioritized, timeframes increased, and the City would adopt "complaint driven enforcement." Additionally, the slide discussed the "elimination of the ACT Team" as well as the transfer of mobile home park enforcement and inspection responsibilities to the state. We are not persuaded by counsel's argument that this slide establishes that the City decided to transfer all the work out of the bargaining unit before or on March 3, 2010.

Association that the City would be reducing services, specifically ceasing any proactive enforcement, reprioritizing existing cases, and returning enforcement of code violations in mobile home parks to the State of California.<sup>9</sup> Redlitz provided additional information regarding how the remaining work would be handled. To this end, she explained that much of the work would be transferred to the code enforcement manager, the remaining senior code enforcement officer, and part-time code enforcement officers. Redlitz stated that she remembered an Association representative objected to the use of part-time code enforcement officers after the layoffs.

Lane was present at the March 15, 2010 meeting. He admitted that he knew that the City was not going to layoff part-time code enforcement officers so he assumed the City was going to replace full-time code enforcement officers with part-timers.

Accordingly, Lane understood, at the March 15 meeting, that at least some of the bargaining unit work would be transferred out of the bargaining unit. However, there is no evidence in the record that Lane or anyone else on behalf of the Association asked to negotiate the use of part-time code enforcement officers to do the work of the full-time code enforcement officers.

Karen Tatge, secretary of the Association, also was present at the March 15, 2010 meeting. She testified that at the March 15 meeting, there was discussion between the City and the Association regarding how the code enforcement division would continue to do its work without full-time code enforcement officers. Tatge further stated that, as of

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<sup>9</sup> Apparently, the City decided against returning the enforcement of code violations in mobile home parks back to the State of California.

the March 15 meeting, it was the Association's position that the code enforcement division could not be successfully run after the proposed layoffs. And Tatge admitted, based on the March 15 meeting, the Association was aware that the code enforcement division, post-layoff, would operate with part-time officers conducting the code enforcement.

At the end of the March 15, 2010 meeting, the Association agreed to a management rights clause allowing the City to continue to accomplish work internally within the City workforce after the layoffs and to assign the work among the various departments. Specifically, the clause stated, "[t]he City will continue to accomplish work internally within the City workforce and assign such work among various City departments. When extraordinary or specialty work must be accomplished, the City will seek the most cost effective resources to accomplish such work either through temporary employees or outside professionals."

PERB asserts the March 15, 2010 meeting should not affect our analysis. First, PERB claims the City represented to the Association that the work of full-time code enforcement officers would be completely eliminated, but then transferred the work to part-time employees. Thus, PERB contends the City failed to provide advance notice of such a transfer. We find no support in the record for this assertion. Indeed, such a contention directly contradicts the testimony of Redlitz, Lane, and Tatge regarding what was discussed at the March 15 meeting. Contrary to PERB's position, it is undisputed that the use of part-time employees to handle at least some of the work of the full-time code enforcement officers after the layoff was discussed.

Second, PERB argues it would have been futile for the Association to have asked the City to bargain because the City had already made a firm decision to transfer work out of the bargaining unit. However, because there is no substantial evidence to support the contention the City had made any such firm decision prior to the March 15 meeting, we reject this contention.

Because we disagree with both of PERB's arguments that the March 15, 2010 meeting does not impact the Association's claim that the City failed to offer the Association the opportunity to negotiate the transfer of work from the full-time code enforcement officers to part-time employees, we conclude that the Association waived its right to negotiate the transfer of work.<sup>10</sup> (See *California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 937.)

The question of adequate notice and waiver was discussed in *Victor Valley Union High School Dist.* (1986) PERB Decision No. 565 [10 PERC ¶ 17079]. There, the district had increased the teachers' instructional day without negotiating with the union. The district claimed the union had waived its right to negotiate the issue because Board meeting agendas had been sent to the union. PERB found no waiver, but analyzed the issue as follows:

"Notice of a proposed change must be given to an official of the employee organization who has the authority to act on behalf of the

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<sup>10</sup> PERB argues that we cannot consider the City's waiver argument because the City did not raise an exception based on waiver to the administrative law judge's proposed decision. The record belies PERB's contention. The City raised waiver in its exceptions. Additionally, PERB expressly considered the City's waiver argument and rejected it in its decision.

organization. The notice must be communicated in a manner which clearly informs the recipient of the proposed change. Even in the absence of formal notice, proof that such an official had actual knowledge of the proposed change will suffice. Notice must be given sufficiently in advance of a firm decision to make a change to allow the exclusive representative a reasonable amount of time to decide whether to make a demand to negotiate. What constitutes a 'reasonable amount of time' necessarily depends upon the individual circumstances of each case. As waiver is an affirmative defense, an employer asserting a waiver of the right to bargain properly bears the burden of proving that the exclusive representative failed to request bargaining despite receiving sufficient notice of the intended change." (*Id.* at pp. 5-6.)

Here, it is clear the Association had actual knowledge of the City's plan to transfer work out of the ACE bargaining unit. Based on the March 15 meeting between the City and the Association, two Association representatives (Lane and Tatge) testified that they were aware the City planned to transfer work out of the bargaining unit from the full-time code enforcement officers to the part-time code enforcement officers. Indeed, at least Tatge informed the City representative that she did not believe the code enforcement division could successfully perform its duties with the part-time employees taking on the full-time code enforcement officers' work. Thus, it is clear from the record that the Association had notice of the proposed change.

Moreover, as we discuss above, there is not substantial evidence that the City made a firm and final decision to transfer the work out of the bargaining unit before it informed the Association of its intention to do so. Despite expressing concern that the code enforcement division could effectively function under the City's proposed transfer, the Association did not request the opportunity to negotiate about the transfer of work.

Finally, the written MOU agreed to by the parties after the March 15, 2010 meeting also supports a finding of waiver. There, the parties agreed the City would continue to accomplish work internally, and if necessary, assign work to temporary employees or outside professionals. In its decision, PERB found that this language in the MOU only allowed the City to use "temporary employees" for "extraordinary or specialty work" and code enforcement work is not of that kind. We would agree with PERB's finding if the record was not so clear that the City and the Association specifically discussed at the March 15, 2010 meeting the use of part-time code enforcement officers to perform code enforcement duties that had been the province of full-time code enforcement officers. Because this topic was clearly discussed, we do not interpret the portion of the MOU as narrowly as does PERB. To the contrary, we read this portion of the MOU as indicating that the Association understood and either acquiesced to or did not request the opportunity to bargain about the transfer of work out of the ACE bargaining unit. Moreover, as the City points out, there is additional evidence in the record showing that the subject language of the MOU was previously used to memorialize the City's use of temporary (part-time) employees to accomplish the remaining work after layoffs.

Against this backdrop, we conclude the Association waived its right to negotiate regarding the transfer of work out of the bargaining unit.

Because we determine that substantial evidence does not support PERB's finding that the City made a firm and final decision to transfer work out of the bargaining unit at the same time or before it decided to layoff the full-time code enforcement officers, and

we conclude the Association waived its right to negotiate the transfer, PERB's decision cannot stand.

DISPOSITION

The decision of PERB is reversed.

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HUFFMAN, Acting P. J.

WE CONCUR:

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O'ROURKE, J.

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IRION, J.