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Attorneys for Defendants

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SAN BERNARDINO CITY PROFESSIONAL ) CASE NO. EDCV 05-473 VAP(SGLx)  
FIREFIGHTERS UNION, LOCAL 891; et )  
al., ) DEFENDANTS' OPPOSITION TO MOTION  
Plaintiffs, ) FOR WRIT OF MANDATE;  
v. ) DECLARATIONS OF JAMES ODLUM AND  
LARRY PITZER; et al., ) STEPHANIE EASLAND  
Defendants. )  
DATE: May 22, 2006  
TIME: 10:00 a.m.  
COURTROOM:2

Defendants Larry Pitzer and City of San Bernardino submit the following opposition to Plaintiffs' Motion for Writ of Mandate.

**THE MOTION WAS FILED IN VIOLATION OF LOCAL RULE 7-3**

Local Rule 7-3 requires two things, namely that the notice of motion contain a statement that a conference of counsel occurred, and more important, that a conference of counsel did occur. Neither of these requirements is met here.

The notice of motion does not include the language required by Rule 7-3. Furthermore, there was no Rule 7-3 conference about the motion for writ of mandate. (See accompanying Odlum declaration).

Because Plaintiffs failed to comply with Local Rule 7-3, their

1 motion for writ of mandate should be denied on that basis alone.

2 **THE MOTION IS UNTIMELY UNDER THE SCHEDULING ORDER**

3 The Court's September 19, 2005 Scheduling Order set May 2, 2006  
4 as the cut-off for a hearing on a motion for mandate. Plaintiffs'  
5 motion for writ of mandate was not filed and served until April 28,  
6 the last business day before the cut-off. The motion is set for  
7 hearing on May 22, some three weeks after the cut-off.

8 The Court's Scheduling Order is clear: the cut-off is the date  
9 by which Plaintiffs had to set the hearing for a motion for writ of  
10 mandate, not the date by which such a motion had to be filed.  
11 Clearly, Plaintiff's motion for writ of mandate is untimely under  
12 the Scheduling Order, and should be denied on that basis alone.

13 **THE COURT DOES NOT HAVE JURISDICTION TO GRANT THE MOTION**

14 Plaintiffs' motion seeks a writ based on the first cause of  
15 action (California's Meyers-Milias-Brown Act) and on the second  
16 cause of action (Public Safety Officers' Procedural Bill of Rights  
17 Act). As explained below and in Defendants' pending motion for  
18 summary judgment, Plaintiffs' claims under those two statutes fail  
19 because they lie within the exclusive primary jurisdiction of the  
20 Public Employment Relations Board and because Plaintiffs did not  
21 exhaust their administrative remedies.

22 **1. Meyers-Milias-Brown Act**

23 The Meyers-Milias-Brown Act (MMBA) is a California statute  
24 governing the rights of state and local public sector employees,  
25 including firefighters, to join and support labor unions. Government  
26 Code sections 3500-3510. The MMBA is patterned on the federal  
27 National Labor Relations Act. Accordingly, authority under the NLRA

1 is considered persuasive in interpreting the MMBA. Los Angeles  
2 County v. Superior Court, 23 Cal.3d 55, 63, 151 Cal.Rptr. 547  
3 (1978).

4 The Public Employment Relations Board (PERB) is the state  
5 administrative agency that oversees and enforces the MMBA. Like its  
6 federal counterpart (the National Labor Relations Board), PERB has  
7 exclusive jurisdiction over alleged violations of the labor  
8 statutes, including the MMBA, which it oversees. Government Code  
9 section 3509(b). PERB has broad authority to fashion remedies in  
10 cases of unfair employment practices. Government Code section 3509.

11 2. Preemption Under MMBA

12 The United States Supreme Court and other federal courts  
13 interpreting the NLRA have developed a rule of preemption known as  
14 the Garmon doctrine, named after the landmark decision of San Diego  
15 Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). Under the  
16 Garmon doctrine, a claim is preempted, and within the exclusive  
17 jurisdiction of the NLRB, if the activities alleged in the claim are  
18 arguably protected or prohibited by the NLRA. The Garmon doctrine  
19 has been applied in hundreds of cases to dismiss lawsuits concerning  
20 activities which arguably constitute unfair labor practices under  
21 the NLRA, including claims that an employee was retaliated against  
22 for pro-union activity. See e.g. Shane v. Greyhound Lines, 868 F.2d  
23 1057 (9<sup>th</sup> Cir. 1989).

24 California law has a Garmon doctrine counterpart, under which  
25 claims involving conduct arguably protected or prohibited by MMBA  
26 are within the exclusive jurisdiction of PERB. A leading case is El  
27 Rancho Unified School District v. National Education Association, 33

1 Cal.3d 946, 192 Cal.Rptr. 123 (1983), in which the California  
2 Supreme Court held that a school district's lawsuit seeking damages  
3 for an allegedly illegal teacher strike was preempted and within the  
4 exclusive jurisdiction of PERB. In so holding, the court relied on  
5 Garmon and its progeny, finding that a court's jurisdiction is  
6 preempted if the conduct at issue is arguably protected or  
7 prohibited by one of the California labor statutes administered by  
8 PERB and the controversy presented to the court "may fairly be  
9 termed the same" as could be presented to PERB. 33 Cal.3d at 953-  
10 960.

11 3. Exhaustion of Remedies

12 A corollary of the preemption doctrine is the rule that a  
13 plaintiff cannot sue on a preempted claim unless he has first  
14 exhausted his administrative remedies. Stated differently, because  
15 the administrative agency (here PERB) has exclusive primary  
16 jurisdiction, one cannot sue in court without first exhausting the  
17 available administrative remedies with PERB. Leek v. Washington  
18 Unified School District, 124 Cal.App.3d 43, 177 Cal.Rptr. 196  
19 (1981).

20 4. The First Cause of Action is Preempted and Lies Within PERB's  
21 Exclusive Jurisdiction

22 The motion for a writ of mandate is based partly on the first  
23 cause of action.

24 The first cause of action is brought expressly under the MMBA.  
25 It alleges that plaintiff Lewis was actively involved in his union  
26 (complaint paragraph 10), including acting as lead union negotiator  
27 in "continuous battles" with management. (Complaint paragraph 12).  
28

1 The first cause of action further alleges that Plaintiff Lewis was  
2 retaliated against for these activities by being wrongfully denied a  
3 promotion and being subjected to an unjustified personnel  
4 investigation. (Complaint paragraphs 13, 16-20, 28-31).

5 The first cause of action seeks a writ compelling  
6 Defendants to promote Lewis to battalion chief, retroactive to  
7 the day he was passed over, together with all back pay,  
8 benefits and seniority rights. (Complaint paragraphs 34 and  
9 35).

10 One could hardly imagine a cause of action more directly  
11 alleging activity arguably prohibited by the MMBA. A claim that an  
12 employee was retaliated against for engaging in union activities is  
13 a garden variety application of the Garmon doctrine. Shane v.  
14 Greyhound Lines, 868 F.2d 1057 (9<sup>th</sup> Cir. 1989). Accordingly, the  
15 first cause of action is preempted, and lies within the exclusive  
16 jurisdiction of PERB.1

17 The fact that this case is in federal court, as opposed to  
18 state court, does not change this conclusion. See e.g. Bethphage  
19 Lutheran Services, Inc. v. Weicker, 965 F.2d 1239 (2d Cir.  
20 1992) (federal court should not entertain jurisdiction of case where  
21 state administrative existed to resolve dispute).

22 5. The Second Cause of Action is Preempted and Lies Within  
23 PERB's Exclusive Jurisdiction  
24

25 1. The fact that the first cause of action purports to seek mandate  
26 relief does not change this conclusion. The preemption doctrine  
27 applies with equal force to actions for writs of mandate. Personnel  
Commission v. Barstow Unified School District, 43 Cal.App.4<sup>th</sup> 871, 50  
28 Cal.Rptr.2d 797 (1996).

1       The motion for writ of mandate is also based on the second  
2       cause of action.

3       The second cause of action is based on the same allegedly  
4       wrongful conduct as the first cause of action, namely Plaintiff  
5       Lewis being passed over for promotion and subjected to an  
6       unwarranted personnel investigation. (Complaint paragraphs 38, 43).

7       The second cause of action alleges that Defendants' conduct  
8       violated the Public Safety Officers Procedural Bill of Rights Act  
9       (Government Code sections 3300 et seq.), a statute which grants  
10      special procedural protections to public safety officers in  
11      disciplinary situations.

12      PSOPBRA is not a statute entrusted to PERB for enforcement.  
13      Nevertheless, the second cause of action is preempted and within  
14      PERB's exclusive jurisdiction because PERB has exclusive primary  
15      jurisdiction to initially pass on the legality of the underlying  
16      conduct.

17      Garmon preemption applies with full force where, as here, the  
18      same conduct is alleged to have violated both the MMBA and another  
19      statute. In El Rancho Unified School District, supra, the school  
20      district alleged that the teachers union engaged in an illegal  
21      strike, in violation of the Education Employment Relations Act  
22      (EERA). The school district also alleged that the strike violated  
23      the Education Code. The Education Code does not lie within PERB's  
24      jurisdiction. Nevertheless, the California Supreme Court held that  
25      the entire case fell within the exclusive jurisdiction of PERB. The  
26      court emphasized that "what matters is whether the underlying  
27      conduct on which the suit is based - however described in the  
28

1 complaint - may fall within PERB's exclusive jurisdiction." 33  
2 Cal.3d at 954, footnote 13. See also Los Angeles Council  
3 v.L.A.U.S.D., 113 Cal.App.3d 666, 669, 672, 169 Cal.Rptr. 893 (1980)  
4 (action alleging violations of both EERA and Education Code  
5 preempted as within exclusive primary jurisdiction of PERB).

6 This rule was discussed at length in Personnel Commission v.  
7 Barstow Unified School District, supra. In Personnel Commission,  
8 the commission and the teachers union alleged that the school  
9 district violated the Education Code by laying off district bus  
10 drivers and contracting out the work. In a different proceeding,  
11 the union filed a PERB complaint alleging that the same conduct also  
12 violated EERA because it was retaliation for the exercise of  
13 protected rights and was implemented in violation of the duty to  
14 bargain. The court held that the Education Code allegations, as  
15 well as the EERA allegations, lay within the exclusive primary  
16 jurisdiction of PERB. In so holding, the court reasoned:

17 "Indeed, to hold otherwise would permit a party to avoid  
18 exhaustion merely by avoiding any express claim of unfair  
19 practice or other EERA violation in its complaint. In El  
20 Rancho, however, the Supreme Court stated that 'what  
21 matters is whether the underlying conduct on which the  
22 suit is based -- however described in the complaint -- may  
23 fall within PERB's exclusive jurisdiction."

24  
25 43 Cal.App.4<sup>th</sup> at 889 (emphasis in original).

26 Similarly, in Leek v. Washington Unified School District, 124  
27 Cal.App.3d 43, 177 Cal.Rptr. 196 (1981), a group of school district

1 employees who did not belong to the union brought an action  
2 challenging the requirement that they pay union fees, alleging that  
3 the requirement violated EERA and the state constitution. The court  
4 held that both claims were subject to dismissal based on PERB  
5 preemption. In so holding, the court stated:

6 "However, as we previously perceived, it is a reasonable  
7 probability that a ruling by PERB on the nonconstitutional  
8 issues would obviate the consideration of constitutional  
9 challenges. In any event, appellants are required to  
10 exhaust their administrative remedies despite the  
11 allegations of constitutional violations."

12 124 Cal.App.3d at 53. See also Link v. Antioch Unified, 142  
13 Cal.App.3d 765, 191 Cal.Rptr. 264 (1983) (same, even though plaintiff  
14 avoided referring to EERA in complaint).

15 Where, as here, the same conduct is alleged to have violated  
16 MMBA and a statute not within PERB's exclusive jurisdiction, the  
17 proper course is for the court to dismiss the case based on the  
18 plaintiff's failure to exhaust administrative remedies. Leek, supra,  
19 124 Cal.App.3d at 53-54; San Jose Teachers v. Superior Court, 38  
20 Cal.3d 839, 863, 215 Cal.Rptr. 250, vacated on other grounds, 475  
21 U.S. 1063 (1986). 2

22 Likewise, the second cause of action fails because all  
23 Plaintiffs' causes of action are based on the same allegedly  
24 unlawful activity, namely denying Lewis a promotion and conducting  
25 an unwarranted investigation. Since that conduct allegedly violated  
26

27 2. PERB will assert jurisdiction over cases involving conduct that  
28 may violate both MMBA and another non-labor statute. Fremont School



1 MMBA, all claims arising from that conduct lie within PERB's primary  
2 exclusive jurisdiction and must be dismissed. This conclusion is  
3 buttressed by the fact that Plaintiff Lewis testified that he  
4 carried out all his PSOPBRA-protected conduct in his capacity as a  
5 Union official.

6 6. Government Code section 3511 Does Not Save This Case From  
7 Preemption.

8 Plaintiffs might argue that Government Code section 3511 saves  
9 their case from preemption. Such an argument would be incorrect.

10 In the 1999-2000 Legislative Session, the California  
11 Legislature extended PERB's exclusive jurisdiction to include  
12 alleged violations of the MMBA. Before that, the MMBA was enforced  
13 through court actions. This extension of PERB's exclusive  
14 jurisdiction was accomplished by amending Govt. Code section 3509.

15 In Govt. Code section 3511, the Legislature carved out for  
16 police officers a limited exception to PERB's exclusive  
17 jurisdiction. Section 3511 states:

18 "The changes made to sections 3501, 3507.1, and 3509 of  
19 the Government Code by legislation enacted during the  
20 1999-2000 Regular Session of the Legislature shall not  
21 apply to persons who are peace officers as defined in  
22 Section 830.1 of the Penal Code."

23 (emphasis added).

24 Penal Code section 830.1, in turn, includes a long list of  
25 occupations which are considered "peace officers." Essentially,  
26 Penal Code section 830.1 lists occupations traditionally viewed as

27  
28 District, PERB Dec. No.1240 (1997).

1 police officers, such as sheriffs, local police officers, special  
2 agents of the Department of Justice and the Attorney General, and  
3 the like. Section 830.1 does not include firemen.

4 In 1997, the City of San Bernardino designated its firemen as  
5 peace officers for some purposes. However, that designation was  
6 expressly made pursuant to Penal Code section 830.37, which allows a  
7 municipality to designate arson investigators and certain other fire  
8 personnel as peace officers. (See accompanying declaration of  
9 Stephanie Easland).

10 In summary, the limited exception to preemption contained in  
11 Government code section 3511 applies only to the occupations listed  
12 in Penal Code section 830.1, namely those traditionally viewed as  
13 police officers. Penal Code 830.1 does not include firefighters,  
14 and therefore the exception to preemption in Govt. Code section 3511  
15 is irrelevant. Thus, firefighters such as Plaintiff Lewis, and  
16 other members of the Plaintiff Union, are subject to the exclusive  
17 jurisdiction of PERB.

18 **CONCLUSION**

19 For all of the foregoing reasons, Plaintiffs' motion for writ  
20 of mandate should be denied.

21  
22 DATED: May 8, 2006

JAMES A. ODLUM  
MUNDELL, ODLUM & HAWS, LLP

23  
24 By:  \_\_\_\_\_

25 James A. Odum  
26 Attorneys for Defendants  
27  
28

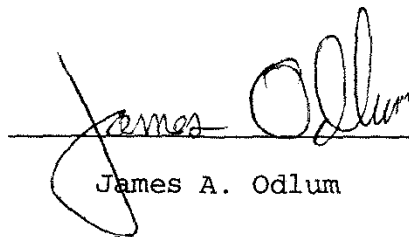
**DECLARATION OF JAMES A. ODLUM**

I, James A. Odum, declare as follows:

1. I am an attorney duly licensed to practice in all courts of the State of California and before this Court. I am the attorney responsible for representing Defendants in the above-entitled action.

2. I have never met and conferred with Plaintiffs' counsel under Local Rule 7-3 about Plaintiffs' Motion for Writ of Mandate. Similarly, I have never been asked to have such a meet and confer session. On March 13, 2006, Corey Glave (counsel for Plaintiffs) and I did meet and confer under Local Rule 7-3 with respect to Defendants' Motion for Summary Judgment, but there was no mention of a motion for writ of mandate.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed on May 8, 2006.

  
James A. Odum

DECLARATION OF ODLUM

Fax sent by : 9098909500

MUNDELL, ODUM & HAW

05-08-06 09:36 Pg: 2/2

**DECLARATION OF STEPHANIE EASLAND**

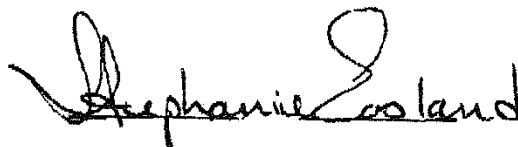
I, Stephanie Easland, declare as follows:

1. I am an attorney duly licensed to practice law in all courts of the State of California and am a member of the Bar of this Court.

2. I have been employed in the office of the City Attorney of the City of San Bernardino since 1990. I currently am the Assistant City Attorney. My job responsibilities require me to be familiar with the San Bernardino Municipal Code.

3. Municipal Code section 15.16.060 designates the Fire Chief and members of the fire prevention bureau as peace officers, pursuant to California Penal Code section 830.37. Attached hereto as Exhibit 1 is a true and correct copy of Municipal Code section 15.16.060. The City of San Bernardino has never designated any fire personnel as peace officers under Penal Code section 830.31, nor does that Penal Code section envision designating fire fighters as peace officers.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed on May 8, 2006.

  
Stephanie Easland

MUNDELL,  
ODUM &  
HAWKINS LLP

DECLARATION OF EASLAND

**SAN BERNARDINO**

**MUNICIPAL CODE**

**1998**

**A Codification of the General Ordinance of  
San Bernardino, California**

**Codified, Indexed and Published By**

**City of San Bernardino  
City Attorney's Office**

**300 North "D" Street  
San Bernardino, California**

1. Fire Chief, Deputy Chief, Fire Marshal, Battalion Chiefs, Fire Investigators, Captains, Engineers, Firefighters, Firefighter/Paramedics, Fire Plan Checker, and Fire Prevention Officers.
2. When requested to do so by the Fire Chief, the Chief of Police is authorized to assign such available police officers as necessary to assist the fire department in enforcing the provisions of this code. FINDINGS: A,B,C,D,E,F APPLY (Ord. MC-1130, 10-07-02; Ord. MC-1048, 5-17-99; Ord. MC-1007, 11-17-97; Ord. MC-984, 11-4-96)

#### **15.16.061 Commencement of Proceedings.**

Section 103.4 of the California Fire Code is amended by adding the following Section:

103.4.7 Abatement Proceedings. Whenever the Fire Chief or his/her designated representative reasonably believes a violation of the California Fire Code exists, he/she shall commence abatement proceedings in accordance with Chapter 8.30 of the San Bernardino Municipal Code. All hearings shall be conducted by the Fire Chief or his/her designee ("Hearing Officer"). The Hearing Officer may hear matters pertaining to both California Fire Code violations and/or public nuisance violations as enumerated in Section 8.30.010.

FINDINGS: A,B,C,D,E,F APPLY (Ord. MC-1130, 10-07-02; Ord. MC-1015, 1-26-98)

#### **15.16.065 Inspections and Inspection Fees.**

Section 103.3.1.1 of the California Fire Code is amended to read as follows:

103.3.1.1. Authority to inspect. The fire department shall inspect, as often as necessary, buildings, events and premises, including such other hazards or appliances designated by the Fire Chief for the purpose of ascertaining and causing to be corrected any conditions which would reasonably tend to cause fire or contribute to its spread, or any violation of the purpose or provisions of this code and of any other law or standard affecting fire, life and health safety.

Inspection Fees. A fee shall be charged for the following types of inspections:

X = Annual Inspection Fee

Y = Individual Inspection

##### **Y General Use**

1. Any activity or operation not specifically described in other permits, which is likely to produce conditions hazardous to life or property.
2. Any residential building used for licensed day care, adult residential care, group homes, or for room and board homes.

##### **X Educational Buildings**

1. Buildings used for educational purposes through 12<sup>th</sup> grade by 50 or more

**PROOF OF SERVICE VIA MAIL**

1  
2 I, James A. Odlum, declare as follows:

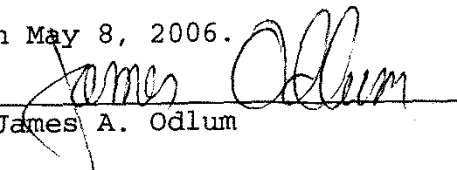
3 I am employed in the County of San Bernardino in the State of  
4 California. I am over the age of eighteen years. I am a member of  
5 the bar of this Court. I am not a party to this action. My  
6 business address is 650 East Hospitality Lane, Suite 470, San  
7 Bernardino, California 92408-3595.

8 On May 8, 2006, I served the within DEFENDANTS' OPPOSITION TO  
9 MOTION FOR WRIT OF MANDATE; DECLARATIONS OF JAMES ODLUM AND  
10 STEPHANIE EASLAND on all interested parties by placing a true and  
11 correct copy thereof in an envelope addressed to the attorney(s) of  
12 record for said interested party or parties, as follows:

13 Corey W. Glave  
14 Goldwasser & Glave, LLP  
15 5858 Wilshire Blvd., Suite 205  
16 Los Angeles, CA 90036-4523

17 and by then sealing said envelope(s) and depositing same, with  
18 postage thereon fully prepaid, in the mail at San Bernardino,  
19 California.

20 I declare under penalty of perjury under the laws of the United  
21 States of America that the foregoing is true and correct and that  
22 this declaration is executed on May 8, 2006.

23  
24  
25  
26  
27  
28  
  
James A. Odlum