STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN GABRIEL FIRE FIGHTERS ASSOCIATION, Charging Party, v. CITY OF SAN GABRIEL, Respondent.	Case No. LA-CE-1297-M PERB Decision No. 2751-M December 14, 2020

Appearances: Castillo Harper APC by Joseph Bolander, Attorney, for San Gabriel Fire Fighters Association; Atkinson, Andelson, Loya, Ruud & Romo by Nate Kowalski, Attorney, for City of San Gabriel.

Before Banks, Krantz, and Paulson, Members.

DECISION

Paulson, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions and cross-exceptions by the City of San Gabriel (City) and the San Gabriel Fire Fighters Association (FFA), respectively, to the attached proposed decision of an administrative law judge (ALJ). The ALJ concluded that the City failed to meet and confer in good faith with FFA over a successor memorandum of understanding (MOU) and interfered with employee and organizational rights, in violation of the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations.[2]

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

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

The Board has reviewed the entire record, including the City's exceptions, FFA's response and cross-exceptions, and the City's reply.[3] Based on this review, we conclude that the record supports the ALJ's factual findings and that his legal conclusions are well-reasoned and in accordance with applicable law. We therefore adopt the proposed decision as the decision of the Board itself, subject to discussion of the parties' exceptions below.

BACKGROUND

The procedural history and extensive factual findings can be found in the attached proposed decision. We summarize the pertinent facts here to provide context for our discussion of the parties' exceptions.

FFA is one of four unions representing bargaining units in the City, along with the San Gabriel Fire Management Group (FMG), the San Gabriel Police Officers' Association (POA), and the San Gabriel Police Management Group (PMG).[4] The predecessor MOUs between the City and each of the unions were set to expire on June 30, 2017. Beginning in February 2017, the City's Interim Director of Human Resources Teresa St. Peter and outside counsel Steve Filarsky negotiated with the

[3] The City filed a "Reply to Charging Party's Response to City's Exceptions" concurrently with its response to FFA's exceptions. Because PERB Regulations neither expressly permit nor preclude the submission of reply briefs, the Board has discretion to consider such filings. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 13.) The City's reply is largely an attempt to reargue its exceptions to the ALJ's remedial order. Although we exercise our discretion to consider the reply, it did not assist the City, as will be clear *post*.

[4] The City also has approximately 70-80 unrepresented employees.

unions over successor MOUs. FFA's bargaining team consisted of President Dave Milligan, Vice President Chris Eakman, and Kirk Goltermann.

In February 2017, the City held a "kickoff" meeting with FFA to discuss impending negotiations, just as the City did with each of the other unions. Milligan, Goltermann, and Steve Turner, a labor representative employed by FFA's counsel, attended for FFA. The City asked FFA the same question it was asking each City union: whether FFA wanted to engage in "incremental bargaining" or "cut to the chase?" The City explained to all the unions that "cut to the chase" meant the City would "put [its] best offer on the table," representing the full authority that the City Council had given at that point in time. At the hearing in this matter, Filarsky and St. Peter opined that a cut to the chase approach did not mean "take it or leave it," as it did not preclude the City's bargaining team from submitting additional offers to the City Council. Filarsky testified that unions most often chose to cut to the chase, and in such instances, it takes five or six meetings to reach an agreement, as opposed to the 30 meetings usually necessitated under the traditional incremental approach.

In or around March 2017,[5] Milligan, Goltermann, Turner, St. Peter, and Filarsky held another kickoff meeting. The City continued to ask whether FFA "wanted to negotiate or cut to the chase." Again, there is no evidence in the record that the parties discussed any substantive matters ahead of formal bargaining. The meeting was unproductive.

On April 12, FFA and the City met for their first formal bargaining session. FFA proposed a three-year successor MOU with 5 percent salary increases in each of the

[5] All dates hereinafter are in 2017 until otherwise noted.

contract years, supporting its proposal with a salary survey showing that unit members' salaries were at or lower than their counterparts in area cities. Other aspects of FFA's proposal included special assignment pay and an increase in compensatory time off accrual from 120 to 360 hours, among other items.

On April 13, St. Peter e-mailed Milligan with the City's own salary survey showing that FFA members' salaries were slightly lower than the average and median of fire department employees in eight neighboring cities, but that their bonuses and benefits were comparable to or greater than those of the employees in the other cities.

On May 24, St. Peter e-mailed Milligan to provide an update on her meetings with the City Council. She advised that "[t]he Council has been working diligently to ensure they understand all of the issues/proposals being presented from all City employee groups," and that she was scheduled to discuss the items with the City Council on June 7 and June 20. St. Peter stated that she would not have an update for FFA until after the June 20 meeting. In the interim, she would send a "Q and A" e-mail regarding the *Flores v. City of San Gabriel* (9th Cir. 2016) 824 F.3d 890 (*Flores*) decision.[6] The record does not show that St. Peter provided FFA an update in the days immediately following the June 20 meeting.

[6] In *Flores*, City police officers sued the City under the Fair Labor Standards Act, 29 U.S.C. 201, et seq. (FLSA), for its failure to include cash-in-lieu-of-benefits payments in its calculation of the officers' regular rate of pay, an omission that resulted in lower overtime rates and underpayment of overtime compensation. The cash-in-lieu-of-benefits option was a part of the City's Flexible Benefit Plan, under which the City provided $1,586 to each employee per month to purchase medical, vision, and dental benefits. An employee who declined medical benefits because he or she had alternate coverage was entitled to receive the unused portion of his or her benefits allowance as a cash payment added to regular paychecks.

On June 2, St. Peter e-mailed Milligan a "total compensation survey" showing that FFA's combined salary and benefits were greater than the average and median of fire department employees in the same eight area cities from the City's earlier salary survey.

On July 11, St. Peter e-mailed Milligan and the presidents of FMG, POA, and PMG with "an update related to Meet and Confer." She informed them that she would be meeting with the City Council in closed session on July 19, after which she was "hopeful . . . to start the negotiation process with each of [the unions]." She committed to sending another e-mail on July 20 with an update and request for meeting dates. There is no evidence in the record that St. Peter sent FFA an update on July 20.

On July 31, St. Peter informed FFA and the other unions that the City was ready to begin negotiations and would be available on either August 16 or 17. St. Peter reiterated her request that the parties elect their preference for traditional bargaining or "cut to the chase" bargaining.

On August 14, FFA's counsel made a joint request for information on behalf of FFA, FMG, POA, and PMG about potential changes to the City's Flexible Benefit Plan in

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On June 2, 2016, the United States Court of Appeals for the Ninth Circuit held that cash-in-lieu-of-benefits payments must be included in the calculation of the regular rate of pay. The court further held that the plaintiffs were entitled to liquidated damages because the City had not shown that it attempted to comply with the FLSA in good faith, and that the Act's three-year statute of limitations applied because the violations were willful. On May 15, 2017, the United States Supreme Court denied the City's petition for writ of certiorari, thereby finalizing the decision. (*City of San Gabriel v. Flores* (2017) 137 S.Ct. 2117.)

The City's proposal to eliminate the cash-in-lieu-of-benefits option was a major issue in bargaining between FFA and the City, as discussed *post*.

light of *Flores*. FFA's counsel asked the City four questions about timing and implementation of the decision.

On August 24, St. Peter sent an e-mail to all City employees regarding implementation of *Flores*, stating that the City had begun including the full value of the $1,586 benefit allocation in the regular rate of pay for purposes of calculating overtime compensation effective August 19.

On August 29, the parties met for their second formal bargaining session. Prior to the meeting, St. Peter forwarded her July 31 e-mail to Milligan and asked again whether FFA preferred "incremental bargaining or to 'cut to the chase'?" Milligan replied to St. Peter without directly addressing her question. At the negotiations table, the City proceeded with traditional bargaining, providing FFA with a response to its April 12 proposal in the form of a package proposal. The City offered FFA a three-year successor MOU with salary increases of 2 percent for 2017-2018, 1 percent for 2018-2019, and 1 percent for 2019-2020, a flat rate for special assignment pay, and retention of the then-current compensatory time off accumulation limit. In addition, the City's proposal included terms from "City Wide Proposals" that the City had promulgated to the other unions and unrepresented employees.[7] The most noteworthy of these was the

[7] St. Peter testified that all of the other bargaining units chose to "cut to the chase" in bargaining. In the City Wide Proposals that the City presented to its other unions and unrepresented employees, the section titled "Salary Increase" enumerated salary increases of 4 percent for 2017-2018, 1 percent for 2018-2019, and 1 percent for 2019-2020. This section was whited out in the version the City gave to FFA. Ultimately, FMG, POA, and PMG accepted three-year successor MOUs with salary increases of 4 percent in the first year, retroactive to June 24, 2017, and 1 percent in the second and third years. Unrepresented employees received the same salary increases.

proposed elimination of the cash-in-lieu-of-benefits option under the Flexible Benefit Plan.

Later on August 29, St. Peter e-mailed Milligan and Goltermann a copy of the City's "revised proposal," which contained several additions to the FFA-specific proposals relating to certain job classifications and witness leave. Also on August 29, St. Peter sent the City's bargaining units a response to their August 14 information request. She stated that City attorneys were working with the plaintiffs' attorneys to finalize the *Flores* matter, and "[w]e expect that we will be ready to address this with the bargaining units by mid to late September." Her letter did not provide any substantive information regarding payments owed under *Flores* or how the City might implement the decision.

On September 6, St. Peter e-mailed Milligan with responses to questions FFA posed at the first bargaining session regarding special assignment pay and the status of the City pension fund. She also asked for a date to schedule the next bargaining session.

On September 22, Milligan e-mailed St. Peter, stating that he "wanted to keep in touch and let you know I hope to have another meet/confer response sometime during the first week of October."

On September 28, the City provided FFA with an "FFT OT Calculation Summary" showing that the City owed unit members a total of $82,965.69 in overtime compensation for years 2014 through 2017. This document impliedly answered part of the unions' August 14 request for information regarding the timing of the City's back

payments to employees. The City did not respond to the unions' other questions from the information request.

On October 10, St. Peter e-mailed the City's last, best, and final offer (LBFO) to FFA. As of that date, the parties had held just two formal bargaining sessions and had not met at all since the City made its initial offer on August 29. Nor had FFA at that point responded to the City's August 29 offer. St. Peter's e-mail stated that the City would be presenting the compensation package for all unrepresented employees at the November 7 City Council meeting, and that the City wished to conclude negotiations with its bargaining units. Her message offered a three-year LBFO, to be replaced by a one-year LBFO if FFA did not accept the three-year offer by November 17 at 5:00 p.m.[8]

St. Peter attached to her October 10 e-mail a document entitled "2018 Health Plan Options," detailing the various salary increases and medical contribution amounts the City would pay under proposed Plans A, B, or C. The LBFO proposed either a 4 percent or 3 percent salary increase[9] in the first contract year and 1 percent in each of the ensuing contract years, retroactive to July 2017, with different medical contribution amounts, depending on which health plan option FFA chose. The one-year offer was

[8] As the ALJ explained at length in his proposed decision, the City's purported one-year LBFO was not actually its last, best, and final offer because it was inferior to the City's actual LBFO and was not, in any event, an offer. The City did not present the "offer" for acceptance, but instead used it as a statement of what it intended to implement if FFA failed to accept its three-year offer by November 17. Thus, hereafter, we use "LBFO" to refer to the October 10 three-year offer, as subsequently amended in several small respects.

[9] Under Plan A, the City offered a 4 percent increase with a lower City contribution towards health care premiums. Plans B and C featured a 3 percent increase with higher City contributions for health care premiums.

nearly identical to the City's revised August 29 proposal except that it provided for a "1 year term effective upon City Council approval" and a 2 percent salary increase in that year, effective upon City Council approval, rather than retroactive to July 2017.

St. Peter, when asked why the City attached the deadline to its offer, testified as follows:

> "A: The City put the deadline on the offer because we had to take any changes to Council. To get approval from City Council, you had to have -- do that to any implementation and we were looking at having payroll make changes then to the cafeteria plan for all of the employees so that we would have this in place by January 1 [2018]."
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> "Q: Okay. When employees make changes to their health benefits plan, is that something that is effectuated immediately?
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> "A: So, every year the City will have an open enrollment period. They participate in CalPERS medical, and the opening enrollment period is usually sometime in September to the beginning of October. And at that time, they're making their selections for their plans to be effective January 1 of the following year. So that meant that open enrollment was concluded and that we were going to have to implement any plan changes as well for anybody that had made a different plan selection.
>
> "Q: And that implementation doesn't happen overnight.
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> "A: No. No, it does not. We have to get all that information and transmit it to CalPERS.
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> "Q: Does that take weeks ordinarily?
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> "A: Once open enrollment is closed, which is sometime early October, then we have a deadline, I think maybe until November to get the information to CalPERS. And then as I said, in addition to that, it's making all of the changes internally for our payroll system."

Filarsky testified similarly, stating that "there was a need to put into effect all of the health insurance changes with respect to the finance and payroll system and to communicate that to [Cal]PERS. And those changes were in part based on open enrollment choices, but they also were based on what the respective groups agreed to with respect to funding of employee only insurance, employee plus one, employee plus two." In addition to the alleged exigency created by the CalPERS reporting deadline, Filarsky gave another reason for the City's imposition of the November 17 deadline: the City's continuing liability under the *Flores* decision, which would end only when the City terminated the Flexible Benefit Plan either by mutual agreement or imposition after exhausting the impasse procedure. The City's liability was of particular importance with respect to the Fire Department, as Filarsky claimed it had an "inordinate amount of overtime as compared to other departments."

On October 11, Milligan e-mailed St. Peter to state that FFA would like to meet and confer about all options. He explained that FFA was to hold a meeting on October 21 to discuss all the proposed items, and that he would contact her after the meeting to set up another bargaining session.

On October 12, FFA made its second bargaining proposal. FFA demanded, among other items, a 4.5 percent salary increase in each of the contract years and continuation of the Flexible Benefit Plan, albeit with the cash-in-lieu-of-benefits option reduced to $784, half of the City's maximum contribution at the time.

On October 26, St. Peter e-mailed Milligan and Eakman to request another negotiating session. She explained that she would be meeting with the City Council in

closed session on November 1 and wanted to meet with FFA before the City Council's next closed session on November 7.

The parties met for their third and final pre-impasse bargaining session on November 7. The City maintained its offer of 4 percent, 1 percent, and 1 percent salary increases for each contract year, respectively, retroactive to July 2017, but added a reopener for salary in year three, and withdrew its proposal to change the morning shift start time from 0800 to 0700. FFA and the City reached tentative agreements on several items, including a three-year term for the successor MOU and vacation accrual and cash out limits, though the timing of agreement on the latter is unclear. The parties remained apart on salary increases, with FFA continuing to demand a 4.5 percent increase in each of the three contract years.

On November 13, St. Peter e-mailed Milligan to ask if FFA had a response to the City's November 7 proposal. She advised that she had another closed session meeting with City Council planned for the next day and offered to schedule another bargaining session prior to then. On the same day, Milligan responded to St. Peter, stating that FFA had a meeting scheduled for November 15 to discuss the City's proposal. Milligan promised to get back to her on November 20 "to see if we need to schedule a meeting or simply drop off a response." Later that same day, St. Peter replied to Milligan, asking if he could respond to her by November 16 or 17. She stated, "[p]er the City's memo to the FFA dated October 10, 2017, the City's current offer remains viable only until 11/17/17 @ 5:00PM. After that time, the City will move forward with its one year Last, Best and Final Offer."

On November 14, Milligan e-mailed St. Peter and stated that FFA would do its best to respond by November 16, noting the inherent challenge of receiving a collective response from the membership in such a short period. FFA believed the November 7 bargaining session had been productive and wanted to continue the bargaining process. Milligan asked for an extension of time to respond if FFA could not meet the November 17 deadline.

On November 15, St. Peter informed Milligan that "[t]he City will need your response prior to the deadline at 5:00 PM on November 17, 2017 or we will need to move forward with the City's Last, Best and Final Offer. . . Both the PMG and POA have now had a membership meeting and ratified an agreement with the City. It would not be fair to the PMG or POA to now extended the deadline imposed for FFA."

The next day, FFA responded to the City's latest proposals. FFA proposed a two-year MOU with a 5 percent salary increase each year.

On November 17, St. Peter sent a counterproposal to Milligan. She stated that while the City would not be able to provide an additional salary increase, it would be willing to increase the special assignment compensation. She closed by stating, "This proposal represents the maximum change the City can provide for FFA. I will be waiting for your response prior to the deadline of 5:00 PM today. Please note that this 3-year offer will expire at 5:00 PM today 11/17/18 [sic]."[10]

Later that same day, FFA rejected the City's October 10 three-year proposal, as modified by the subsequent exchange of proposals through November 17.

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[10] As the ALJ found, the salary increases in the first year of the City's November 7 and November 17 offers were retroactive to July 2017, as was the case in the City's October 10 offer.

On November 18, Filarsky e-mailed Turner to advise that the City was declaring impasse. Filarsky asked if FFA wished to proceed to mediation, and FFA later agreed.

On January 9, 2018,[11] the State Mediation and Conciliation Service conducted a mediation with the parties. The City reoffered its October 10, 2017 three-year proposal as modified by the subsequent exchange of proposals through November 17, 2017, and the parties reached tentative agreements on all open items except the special assignment pay for the paramedic coordinator and urban search and rescue assignments. FFA was to ask its membership to vote on the package by January 26. On January 29, counsel for FFA informed St. Peter that the membership had rejected the proposed MOU.

On February 21, Filarsky e-mailed FFA's counsel with "one last ditch effort to avoid a one year imposition." The e-mail included a three-year offer akin to that which FFA had already rejected, this time with a deadline for acceptance of March 6 at 5:00 p.m. Filarksy cautioned that if FFA rejected the proposal, the City would proceed with unilateral implementation on March 20. FFA rejected the City's offer on March 5.

On April 3, the City Council adopted a resolution "to implement the Last, Best and Final Offer as terms and conditions of employment related to the [FFA] effective July 1, 2017 through June 30, 2018." Attached to the resolution was a document entitled "1-Year Last, Best and Final Terms and Conditions of Employment" that in large part formalized the provisions of the October 10 one-year "offer." The terms and conditions included a change in the start time of the standard shift to 0700 hours, a change in maximum vacation accrual to 504 hours, and change in the paramedic coordinator

[11] All dates hereinafter refer to 2018 unless otherwise specified.

special assignment pay to $250, all of which were inconsistent with the City's October 10, 2017 three-year proposal as modified by the subsequent exchange of proposals through November 17, 2017.

On April 4, FFA filed the underlying unfair practice charge alleging that the City violated its duty to meet and confer in good faith by rushing to impasse and engaging in bad faith or surface bargaining. FFA also alleged that the City discriminated against bargaining unit employees when it imposed the one-year agreement on April 3 because FFA had rejected the proposed three-year agreement on March 5.

On May 20, 2019, the Office of the General Counsel issued a complaint. The ALJ held a formal hearing on October 21 and 22, 2019, and the parties submitted their post-hearing briefs on January 6, 2020.

DISCUSSION

A. Timeliness of City's Exceptions

As an initial matter, FFA contends that the Board should dismiss the City's exceptions as untimely because they were allegedly filed one day late. PERB Regulation 32300(a), allows a party to file exceptions to a proposed decision "within 20 days following the date of service of the decision." A document is considered "served" by PERB or a party "when personally delivered, when deposited in the mail or with a delivery service properly addressed, when sent by facsimile transmission . . . or when sent by electronic mail in accordance with the requirements of Section 32091, 32135(d) and 32140(b)." (PERB Reg. 32140(a).) In contrast, a document is considered "filed" by e-mail when received during a regular PERB business day. (PERB Reg. 32135(b).) With few exceptions not applicable here, in computing any

period of time under PERB Regulations, "the period of time begins to run the day after the act or occurrence referred to." (PERB Reg. 32130(a).) No extension of time applies to service by e-mail. (PERB Reg. 32130(c).)

The City asserts that PERB's Division of Administrative Law (Division) served the proposed decision exclusively via e-mail on March 24, 2020 at 6:21 p.m., "after the 'close of business'" and the Division thus "did not perfect service until the 'opening of business' on the following day, March 25, 2020."[12] The City's contentions are erroneous on several counts.

The proposed decision was served via e-mail on March 24 at precisely 5:00 p.m., not 6:21 p.m., as the City contends. While PERB Regulation 32135(a) deems a document as *filed* by e-mail only when received during a regular PERB business day, there is no corresponding PERB regulation for *service* by e-mail, i.e., deeming an electronic service complete only when effectuated during a regular PERB business day. Moreover, PERB Regulation 32140(a) requires PERB to include a proof of service reflecting the date of service, and when the Division did so in this case, it indicated service occurred on March 24. For these reasons, the City's time to file exceptions began to run on March 25, regardless of the time of electronic service.[13]

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[12] PERB Regulation 32140(b) states that a party consents to electronic service if it files a document electronically with the Board. Here, the City did so repeatedly prior to receiving the proposed decision by e-mail on March 24.

[13] Even if we found the timing of the Division's March 24, 2020 e-mail to be relevant, it is unclear whether the City would have gained an additional day to file. The proposed decision was served at 5:00 p.m. PERB's "close of business" is at 5:00 p.m. (*Shasta College Faculty Association* (2004) PERB Decision No. 1603, p. 2.) Our decisions have variously construed 5:00 p.m. to be within the same day of business (*Grossmont-Cuyamaca Community College District* (2007) PERB Order No. Ad-365,

Twenty days from March 25 is April 13. The City filed its exceptions on April 14. Its exceptions were thus untimely by one day. Nonetheless, in light of the ambiguity regarding the appropriate cutoff time for service, we exercise our discretion to excuse the City's late filing for good cause and address the case on the merits. (PERB Reg. 32136.)

B. Bad Faith Bargaining

The City excepts to the ALJ's conclusions that it engaged in bad faith bargaining by making an unjustified exploding offer[14] and rushing to impasse.[15] We reject these exceptions, for the reasons explained below.

The MMBA requires public agencies and representatives of recognized employee organizations to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment." (MMBA, § 3505.) The statute defines this

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pp. 6-7), or the time at which the offices close, meaning 4:59 p.m. is the last minute of the business day. (*Shasta College Faculty Association*, *supra*, PERB Decision No. 1603, p. 2.) We believe the former understanding is more sound as it is consistent with the operational hours of PERB's regional offices. Using this interpretation, the 20-day period for filing exceptions began to run on March 25.

Moreover, March 31, Cesar Chavez Day, was an intervening State holiday, but PERB Regulation 32130(b) extends the time for filing only when the *last* date to file a document falls on Saturday, Sunday, or a holiday, or when PERB offices are closed. This section is therefore of no assistance to the City.

[14] An exploding offer is one that expires on a given date. (*City of Arcadia* (2019) PERB Decision No. 2648-M, p. 2, fn. 3 (*Arcadia*).)

[15] As discussed *post*, the City did not except to the ALJ's determination that the evidence revealed several other indicia of bad faith: imposing a durational term, an MOU, and employment terms that were not reasonably comprehended within the City's LBFO.

as a “mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation.” (*Ibid*.) Good faith is “a subjective attitude and requires a genuine desire to reach agreement.” (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25.)

In determining whether a party has violated its duty to meet and confer in good faith, PERB uses a “per se” test or a “totality of the conduct” analysis, depending on the specific conduct involved and its effect on the negotiating process. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 13 (*Fresno*); *Arcadia*, *supra*, PERB Decision No. 2648-M, p. 34.) Per se violations generally involve conduct that violates statutory rights or procedural bargaining norms, irrespective of a party’s intent. (*Fresno*, *supra*, PERB Decision No. 2418-M, p. 13; *Arcadia*, *supra*, PERB Decision No. 2648-M, pp. 34-35.) In contrast, the totality of conduct test applies to bad faith bargaining allegations that our precedent has not identified as constituting a per se refusal to bargain. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 35.) In such surface bargaining cases, the Board looks to the entire course of negotiations, including the parties’ conduct at and away from the table, to determine whether the respondent has bargained in good faith. (*Ibid*.; *City of Roseville* (2016) PERB Decision No. 2505-M, p. 10.) The ultimate question is whether the respondent’s conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 35; *Fresno*, *supra*, PERB Decision No. 2418-M, p. 15.) Because PERB evaluates the net effect of

respondent's conduct on the course of negotiations, even a single indicator of bad faith, if egregious, can be a sufficient basis for finding that a negotiating party has failed to bargain in good faith. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 26; *City of San Ramon* (2018) PERB Decision No. 2571-M, p. 7; *City of San Jose* (2013) PERB Decision No. 2341-M, p. 19.)

With this test in mind, we address the parties' exceptions.

1. The City's Exploding Offer

A party cannot in good faith make an exploding proposal unless it can adequately explain a legitimate basis for doing so. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 39.) When a party issues an exploding offer without an adequate explanation as to why its bargaining position should become less generous on a given date in the future, it preemptively indicates its intent to engage in regressive bargaining, imposes its own ground rule and deadline, evidences unlawful inflexibility, and manifests a take-it-or-leave-it attitude. (*Id*. at pp. 39-40.) Although an exploding offer is not a per se violation, a bargaining party evidences bad faith under the totality of conduct test if it does not adequately justify a threatened change in position that is inherent in an exploding offer. (*Id*. at p. 43.) We regard an unjustified exploding offer as an indicator of bad faith in the overall context of negotiations because it functions to move parties further away from agreement and frustrate the negotiations process. (*Ibid.*) The City argues that the ALJ erred in finding that it had not provided a legitimate basis for making its exploding offer to FFA. We reject this exception.

When asked at hearing why the City made its exploding offer, St. Peter testified that it was compelled to do so because of the dictates of the CalPERS deadline and

payroll processing. Later in her testimony, St. Peter stated: "[B]y November, there was no opportunity for firefighters to switch plans because open enrollment would have closed with CalPERS. So, whatever elections they had or had not made in open enrollment, we were going to go – we have to move forward with those." Filarsky testified to similar effect with regard to the City's rationale for its exploding offer, stating that the City needed to communicate health plan changes to CalPERS and institute them in the payroll system.

However, the record does not support the City's argument. The City claims that its need to report benefit plan elections to CalPERS by November 2017 was "an immutable event outside its control" that justified its imposition of a November 17, 2017 deadline for acceptance of its offer. Yet, the City acknowledges that it was, in fact, able to timely report open enrollment information to CalPERS for all its bargaining units irrespective of how far its negotiations with each union had progressed.

Our principal inference from St. Peter's and Filarsky's testimony is that the City's ongoing negotiations with FFA and other unions did not prevent it from meeting the CalPERS reporting deadline. Indeed, as the City itself argues, there is no evidence in the record to suggest that the City was delayed in reporting benefit elections to CalPERS for FFA members as a result of the City and FFA having not agreed to a successor MOU as of November 2017, or even as of April 2018, when the City imposed the one-year MOU. In making this finding, we discern the distinction between the deadline by which the City needed to report employees' benefit elections to CalPERS, on the one hand, and the deadline for payroll to implement any newly negotiated employee contributions toward health care premiums, on the other. The

record indicates the former was fixed and external, whereas the latter was movable and internal, with the City possessing the ability to maintain the prior year's employee contribution amounts for any health benefit election, as part of maintaining the status quo.[16] And while the City proposed in its LBFO that elimination of the cash-in-lieu-of-benefits option would be effective on January 1, 2018, that deadline turned out to be movable. Accordingly, the record supports the ALJ's finding that the CalPERS reporting deadline was not a legitimate basis for making the exploding offer.

The City additionally avers that the ALJ erroneously rejected another of its justifications for the exploding offer: the City's stated need to curb ongoing liability for overtime costs related to implementation of the *Flores* decision. The ALJ found that any urgency created by the City's need to implement the *Flores* decision was a dilemma of the City's own making, as the City knew by May 15, 2017, that the decision had become final.[17] Nonetheless, the City waited until August 29, 2017 to make its first contract proposal to FFA. While the City does not dispute that it issued its first proposal on August 29, 2017, it claims that it gave FFA notice prior to that date of its intent to eliminate the cash-in-lieu-of-benefits option as a result of the increased overtime costs owing to the *Flores* decision. We find three problems with the City's argument.

[16] To maintain the status quo pending negotiations, the City was required to stick to its annual open enrollment dates for employees to adjust their status but refrain from making discretionary decisions to alter its offerings or employee costs. (*County of Kern* (2018) PERB Decision No. 2615-M, pp. 6-7 & fn. 7.)

[17] In actuality, the City knew of its potential liability under *Flores* well before then, as the Ninth Circuit issued its decision on June 2, 2016.

First, none of the City's proffered evidence supports its assertion that it put FFA on notice *prior to* August 2017 that it intended to bargain over elimination of the Flexible Benefit Plan and cash-in-lieu-of-benefits option. For instance, St. Peter's May 24, 2017 e-mail to Milligan stated only that "I will be putting out a 'Q and A' email related to the Flores decision." St. Peter's August 24, 2017 citywide e-mail regarding "Flores Implementation" provided information about timing of the City's payments for accrued and ongoing liability, with no mention that the City was seeking to do away with the cash-in-lieu-of-benefits aspect of the cafeteria plan during contract negotiations. And, in any event, giving FFA notice about its concerns regarding *Flores* liability and actually taking affirmative steps to meet and confer with FFA about those concerns are materially different actions.

Second, the City's need to minimize its liability from a lawsuit, when it long had knowledge of its likely or even potential liability, was not an adequate justification for imposing a deadline on its proposal. Because an exploding offer risks the same harm as regressive bargaining in that it "telegraphs a threat to move the parties farther apart unless the other party accedes to a particular unilaterally-established deadline," a party typically must show changed economic conditions or other changed circumstances to support such an offer. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 39.) The *Flores* decision constituted neither, as the City knew of its potential liability as early as June 2, 2016, when the Ninth Circuit issued its decision, or by June 2017 at the latest, which is when St. Peter claimed that the City learned its petition for writ of certiorari had been denied. Even assuming the City was justified in waiting until June 2017 to begin formal bargaining, that does not explain why the City took until

August 16, 2017, four months after FFA's first proposal, to communicate its readiness to FFA for a substantive meet and confer. And it certainly does not explain why the City would not address its *Flores* liability with FFA until "mid to late September" as St. Peter communicated in her August 29, 2017 letter to FFA's counsel. The City's decision not to address *Flores* with FFA until September 2017 undermines its claim that it had to extinguish immediately its ongoing liability.

Finally, even setting aside the City's delay, an employer cannot unilaterally choose a date by which it needs to conclude negotiations so that it can begin saving money. (*City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 10*; City of Selma* (2014) PERB Decision No. 2380-M, p. 21; *County of Riverside* (2014) PERB Decision No. 2360-M, p. 20.)[18] We return to this principle below in discussing the City's rush to impasse, but one cannot ignore that the City made an exploding offer precisely because it had unilaterally decided to conclude negotiations, via either impasse or agreement, by a set date.

In agreeing with the ALJ that the City did not have adequate justification for issuing the exploding offer, we highlight additional bases supporting the ALJ's conclusion to which the City did not except. Notably, the City did not except to the ALJ's finding that the City wrongly used its agreement with non-represented employees to attempt to compel an agreement with FFA. Nor did the City take

[18] Under "exceptionally limited circumstances," an employer may be privileged to make a unilateral change to address a true emergency. (*County of San Bernardino* (2015) PERB Decision No. 2423-M, p. 54.) To do so, the employer must establish an "actual financial or other emergency that leaves no alternative to the action taken and allows no time for meaningful negotiations before taking action." (*Ibid*.) The City established no emergency, fiscal or otherwise, here.

exception to the ALJ's finding that the City's re-offer of its October 10, 2017 three-year offer on February 21, 2018, was yet another indication that the City did not have a legitimate justification for imposing the November 17, 2017, deadline in the first place. In sum, none of the City's asserted reasons suffice to justify its exploding offer.

For the foregoing reasons, we find the ALJ properly rejected the City's proffered justifications for the exploding offer.

2. Rush to Impasse

The City argues that the ALJ erred in finding that the City rushed to impasse, as the "record contains ample and compelling relevant evidence of the City's repeated attempts to meet and confer with SGFFA" that the ALJ wrongly overlooked. In support, the City cites "numerous occasions" on which the City attempted to follow up with FFA to obtain a counterproposal to its August 29, 2017 proposal and/or to schedule additional meetings: (1) St. Peter's August 29, 2017 e-mail to Milligan and Goltermann wherein she attached the City's revised proposal; (2) St. Peter's September 6, 2017 e-mail to Milligan responding to FFA's queries posed at the first bargaining session and requesting to schedule the next bargaining session; and (3) Milligan's September 22, 2017 e-mail to St. Peter in which he advised St. Peter that he "hope[d] to have another meet/confer response sometime during the first week of October." The City also decries what it claims was FFA's "lackluster response" to the City's October 10, 2017 LBFO. In the City's view, these facts weigh against the finding that it rushed to impasse. We disagree.

A party evinces bad faith when it rushes to impasse, or if its impasse declaration is "premature, unfounded, or insincere" (*City of San Ramon*, *supra*, PERB

Decision No. 2571-M, p. 10), as such action "demonstrate[s] an intent to subvert the negotiating process." (*County of Riverside*, *supra*, PERB Decision No. 2360-M, p. 12; *City of San Jose*, *supra*, PERB Decision No. 2341-M, pp. 20-21.) An employer may impose new terms after impasse only if it bargained in good faith throughout negotiations, from "inception through exhaustion of statutory or other applicable impasse resolution procedures." (*City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 6; *City of Glendale* (2020) PERB Decision No. 2694-M, p. 60 [judicial appeal pending].) Thus, an employer is not privileged to impose concessions absent a bona fide impasse and doing so constitutes an illegal unilateral change. (*County of Riverside*, *supra*, PERB Decision No. 2360-M, p. 11; *City of Selma*, *supra*, PERB Decision No. 2380-M, p. 12.) The Board considers the totality of circumstances to determine whether a bona fide impasse existed, including the number and length of negotiating sessions between parties, the time period over which the negotiations occurred, and the extent to which the parties have made and discussed counterproposals to each other. (*County of Riverside*, *supra*, PERB Decision No. 2360-M, p. 14; *City of Selma*, *supra*, PERB Decision No. 2380-M, p. 13.)

The City's allegedly diligent attempts to meet and confer in good faith before declaring impasse do not comport with the record. Formal bargaining opened on April 12, 2017, at which point FFA presented its first proposal to the City. The City effectively idled for the next three months, finally announcing on July 31, 2017 that it was available to begin negotiations on August 16 or 17, 2017.[19] In total, 139 days

[19] The City's efforts to advance negotiations during this time were minimal at best. St. Peter sent five e-mails to Milligan over this period, only two of which were arguably substantive in that they contained salary and benefit surveys the City had

passed before the parties held their second bargaining session on August 29, 2017, when the City presented its first proposal to FFA.[20] The City's timeline accelerated thereafter. The City did not wait for a third bargaining session or even for FFA's response to its first proposal before issuing its LBFO on October 10, 2017.

The City's expressions of good faith ring hollow. Foremost, the City's claimed "repeated attempts" to meet and confer with FFA were limited to the six-week period subsequent to the parties' first formal bargaining session on August 29, 2017, with no accounting for the preceding 139 day period, during which the City appears to have sat on FFA's proposal. Moreover, the City's claimed attempts to meet and confer with FFA in the 42 days between August 29 and October 10, when it issued its LBFO, consists merely of a September 6, 2017 request for an additional bargaining date.[21] Examined in their totality, these facts do not absolve the City of the finding that it rushed to impasse.

We conclude, with the ALJ, that the City's actions did not evince a genuine desire to reach an agreement, but rather a singular focus on achieving the City's

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compiled. Her May 24, 2017 and July 11, 2017 e-mails explained her ongoing involvement in closed session meetings with the City Council regarding meet and confer items but provided no substantive information to FFA.

[20] We observe that almost two months passed from the City's "kickoff" meeting on February 20, 2017 to the parties' first formal bargaining session on April 12, 2017. Although the kickoff meeting was informal, it was nonetheless an opportunity for the City to flag its concerns regarding the *Flores* decision from the outset as the termination of its cash-in-lieu-of-benefits option was to be one of the City's biggest concessionary demands in bargaining.

[21] St. Peter e-mailed Milligan on October 5, 2017 regarding payment of accrued liability under *Flores*; however, she did not refer to ongoing negotiations or seek to schedule another bargaining session.

primary end—the elimination of the Flexible Benefit Plan by a date certain—at any expense to the bargaining process. Indeed, Filarsky's estimation that even cut to the chase bargaining usually takes five or six meetings, as opposed to the 30 meetings often required under the incremental approach, weighs heavily in our assessment that the City rushed to impasse where here, the City held only three meetings after FFA opted for the incremental approach. Insofar as the City hoped to reach an agreement with all of its unions by the end of 2017, it should have taken concrete steps that might have made such an outcome more likely, such as by scheduling more bargaining dates rather than placing bargaining on hold for multiple months between April and August. The City's inaction for so many months was inimical to its goal. By issuing its final offer after only two meetings, the City effectively refused to engage in traditional bargaining even though FFA lawfully declined its invitation to "cut to the chase."

The City argues that the circumstances surrounding its declaration of impasse are distinguishable from those in *City of San Ramon*, *supra*, PERB Decision No. 2571-M, because, unlike the employer in that case, which allegedly issued one proposal and gave the union less than two weeks to accept its LBFO, here the City issued four proposals, allowed FFA over a month to consider its October 10, 2017 LBFO, and did not immediately impose the LBFO but extended it twice. Even if the City were accurate in characterizing the *City of San Ramon* facts, these distinctions would not be determinative. As we stated in *City of San Ramon*, the "'ultimate determination of good or bad faith turns, not on a formula for the number of meetings that must occur or the number of proposals that must be exchanged before a bona fide impasse exists, but on the effect of a party's conduct on the course of

negotiations.'" (*Id.* at p. 11, citing *City of San Jose*, *supra*, PERB Decision No. 2341-M, p. 42.) In any event, in *City of San Ramon* the parties met approximately ten times over many months, and it is not accurate to say the employer provided only a single offer that the union had only two weeks to consider. (*City of San Ramon*, *supra*, PERB Decision No. 2571-M, adopting proposed decision at pp. 4-34.)

Moreover, we fail to see how the City's provision of a month for FFA to respond to its LBFO indicates good faith when the City prematurely issued the LBFO in the first place. The same is true of the City's two extensions of the LBFO. As the ALJ concluded, by reoffering its LBFO to FFA again on February 21, 2018, the City confirmed that it had no valid basis to initially insist on the November 17, 2017 deadline, and to declare impasse thereafter.

The City's claimed distinctions from *City of Selma*, *supra*, PERB Decision No. 2380-M, also miss the mark. The City argues that, unlike the employer in *City of Selma*, it "reached out to the union on several occasions between August 29, 2017 and November 7, 2017 to schedule a bargaining session" and "provided successive correspondence explaining why it sought to make progress in the parties' negotiations." Again, what the City neglects to mention is that, apart from St. Peter's August 29, 2017 e-mail containing a revised proposal and her September 6, 2017 e-mail responding to FFA's questions from the first formal bargaining session, all of the City's bargaining-related communications took place *after* it issued its ultimatum on October 10, 2017, rather than earlier when additional sessions could have made a greater difference in the parties' ability to reach a bilateral agreement. Finally, the City sidesteps the most salient commonality between this case and *City of Selma*: the fact

that it did not wait until FFA had responded to its first package proposal before presenting its LBFO only 42 days later. That in itself is a compelling indication that the City rushed to impasse. We thus conclude, with the ALJ, that the City violated its duty to bargain in good faith by rushing to impasse.[22]

3. FFA's Alleged Bad Faith Conduct

Because bad faith bargaining allegations require assessment of the totality of conduct, the Board may also consider the charging party's own conduct, regardless of whether the respondent has filed a countercharge. (*Fresno*, *supra*, PERB Decision No. 2418-M, p. 52.) The City contends that the ALJ erred in concluding that it committed bad faith bargaining under the totality of conduct analysis because the ALJ failed to account for FFA's own bad faith conduct. We disagree.

Once the parties reach a tentative agreement, the duty of good faith implies that the negotiators will take the agreement to their respective principals in good faith. (*Alhambra City and High School Districts* (1986) PERB Decision No. 560, p. 14 (*Alhambra*).) Negotiators have an obligation not to "torpedo" the proposed agreement or undermine the process that has occurred. (*Ibid*.; *Anaheim Union High School District* (2015) PERB Decision No. 2434 (*Anaheim*), adopting proposed decision at p. 64.) If either party does not ratify the agreement, then the duty to bargain is revived.

[22] The City's assertion that *City of San Ramon* and *City of Selma* "present[ ] distinguishable, and far more egregious, instances of bad faith conduct than the one found in this case" is a confounding admission, to some degree, of its rush to impasse. Moreover, while arguing that another employer acted in greater bad faith is not a particularly strong basis for a defense, we find the City's conduct here to have been as egregious, if not more so, than that of other employers found to have bargained in bad faith.

(*Alhambra, supra*, PERB Decision No. 560, p. 14, fn. 10.) Torpedoing may take the form of repudiating an agreement (*State of California (Department of Personnel Administration)* (2003) PERB Decision No. 1516-S, pp. 4-5), or making false statements about it. (*Anaheim*, *supra*, PERB Decision No. 2434, adopting proposed decision at p. 65.)[23] However, there is no evidence here suggesting such false statements or repudiation.

The City argues that the ALJ ignored evidence that FFA failed to recommend the tentative agreement the parties reached at the January 9, 2018 mediation, and instead torpedoed it during the ratification vote. While there is no dispute the parties reached a tentative agreement at the mediation, none of the evidence the City cites in support of its claim that FFA "indicated [to its membership] that the proposal should be voted down" persuades us that FFA's representatives actually undermined ratification of the agreement. The City principally argues that when Eakman and Milligan presented the tentative agreement to FFA membership for ratification, they stated that the mediation had been a "waste of time." While this could be interpreted as their rejection of the tentative agreement and as an indirect signal to the membership to follow suit, we find the more likely cause of this statement to be the fact that the City's offer at mediation was the same one that it had on the table on November 17, 2017.

[23] While "actively campaigning" against a tentative agreement may be another unlawful form of torpedoing, the level of dissenting bargaining team members' active campaigning that would be sufficient to prove a union's bad faith remains an unresolved issue. (*Kern High School District* (1998) PERB Decision No. 1265, p. 3.) We need not address that question under the facts presented herein as there is no evidence that FFA engaged in any kind of conduct that undermined the negotiations process.

There is no evidence in the record that Eakman, Milligan, or any FFA agent actively campaigned against ratification of the agreement or repudiated it. Moreover, recommending a tentative agreement by the negotiations team is never a guarantee that the membership will ratify the proposal. We therefore do not find that any conduct by FFA excuses the City's bad faith conduct.

Contrary to the City's claim, the ALJ's conclusion that the City violated its duty to meet and confer with FFA in good faith was based on multiple indicia of the City's bad faith conduct, all of which are amply supported by the record. Tellingly, the City did not except to the ALJ's findings that it imposed a durational term, an MOU,[24] and terms not reasonably contemplated in its LBFO,[25] which, standing alone, would be strong indicia of bad faith bargaining. The City argues that "the ALJ's overall finding of bad faith rests on one or two indicia of bad faith at most . . . [and] one or two indicia of bad faith are generally insufficient to support a finding of bad faith under the totality of circumstances test." As we explained above, however, the ultimate determination of good or bad faith does not hew to a formulaic application of a rule; rather, in considering allegations of bad faith or surface bargaining, we look at the entire course

[24] Although the City referenced the ALJ's finding that it imposed a durational term and an MOU, it did so solely within the ALJ's broader conclusion that the City had engaged in bad faith or surface bargaining. The City did not provide the grounds for this particular exception or otherwise attempt to argue it.

[25] Consistent with *City of Glendale*, *supra*, PERB Decision No. 2694-M, the ALJ found that the City demonstrated bad faith when it imposed three terms and conditions of employment that were not reasonably comprehended within its LBFO: the shift schedule change from 0800 to 0700, the increase of the maximum vacation accrual from 360 hours to 504 hours, and the change in special assignment pay for the paramedic coordinator from $300 to $250.

of negotiations and the totality of the parties' conduct. Here, the totality of the City's conduct, including its tendering of an exploding offer, rush to impasse, and implementation of terms and conditions of employment that were not reasonably comprehended within its true LBFO, supported the ALJ's finding that the City engaged in bad faith bargaining. By the same token, the ALJ correctly found that the City's conduct also interfered with the right of bargaining unit employees to be represented by FFA, as well as with FFA's right to represent bargaining unit employees.

C. Remedy

Both parties except to the ALJ's proposed remedial order, for different reasons. The City contends that the ALJ erred in issuing an order for the City to reinstate its October 10, 2017 three-year offer. Specifically, the City urges us to disavow *City of Palo Alto* (2019) PERB Decision No. 2664-M "to the extent it suggests that a party may be directed to reinstate an offer on which the parties have never reached agreement."

FFA, on the other hand, argues that the ALJ's proposed remedial order is inadequate for two reasons. First, it does not expressly prevent the City from including in the reissuance of its LBFO the language stating that refusal of the offer would result in imposition of the one-year contract that the City ultimately imposed. Second, it does not provide a make whole remedy to account for the compensation lost from elimination of the cash-in-lieu-of-benefits option and any attendant overtime.

The MMBA empowers PERB with broad powers to remedy unfair practices or other violations of the Act and to take any action the Board deems necessary to effectuate the Act's purposes. (MMBA § 3509, subd. (b); *City of Palo Alto*, *supra*,

PERB Decision No. 2664-M, p. 2.) A "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) The typical remedy in bad faith bargaining cases includes an order to cease and desist from the unlawful conduct. (*City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 17; *City of Selma*, *supra*, PERB Decision No. 2380-M, p. 25.) In cases where an employer implemented changes to terms and conditions of employment within the scope of representation without first reaching a bona fide impasse in negotiations, the Board has also ordered the employer to restore the status quo by rescinding the implemented terms and making employees whole for any losses suffered as a result of the unlawful implementation. (*County of Sacramento* (2020) PERB Decision No. 2745-M, p. 27; *City of Glendale*, *supra*, PERB Decision No. 2694-M, pp. 71-72; *City of Selma*, *supra*, PERB Decision No. 2380-M, pp. 24-25; *County of Riverside*, *supra*, PERB Decision No. 2360-M, pp. 32-33; *City of San Ramon*, *supra*, PERB Decision No. 2571-M, p. 17.)

It is appropriate to order a party to reinstate a withdrawn offer that it withdrew as part of an overall course of bad faith conduct. (*City of Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 5; *Mead Corp. v. NLRB* (11th Cir. 1983) 697 F.2d 1013, 1023 (*Mead Corp.*), enforcing *The Mead Corp.* (1981) 256 NLRB 686.) Distinct from imposing contractual terms on parties, or from ordering a bargaining party to make a proposal that it never previously offered, ordering a bargaining party to return to a prior bargaining position that it abandoned in bad faith is well within the Board's authority to craft a remedy that compensates affected parties and withholds from the

wrongdoer the fruits of its violation. (*City of Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 3.) In accordance with these principles, we find that the ALJ's *Mead Corp.* order was proper and we reject the City's exception.[26]

We also agree with the ALJ that the present circumstances call for an order allowing FFA some choice regarding its preferred method of remedying the City's violation, as "'[w]hether a change is beneficial or detrimental to the employees is a decision reserved to the employees as represented by their union.'" (*County of Kern*, *supra*, PERB Decision No. 2615-M, p. 12, citing *Solano County Employees' Assn. v. County of Solano* (1982) 136 Cal.App.3d 256, 262.) In crafting the appropriate choice, we note that should FFA believe accepting the retroactive LBFO (the *Mead Corp.* remedy) is most beneficial to its membership, there would at that point be no cause for us to also retroactively restore the cash-in-lieu-of-benefits option to bargaining unit employees. This is true because the retroactive compensation and benefits found in the LBFO were offered in exchange for eliminating the cash-in-lieu-of-benefits option. However, we agree with FFA to the extent that, should it not choose the reinstated LBFO, then the only way to restore the status quo is to direct the City to undo any and

[26] To the extent there is any ambiguity in the ALJ's proposed order, we give partial effect to FFA's exceptions by requiring that the City's reoffer of its proposal exclude its exploding deadline and related statement threatening imposition of the one-year MOU should FFA refuse the three-year offer by that deadline. Moreover, in the interest of clarity and easing compliance proceedings, we reiterate the central terms of the October 10, 2017 proposal, as modified through November 17, 2017: salary increases of 4 percent retroactive to July 1, 2017, 1 percent retroactive to July 1, 2018, and 1 percent retroactive to July 1, 2019; $300 special assignment pay for the paramedic coordinator assignment; $75 special assignment pay for the urban search and rescue special assignment; shift start time unchanged; and 360 hours maximum of vacation accrual.

all unlawful unilateral changes, including its elimination of the cash-in-lieu-of-benefits program without reaching a good faith impasse, at FFA's option.[27]

ORDER

Upon the foregoing findings of fact and conclusions of law, it is found that the City of San Gabriel (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. and PERB Regulations when it failed to meet and confer in good faith with the San Gabriel Fire Fighters Association (FFA). By this conduct, the City also interfered with the right of unit employees to participate in the activities of an employee organization of their own choosing, and denied FFA the right to represent bargaining unit members in their employment relations with a public agency.

Pursuant to MMBA section 3509, it hereby is ORDERED that the City of San Gabriel, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with FFA.

[27] FFA's cross-exceptions state as follows: "It is not lost on SGFFA that the ALJ may have structured the union's choices in such a manner that it would likely only choose option (a) [representation of the October 10, 2017 offer], as opposed to option (b) [bargaining on terms and conditions in good faith retroactive to July 2017], if it was inclined to accept [ ] the October 10, 2017 offer." If FFA's commentary accurately reflects the relative merits of the available choices, that is not a factor that impacts a PERB remedy. Rather, the choices must be crafted to restore the status quo but no more; if one choice is objectively or subjectively better than the other, that is an eventuality that can occur in the course of bargaining and may indeed have been true of the status quo we are restoring. In other words, as of the date on which the City unlawfully withdrew its three-year proposal, it is entirely possible that accepting the increases in that offer in exchange for eliminating the cash-in-lieu-of-benefits program was on balance more beneficial to unit employees than was continuing the cash-in-lieu-of-benefits program. If so, that is not a circumstance of PERB's making.

2. Denying FFA its right to represent bargaining unit employees.

3. Interfering with bargaining unit employees' right to be represented by FFA.

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

1. Upon request by FFA, and at its choice, within 10 workdays after this decision is no longer subject to appeal, do one of the following:

a. Resume good faith negotiations with FFA, including reoffering, retroactive to July 1, 2017, the three-year proposal that the City offered FFA on October 10, 2017, as modified by the parties' subsequent exchange of proposals through November 17, 2017, with the exception of the deadline for its acceptance originally contained therein and any statement threatening imposition of the one-year MOU should FFA refuse the offer; or

b. Resume good faith negotiations with FFA, reinstate the cash-in-lieu-of-benefits option for bargaining unit employees represented by FFA, retroactive to April 2018, and undo any or all changes unilaterally imposed in April 2018 per FFA's request. Any monetary payments pursuant to this subparagraph B.1.b. shall be augmented by interest at a rate of 7 percent per annum.

2. Within 10 workdays after this decision is no longer subject to appeal, post at all City locations where notices to employees in the certified bargaining unit are customarily posted, copies of the Notice attached hereto as an Appendix. In addition to physical posting, the Notice shall be posted by electronic means customarily used by the City to regularly communicate with employees in the bargaining unit. The Notice must be signed by an authorized agent of the City, indicating that it will comply

with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.[28]

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The City shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on FFA.

Members Banks and Krantz joined in this Decision.

[28] In light of the ongoing COVID-19 pandemic, the City shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the City so notifies OGC, or if FFA requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the City to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing the City to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing the City to mail the Notice to those employees with whom it does not customarily communicate through electronic means. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 29, fn. 13.)

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-1297-M, *San Gabriel Fire Fighters Association v. City of San Gabriel*, in which all parties had the right to participate, it has been found that the City of San Gabriel (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. and PERB Regulations when it failed to meet and confer in good faith with the San Gabriel Fire Fighters Association (FFA). By this conduct, the City also interfered with the right of unit employees to participate in the activities of an employee organization of their own choosing, and denied FFA the right to represent bargaining unit members in their employment relations with a public agency.

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

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with FFA.

2. Denying FFA its right to represent bargaining unit employees.

3. Interfering with bargaining unit employees' right to be represented by FFA.

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

1. Upon request by FFA, and at its choice, within 10 workdays after this decision is no longer subject to appeal, do one of the following:

a. Resume good faith negotiations with FFA, including reoffering, retroactive to July 1, 2017, the three-year proposal that we offered FFA on October 10, 2017, as modified by our subsequent exchange of proposals through November 17, 2017, with the exception of the deadline for its acceptance originally contained therein and any statement threatening imposition of the one-year MOU should FFA refuse the offer; or

b. Resume good faith negotiations with FFA, reinstate the cash-in-lieu-of-benefits option for bargaining unit employees represented by FFA, retroactive to April 2018, and undo any or all changes unilaterally imposed in April

2018 per FFA's request. Any monetary payments pursuant to this subparagraph B.1.b. shall be augmented by interest at a rate of 7 percent per annum.

Dated: _____ CITY OF SAN GABRIEL

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN GABRIEL FIRE FIGHTERS ASSOCIATION, Charging Party, v. CITY OF SAN GABRIEL, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-1297-M PROPOSED DECISION (March 24, 2020)

Appearances: Castillo Harper APC by Joseph Bolander, Attorney, for San Gabriel Fire Fighters Association; Atkinson, Andelson, Loya, Ruud & Romo, by Nate Kowalski, Attorney, for City of San Gabriel.

Before Bernhard Rohrbacher, Administrative Law Judge.

INTRODUCTION

In this case, the Charging Party, San Gabriel Fire Fighters Association (FFA or SGFFA), alleges that the Respondent, City of San Gabriel (City), violated the Meyers-Milias-Brown Act (MMBA)[1] by engaging in bad faith bargaining with the FFA over a successor Memorandum of Understanding (MOU) and by retaliating against FFA-represented employees because they exercised their right under the MMBA to reject certain terms and conditions offered by the City for said successor MOU.

PROCEDURAL HISTORY

On April 4, 2018, FFA filed the underlying unfair practice charge (Charge).

[1] The MMBA is codified at Government Code section 3560 et seq. Below, all section references are to the Government Code.

On May 20, 2019, the PERB Office of the General Counsel issued a complaint (Complaint) in the matter.

The Complaint alleges that, by various acts or omissions, the City failed and refused to meet and confer in good faith with FFA, including, but not limited to, the following: (1) In or around February 2017, the City entered negotiations for a successor MOU with a take-it-or-leave-it attitude by stating that the meet and confer process could be conducted "incrementally" or it could "cut to the chase" and give FFA the best offer it would make. (2) On October 10, 2017 and again on February 21, 2018, the City proposed a three-year MOU providing for a 4 percent pay increase in the first year and successive 1 percent pay increases in the second and third years, but, in or around April 2018, it imposed a one-year agreement providing for a 2 percent pay increase in the first and only year of that agreement. The Complaint further alleges that the City by this conduct violated MMBA sections 3505 and 3506.5, subdivision (c), and that it thereby committed an unfair practice under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivision (c).[2] In addition, the Complaint alleges that by the same conduct, the City also interfered with the right of bargaining unit employees to be represented by FFA, as well as with FFA's right to represent bargaining unit employees; that the City thereby violated MMBA sections 3506 and 3506.5, subdivision (a), as well as MMBA sections 3503 and 3506.5, subdivision (b), respectively; and that it thus committed unfair practices under MMBA

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

section 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a) and (b), respectively.

The Complaint also alleges that on March 5, 2018, bargaining unit employees exercised rights guaranteed by the MMBA when they refused the City-proposed three-year MOU described above and that in or around April 2018, the City retaliated against these employees because of their exercise of said rights by imposing the one-year agreement described above. The Complaint further alleges that the City by this conduct violated MMBA sections 3505 and 3506.5, subdivision (a), and that it thereby committed an unfair practice under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivision (a). In addition, the Complaint alleges that by the same conduct, the City also interfered with FFA's right to represent bargaining unit employees; that the City thereby violated MMBA sections 3503 and 3506.5, subdivision (b), respectively; and that it thus committed unfair practices under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivision (b).

On June 6, 2019, the City filed an Answer to the Complaint. In its Answer, the City admitted that FFA is an exclusive representative within the meaning of PERB Regulation 32016, subdivision (b), of an appropriate unit of employees and that the City is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). The City further admitted that from about February 2017 through March 2018, FFA and the City conducted negotiations about a successor MOU; that on October 10, 2017, and again on February 21, 2018, the City proposed a three-year MOU providing for a 4 percent pay increase in the first year and successive 1 percent pay increases in the second and third year; and that on March 5,

2018, Union-represented employees exercised rights guaranteed under the MMBA when they refused the City-proposed three-year MOU described above. The City denied all other allegations in the Complaint and raised several affirmative defenses.

On July 10, 2019, an informal settlement conference was conducted, but the parties were unable to resolve the matter.

On September 17, 2019, the City filed an unopposed Motion Requesting Leave to File First Amended Answer to Complaint (Motion), through which it sought to add several affirmative defenses to its Answer.[3]

Also on September 17, 2019, I granted the City's Motion.

Following a telephonic pre-hearing conference on September 27, 2019, I informed the parties via letter that I would not seek enforcement of subpoenas ad testificandum served by FFA on City Manager Mark Lazaretto and City Human Resources Manager Rayna Ospina, nor impose sanctions on the City for non-compliance with these subpoenas at that time. I based that decision on my conclusion that the testimony FFA sought to elicit from these two witnesses—i.e., that the City engaged in "hard bargaining tactics" during post-implementation-decision

[3] In its First Amended Answer to Complaint, the City also denied that from in or around February 2017 through in or around March 2018, FFA and the City conducted negotiations about a successor MOU, a factual allegation that it had admitted in its original Answer. However, as just stated, through its Motion, the City only sought to add several affirmative defenses; it did not also seek to change any of the responses in its original Answer to the factual allegations in the Complaint. PERB Regulation 32645 permits the Board to "disregard any error or defect in the original or amended charge, complaint, answer or other pleading which does not affect the substantial rights of the parties." To the extent this omission was in error, I disregard it. To the extent it was a deliberate choice by the City, I consider it beyond the scope of my order granting leave to amend the Answer, and therefore not properly before me.

negotiations—was not relevant to proving bad faith bargaining during pre-implementation-decision negotiations. I cautioned the parties, however, that I might revisit the issue upon FFA's request to do so after presentation of the City's case in chief. Subsequently, I received no such request and therefore do not consider the issue before me in these proceedings.[4]

A formal hearing was held on October 21 and 22, 2019. The parties submitted post-hearing briefs on January 6, 2020.

FINDINGS OF FACT

A. Parties and Background

The City is a public agency within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). In 2017, the City had an overall budget of approximately 35 to 40 million dollars, of which 36%—or approximately 12.6 to 14.4 million dollars—were expended on its Fire Department.

FFA is an exclusive representative of an appropriate unit within the meaning of PERB Regulation 32016, subdivision (b). FFA's unit includes approximately 25 City employees in the classifications Firefighter, Fire Engineer, and Fire Captain.

In addition to the bargaining unit represented by FFA, the City has three other bargaining units that are represented by the San Gabriel Fire Management Group

[4] In the same letter, I informed counsel for the City that any written motion to quash a subpoena duces tecum that FFA had attempted to serve on City Clerk Julie Nguyen, but from which an attachment had been omitted due to clerical error, would have to be filed and served by the close of business at 5:00 p.m. on October 1, 2019. Subsequently, the City did not file any such motion and FFA raised no enforcement issues regarding the subpoena.

(FMG or SGFMG),[5] the San Gabriel Police Officers' Association (POA or SGPOA), and the San Gabriel Police Management Group (PMG or SGPMG).[6] The City also has approximately 70-80 unrepresented employees.

The predecessor MOUs between the City and FFA, FMG, POA, and PMG were all set to expire on June 30, 2017. Beginning in February of 2017, the City's then-Interim Director of Human Resources (HR), Teresa St. Peter,[7] and counsel for the City, Steve Filarski,[8] were engaged in meeting and conferring with the bargaining teams of these four unions over successor MOUs. Ultimately, FMG, POA, and PMG accepted three-year successor MOUs providing for salary increases—or, in the parlance of the City, Cost of Living Adjustments (COLAs)—of 4 percent in the first year (retroactive to June 24, 2017) and 1 percent in each of the second and third years.

[5] This union is also sometimes referred to as the San Gabriel Fire Management Association (FMA or SGFMA).

[6] This union is also sometimes referred to as the San Gabriel Police Management Association (PMA or SGPMA).

[7] St. Peter was the City's Interim HR Director approximately from February to December of 2017. Thereafter, she continued to work for the City as a consultant through April of 2018, i.e., the end of the time period at issue in this case. She previously had served as Interim HR Director in the Cities of Azusa, Chino Valley, Monrovia, San Clemente, and West Covina, reaching back until 1975. She is currently the Interim HR Director of the City of Alhambra. She has been involved in collective bargaining for more than 25 years.

[8] Filarsky has conducted labor negotiations since 1975. He has done so for the City since 2010.

In addition to St. Peter's and Filarski's negotiations with these four unions, St-Peter—but not Filarski—also met at least 10 to 15 times with a "focus group" comprised of some unrepresented City employees regarding their terms and conditions of employment. St. Peter referred to herself as the City's "negotiator" with respect to these meetings with the focus group and claimed that the City reached a similar three-year "agreement," which provided for the same salary increases, with the unrepresented employees, despite the fact that employee attendance at the meetings of this "informal group" appears to have been by City-invitation or self-selection and it further appears there were no elected or other formally recognized representatives for the unrepresented employees at these meetings. Nor is there any evidence that the unrepresented employees voted on the proposal that they "accepted" according to St. Peter.[9]

By contrast, FFA rejected the three-year successor MOU that the other three unions—and, according to St. Peter, the unrepresented employees—had accepted. On April 3, 2018, the City imposed what it called "1-Year Last Best and Final [¶] Terms

[9] St. Peter testified that she sent an e-mail to undisclosed recipients that stated that "we were going to have this group meeting, and we wanted representatives from each department there, and here's what we're looking to do, and please send someone, but we did not designate specific individuals." She described the process by which the unrepresented employees "accepted" the City's proposal as follows: "[W]hen I had conversations with the[] [unrepresented employees who attended the "focus group" meetings], they would go back to their respective departments and talk to their membership [*sic*]. And then they would come back to me, relay what they heard back from them, and it was all formulated based on ongoing discussions." Filarsky testified that the focus group does not employ negotiators, does not have officers, does not hold elections, and does not collect dues: "It's just interested employees who say, you know, maybe we should have this benefit or whatever."

and Conditions of Employment," which provided for a 2 percent salary increase (effective April 14, 2018). The City's and FFA's bargaining conduct between February of 2017 and April of 2018 is detailed below.

B. 2017-18 Bargaining Between the City and FFA

1. February and March of 2017: Informal Meetings

Between February 2017 and April 2018, FFA's bargaining team consisted of then-FFA President Dave Milligan, then-FFA Vice President Chris Eakman, and Kirk Goltermann, who would subsequently replace first Eakman as Vice President in 2018 and then Milligan as President in 2019.[10] Milligan was the head of FFA's bargaining team. Golterman testified at the hearing. Milligan and Eakman did not.

In February 2017, Goltermann, Milligan, and Steve Turner, a labor representative employed by counsel for FFA, met informally with St. Peter and Filarsky to discuss the upcoming negotiations. According to Goltermann, St. Peter asked them whether they wanted "to negotiate or cut to the chase." Milligan repeatedly asked her to define what "cut to the chase" meant. St. Peter would only reply, "That's what you really want," but provided no definition.[11]

[10] Goltermann has been employed by the City as a Firefighter since January 1995. Since then, he has been a member of FFA. Since approximately 1999, he has been directly or indirectly involved in negotiations between the City and FFA, serving on FFA's negotiating committee and attending negotiations for the MOU that expired on June 30, 2017 and its two most recent predecessors.

[11] Here and below, whenever a statement in a paragraph is attributed to a witness, all subsequent statements in the same paragraph are implicitly attributed to the same witness until a statement is attributed to another witness. For example, above, the witness statements beginning with the words "Milligan repeatedly asked" and "St. Peter would only reply" are implicitly attributed to Goltermann.

St. Peter testified that it was Filarsky who posed the question to all four unions at separate bargaining "kickoff" meetings with them in February 2017, i.e., "if they wanted to do incremental traditional bargaining or. . . , as he put it, cut to the chase in terms of the bargaining strategy." St. Peter explained the difference between "incremental" and "cut to the chase" bargaining thusly:

> "The cut to the chase was . . . , from the City's perspective, meaning we would put our best offer on the table, [i.e.], what we had authority from [the City] Council to offer at that point rather than the traditional method of . . . one side starts at one end of the spectrum and the other side starts at the other end of the spectrum, and you have a number of meetings and get to a final point."

St. Peter testified "cut to the chase" did not mean "take it or leave it." The other three unions ultimately chose the cut to the chase approach. Presumably through the focus group, the unrepresented employees were also given the option to "cut to the chase" and they also chose to do so, but no details were given.

Filarsky testified that when he started conducting labor negotiations for the City, the parties engaged in "incremental bargaining," whereby "the union would come in with a very high offer[,] [t]he City would come in with a very lowball offer[,] [a]nd they would chip away at their respective offers until they got to some sort of an agreement." He suggested at the time that the parties instead engage in what he called "cut to the chase" bargaining, whereby "once the City Council gave me authorization to negotiate[,] [w]e would put that authorization on the table sooner rather than later." He explained to the unions that "by virtue of using the cut to the chase approach they were not precluded from submitting additional offers to the City Council, which would

then be shared with the City Council, [and] which the City Council could choose to accept or reject." He further explained to them that he was not the decision maker with respect to "the amount of money that the City wanted to spend," which was "a decision that had to be made by the City Council." Since 2010, when Filarsky first proposed it, the unions most often chose to cut to the chase. In those instances, "instead of having 30 meetings to reach agreement, we might have five or six."

Approximately a month after the "kickoff" meetings, Goltermann, Milligan, Turner, St. Peter, and Filarsky met again. According to Goltermann, the City representatives again asked whether FFA wanted "to negotiate or cut to the chase." Milligan again asked the City representatives to define "cut to the chase." Again, no definition was provided. The City representatives pressed FFA for an answer to the question it had posed. Milligan replied: "When you define what cut to the chase is, then we have a choice. Otherwise, we're here to negotiate." The meeting was unproductive.

2. April 12: First Formal Bargaining Session and First FFA Proposal

On April 12, 2017,[12] the parties held their first formal bargaining session. FFA proposed a three-year successor MOU, which had been e-mailed to St. Peter beforehand. A PowerPoint presentation prepared by Goltermann and Milligan summarized the proposal as follows:

> "1. Salary adjustment:
> "a. 2017 increase of 5%
> "b. 2018 increase of 5%
> "c. 2019 increase of 5%

[12] Hereinafter, all dates are in 2017 unless otherwise indicated.

"2. Special assignment pay:
"3% bonus for employees that have additional responsibilities
"[3]. Sick leave abuse program:
"Employees maintain their 1.5 overtime pay regardless of taking a sick day
"[4]. Comp-time[:]
"Increase total hours from 120-360
"[5]. Staffing[:]
"a. Increase constant minimum staffing from 3 members to 4 members on each Fire Engine
"b. City commits to maintaining the Division Chief positions within SGFFA membership"

FFA justified its demand for a 5% salary adjustment in each of the three contract years by pointing to a lack of salary increases in recent years and a survey purporting to show that salaries of bargaining unit employees were at or towards the bottom as compared to those of firefighters, fire engineers, and fire captains in seven other cities in the area. Salaries would soon prove to be a major point of contention between the parties.

FFA sought the 3 percent special assignment pay for the following non-exhaustive list of special assignments: Arson Investigator, EOC Manager, PIO, SCBA Technician,[13] and Urban Search and Rescue (USAR). Special assignment pay was to be cumulative up to 6 percent for those with several such assignments. Under the MOU that expired on June 30, 2017, USAR assignments had been compensated with $50 per month and Paramedic Coordinator assignments had been compensated by 3

[13] These three abbreviations were not spelled-out at the hearing.

percent. There had been no special assignment pay for the other assignments listed above.

FFA sought to end the sick leave abuse program in the expiring MOU, under which hours taken as sick leave did not count as hours worked towards overtime entitlement. FFA's compensatory time off proposal would increase the amount of comp-time that bargaining unit employee could accumulate from 120 to 360 hours. Its staffing proposal sought to add another Firefighter Paramedic to the one Fire Captain, one Fire Engineer, and one Firefighter Paramedic who are staffing each fire engine. It also sought to receive a commitment that Division Chief positions would be filled from the ranks of bargaining unit employees, rather than through outside recruitment, unless no qualified bargaining unit members could be found.

3. April 13 through August 29: Hiatus in Bargaining and Finalization of the *Flores* Decision

No formal bargaining sessions occurred between April 12 and August 29, as explained below.

On April 13, the City provided FFA with a survey of its own purporting to show that salaries of bargaining unit employees were slightly lower than the average and the median of those of fire department employees in eight area cities,[14] but that their bonuses and benefits were, except for the Public Employment Retirement System (PERS) Tier 2 retirement formula, comparable to, at the mid-range of, or above those of the employees in these other cities.

[14] The eight area cities were composed of the seven cities covered by FFA's survey plus one additional city.

By e-mail message dated May 24, St. Peter informed Milligan:

> "I want to give you an update on our meetings with the City Council. We have now met with them twice in Closed Session to discuss Meet and Confer related issues. The Council has been working diligently to ensure they understand all of the issues/proposals being presented from all City employee groups. I am scheduled to meet with the City Council on June 7th and June 20th to continue to discuss these items. I anticipate that I will not have an update for you on the status of your proposals until after the June 20th meeting. If anything changes I will let you know."

On June 2, the City provided FFA with another salary survey purporting to show that once bonuses and benefits were taken into consideration, total compensation of bargaining unit members exceeded the average and median of fire department employees in the same eight area cities referred to above.

By e-mail message dated July 11, St. Peter informed Milligan and the presidents of the other three unions:

> "I realize that it's been a while since I've provided you with an update related to Meet and Confer. I am meeting with City Council again in Closed Session on Wednesday, July 19th. I am hopeful that we will receive direction from Council at that meeting and be able to start the negotiation process with each of you. I will send you all an email on July 20th providing you with an update and hopefully requesting meeting dates from each of you."

By e-mail dated July 31, St. Peter informed FFA that the City was now "ready to begin the meet and confer process and would be available on either August 16th or 17th." St. Peter also reminded FFA that "Steve Filarsky indicated in our initial meeting that, depending on your preference, the meet and confer process can be done the traditional way—incremental bargaining[—]OR the City can 'cut to the case' and give

you our best offer if you agree to using this process." St. Peter asked FFA to "[p]lease let us know your choice in advance of our first meeting so we can prepare the appropriate offer." It will be recalled that at the parties' first formal bargaining session on April 12 Milligan—the head of FFA's team—had informed the City that he would be on vacation "for negotiation purposes" from July 20 until August 20.

It would soon emerge that, apart from salaries, another major point of contention would be the future of the contractual cash-in-lieu-of-benefits option, which had existed since at least February 1995, when Goltermann was hired. This option was enshrined in the 2014-2017 MOU as the "Flexible Benefit Program":

> "The City will contribute $1586 per month to each employee through a Flexible Benefit Program in order to purchase basic medical, dental, and vision care benefits. Once the enrollment requirements of our insurance providers are met, the employee has the option to receive any unspent funds as taxable income."

Goltermann testified that only two of the 25 bargaining unit employees opted to receive the entire $1586.00 per month as cash in lieu of benefits and that all other bargaining unit employees opted to receive part of that amount as cash. Goltermann himself received between $500.00 and $700.00 per month as cash under the program.

On June 2, 2016, the U.S. Court of Appeals for the Ninth Circuit held, in a case brought by current and former police officers employed by the City and covered by an MOU containing identical Flexible Benefit Program language, that any cash in lieu of benefits received pursuant to that Flexible Benefit Program had to be included when calculating the regular rate of pay for overtime compensation pursuant to the Fair Labor Standards Act (FLSA), 29. U.S.C. § 201 et seq. (*Flores v. City of San Gabriel*

(9th Cir. 2016) 824 F.3d 890, 907 (*Flores*).) The Court further held that, because the City had not shown that it attempted to comply with the FLSA in good faith when it failed to so include such cash in lieu of benefits, plaintiffs were entitled to liquidated damages equal to the amount of actual damages. (*Ibid*.) The Court finally held that, because the City's violation was willful, the FLSA's three-year statute of limitations applied instead of its two-year statute of limitations for non-willful violations. (*Ibid*.) In reaching the first of these holdings, the Court stated:

> "The City warns us that a ruling in favor of Plaintiffs in this case will encourage municipalities to discontinue cash-in-lieu of benefits payment programs due to the consequent increase in overtime costs to the detriment of municipal employees. As we have observed before, such arguments are 'more appropriately . . . made to Congress or to the Department of Labor, rather than the courts.'"

(*Flores*, *supra*, 824 F.3d at p. 901, quoting *Bratt v. City of Los Angeles* (9th Cir. 1990) 912 F.2d 1066, 1071 [ellipsis in original].) As shall be seen below, the City later followed through on its "warn[ing]" in negotiations with FFA and the other unions.

On May 15, 2017, the U.S. Supreme Court denied the City's petition for writ of certiorari in the *Flores* case, thereby finalizing the Ninth Circuit's Decision. (*City of San Gabriel v. Flores* (2017) 137 S.Ct. 2117.)

By letter dated August 14, counsel for FFA submitted to the City a joint information request on the behalf of FFA, FMG, POA, and PMG seeking information related to payments due under the *Flores* decision to employees represented by the unions. The unions explained:

> "The City has indicated that it may propose changes in light of the decision in *Flores* . . . . We will negotiate in good

> faith with the City regarding what the benefit plan will look like moving forward, but additional information is necessary in order to make those negotiations productive. Specifically, it is important for the membership to know more about how, and when, the City will begin the process of reimbursing them for past violations before formulating proposals regarding the future of the plan."

The unions posed the following four questions to the City:

> "(a) For what time frame does the City intend to make back pay payments to employees?;
> "(b) When does the City intend to begin making those payments?;
> "(c) Does the City intend on reviewing those payments with individual employees or employee groups before issuing them?;
> "(d) Does the City intend to include underpayments of MOU overtime in its calculations?"

Through an e-mail message with city-wide distribution dated August 24, St. Peter informed bargaining unit employees and others that the City "**must begin implementing certain parts of the** [*Flores*] **decision immediately; particularly, the inclusion of the $1,568 in the regular rate of pay**" for the purpose of calculating overtime compensation and that, "[a]s a result, the City has implemented this provision of the *Flores* Decision beginning August 19th." (Emphasis in original, italics supplied.) St. Peter added that the City was working on finalizing "issues related to the lawsuit and the plaintiffs" and that, once that work was done, the City would be working "with our bargaining units to discuss implications of the [*Flores*] Decision for current [bargaining unit] employees regarding accrued liability."

4. August 29: Second Formal Bargain Session and First City Proposal

On August 29, the parties held their second formal bargaining session. At 8:15 a.m. on that day, St. Peter re-sent her e-mail dated July 31 to Milligan and asked, "For our meeting today, do you prefer incremental bargaining or to 'cut to the chase'? Please let me know asap." Milligan replied at 9:34 a.m. on the same day, "The SGFFA looks forward to hearing the city council['s] response [to] our proposal." At 10:10 a.m. on the same day, Filarsky replied, "With all due respect, that does not answer the question set forth below."

Later on August 29, the parties met for their second formal negotiations session. The City provided FFA with a response to its April 12 proposal, captioned "2017 FFA Proposals."[15] The "2017 FFA Proposals" stated in pertinent part:

> "[1.] [Salary adjustment:] FY 17/18 – 2%, FY 18/19 – 1%, FY 19/20 - 15
> "[2.] Special Assignment Pay – Paramedic Coordinator $250/month; USAR - $75/month. USAR will be required to requalify every 6 months
> "[3.] [Sick leave abuse program:] Only actual hours worked to be counted as hours worked for FLSA purposes
> "[4.] [Comp-time:] Maintain current CTO accumulation
> "[5.] [Staffing:]
> "[a.] Maintain current minimum staffing
> "[b.] Fire Division Chief vacancies may be filled internally or externally – Management right"[16]

[15] Asked whether FFA had "at any point in time request[ed] a response [to its April 12 proposal] from the City," Goltermann answered: "Not that I am aware of."

[16] The City's "2017 FFA Proposals" also countered that "[c]urrent language in MOU is acceptable" to what it described as an FFA demand to "add language 'Member that is on a current promotional list'" to the existing MOU provision regarding

St. Peter testified that by that time, she had concluded that FFA wanted to engage in "incremental bargaining rather than cutting to the chase" and that the City's salary proposal was part and parcel of such incremental bargaining.

The City supported its salary proposal by providing FFA with a chart purporting to show an increase over the previous ten years of the City's contribution rate to PERS for its Firefighters from 28.6% to 58.3% of salary, highlighting some of the additional costs associated with a salary increase.

For almost all FFA-represented employees, changing the Paramedic Coordinator special assignment pay from 3% to $250 per month would result in a slight increase in total compensation. A Paramedic Coordinator on the lowest step of the lowest-paid classification, Firefighter Step A, would see the largest increase, from $160.92 to $250 or 1.6%.[17] A Paramedic Coordinator on the second-highest and highest step of the highest-paid classification, Fire Captain Step D and E, would see a slight decrease, from $253.95 and $266.67 to $250 or -0.04% and -0.1%, respectively.[18]

"Acting Assignment[s]." The FFA proposals in evidence do not contain such a demand, which may however have been made verbally.

[17] Calculated as the difference between $250 minus 3% of base pay amount divided by the sum of base pay amount plus 3% of base pay amount. Other forms of compensation, such as cash-in-lieu-of-benefits, are not factored in.

[18] Calculated as previously. See *supra*, note 17. There is no evidence in the record as to the classifications or number of the employees who performed Paramedic Coordinator assignments.

These FFA-specific proposals were accompanied by "City-Wide Proposals" that the City offered to other unions and, according to St. Peter, to unrepresented employees. These "City-Wide Proposals" *inter alia* demanded the elimination of the cash-lieu-of-benefits payments pursuant to the Flexible Benefit Program. However, in the proposals presented to FFA, the section on "Salary Increase" had been whited out. In the version presented as the City's first proposal to other Unions, which unlike FFA had opted for the "cut to the chase" approach to bargaining, as well as unrepresented employees, this section proposed salary increases of 4 percent for 2017-2018, 1 percent for 2018-2019, and 1 percent for 2019-2020, i.e., 2 percent more in 2017-2018 than what was being offered to FFA. The "City Wide Proposals" as presented to FFA read in full as follows:

"**City Wide Proposals**

"1. Overtime to be calculated based on **actual hours worked** over 40 in a work week for non-sworn employees and **actual hours worked** during the FLSA work period for sworn employees.

"2. All overtime to be paid in 15[-]minute increments; time in-between 15-minute increments to be rounded down.

"3. All non-safety employees to convert to 80-hour work period. City Hall to be on 9/80 work week schedule. City Hall hours to be open 8:00AM – 6:00PM, Monday through Thursday and alternating Fridays from 8:00AM – 5:00PM. Public Works Field employees will work a 4/10 work week schedule. All Public Works Field employees will work from 6:00AM – 4:30PM, Monday through Thursday.

"4. Current vacation banks for 75-hour employees – Vacation 'B Bank' will be created at then current rate of base pay. Any future pay out based on this base rate. If used, used at then current rate of base pay.

"5. Salary Increase

"6. Health Insurance

"a. Change benefit title from Flexible Benefit Program to Health Insurance[.]

"b. Effective December 1, 2017, the City contribution to Medical Insurance will be as follows:

"• Opt out - $0. Employees may only opt out if they provide proof of credible group coverage.

"• Employee only - $356 per month

"• Employee + 1 - $1052 per month

"• Employee + Family - $1568 per month

"c. Effective January 1, 2018, the City contribution for Dental insurance will be $46.78 per month or the monthly dental premium for employee only whichever is less. All full-time employees must participate in the City dental program for a minimum of employee only coverage.

"d. Effective January 1, 2018, the City contribution for Vision insurance will be $18.16 per month. All full-time employees must participate in the City vision program for a minimum of employee only coverage.

“e. Effective January 1, 2018, City retirees may participate in the City’s dental and vision plans at their own expense. The retiree rate will be the employee rate plus a 2% administrative fee.

“7. Vacation – clarify accrual rates and maximum accumulation.

“8. Annual Vacation Buyback – maximum of 40 hours per year (56 hours for Fire shift employees) paid out first pay period in December.

“9. Vacation Maximum Accrual

“a. Effective December 2017, the maximum vacation accrual ‘cap’ will be enforced. Employees at the maximum accrual rate will no longer be able to accrue additional vacation until they are below the ‘cap.’

“b. Prior to the 2017 annual Vacation Buyback, a separate Vacation ‘C Bank’ will be created into which all hours over the cap will be placed and any cash out of these hours will be at the employee’s base rate of pay as of 12/1/17.

“c. Employees with hours in Vacation C Bank must participate in the Annual 40-hour (56-hour for Fire personnel) Vacation Buyback each December and must buy back the full 40 hours (56 for Fire personnel).

“d For employees over the cap, the 2017 40-hour Buyback will be taken from the employee’s regular vacation bank.

“e. Any future payout from Vacation ‘C Bank’ will be based on the employee’s base rate of pay as of 12/1/17. If these hours are used as

vacation hours, they will be used on the employee's then current rate of base pay.

"f. In subsequent years, employees with hours in the Vacation C Bank[] must buy back 40 hours using the Vacation C Bank until Bank C is exhausted.

"10. Holiday hours – add additional 8 hours of holiday—4 hours on Christmas Eve and 4 hours on New Year's Eve with the exception of sworn Fire personnel.

"11. Effective January 1, 2018, Holidays credited in pay period in which they occur.

"12. Sick leave – In a 'qualifying' event if employee does not have accrued sick leave, time coded as leave without pay (LWOP) unless the employee provides doctor certification of the illness.

"13. Catastrophic Leave – Administrative Policy to be implemented to allow employees to donate accrued vacation, holiday, and compensatory time off hours to another employee who is out for an extended time due to a non-work-related illness or injury.

"14. Bereavement Leave – City Manager discretion to grant 8 hours (24 hours for shift Fire personnel) of such leave for family members other than those currently listed changed to discretionary 24 hours.

"15. Employee Assistance Program (EAP) – replace current Program with enhanced new Program[.]

"16. Health Reimbursement Account – reopener to develop Program to convert leave accruals to tax-free account to be used to pay medical premiums and expenses in retirement.

"17. Comprehensive MOU – reopener to complete[.]

> "18. Civil Service Rules and Administrative Policies[ ]– reopener to negotiate with all employee bargaining units."

(Emphases in original.)

The proposed elimination of the Flexible Benefit Program and its cash-in-lieu-of-benefits option would reduce the total compensation of a bargaining unit member who, like Goltermann, cashed out between $500 and $700 per month by a minimum of between 5.3% and 7.3% (Fire Captain Step E) and a maximum of between 8.5% and 11.5% (Firefighter Step A).[19] For a bargaining unit member who cashed out the entire $1,568 available under the Flexible Benefit Program, total compensation would be reduced by a minimum of 14.9% (Fire Captain Step E) and a maximum of 22.6% (Firefighter Step A).[20]

Later on August 29, St. Peter e-mailed the City's "2017 FFA Proposals – Revised 8/28/17" to Milligan. These revised FFA-specific City proposals were identical to the original ones, except that the following proposals had been added:[21]

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[19] Calculated as cash-out amount divided by the sum of base pay amount effective June 25, 2016 plus cash out amount. Other forms of compensation, such as special assignment pay, are not factored in.

[20] Calculated as previously. See *supra*, note 19.

[21] St. Peter testified that the only difference between the original proposal and the revised proposal was some reformatting in the version of the revised proposal that she reviewed when she testified. (See Respondent's Exhibit J.) However, Respondent's Exhibit P contains a version of the revised proposal that has another page not included in Respondent's Exhibit J with the additional proposals listed below. The file name at the bottom of that page is the same as that at the bottom of the pages that St. Peter reviewed when she testified.

> "Deputy Fire Marshall – Once incumbent retires change this assignment to a non-sworn classification with a new salary range rather than an assignment.
>
> "Paramedic Coordinator required to maintain Paramedic Certification[.]
>
> "Employee to be eligible for witness leave when required to do on behalf of the City[.]
>
> "Firefighter/Paramedic to be classification rather than assignment[.]"

Also on August 29, St. Peter first responded to the unions' August 14 information request. St. Peter informed the unions that the City was currently working with its attorneys to finalize the matter with regard to the *Flores* plaintiffs and that, once that was resolved, it would be contacting each of the bargaining units "to discuss current employees as it relates to the *Flores* decision." St. Peter added: "We expect that we will be ready to address this with the bargaining units by mid to late September and will be able to address any questions at that time."

On September 6, St. Peter e-mailed Milligan:

> "You wanted the costing for the Special Assignment Pay. Please see the attachment.
>
> [¶ . . . ¶]
>
> "Let me know if you have any questions. Please also let me know when we can schedule our next meet and confer."

The attachment to the above-quoted e-mail message purported to show that the FFA-proposed special assignment pay changes would increase the City's annual cost by $327,177.30 for the entire FFA-represented bargaining unit.

On September 22, Milligan e-mailed St. Peter:

> "It[']s been a[ ]while, hope all is going well. I just wanted to keep in touch and let you know I hope to have another meet/confer response sometime during the first week of October. If there will be any delay I will keep you posted."

On September 28, the City provided FFA with a "FFA OT Calculation Summary" indicating that, under the *Flores* decision, bargaining unit members were owed a total of $82,965.69 in additional overtime compensation for overtime performed between and including 2014 and 2017. This implicitly answered the first of the four questions posed by the unions to the City on August 14 and described in that request as asking for information that was "necessary in order to make . . . negotiations ["regarding what the benefit plan will look like moving forward"] productive." There is no evidence in the record that would suggest that the City ever answered any of the other three questions.

On October 5, St. Peter informed Milligan via e-mail message that the City Council had authorized the use of general fund reserves "to pay twice the amounts indicated" in, presumably, the "FA OT Calculation Summary" and that "[t]his presents an additional amount of $122,000 Citywide," including non-bargaining unit employees. Although St. Peter did not state so explicitly, the City had to pay "twice the amount indicated" because the Ninth Circuit's had held that, because the City had not shown that it attempted to comply with the FLSA in good faith when it failed to include cash in

lieu of benefits in the calculation of the regular rate of pay for the purpose of overtime payments under the FLSA, plaintiffs were entitled to liquidated damages equal to the amount of actual damages. (*Flores*, *supra*, 824 F.3d at p. 907.)

5. The City's Last, Best, and Final Offer on October 10

On October 10, 42 days after the City had presented its first and so far only offer to FFA, to which FFA had not yet responded, and after two formal bargaining sessions in total and none since the City had presented its first and so far only offer, St. Peter e-mailed the City's last, best, and final offer to Milligan.[22] St. Peter's e-mail message itself offered a three-year proposal to FFA, to be replaced by an attached one-year "Last, Best, and Final Offer" if FFA did not accept the three-year offer by November 17, 2017 at 5:00 p.m. The e-mail stated in full:

> "The City will be presenting the compensation package for all unrepresented employees to the City Council for approval at the November 7, 2017 City Council Meeting.[23] The City is also looking for resolution of the Meet and Confer process with all represented City bargaining units.

[22] However, as shall be discussed below, the City's last, best, and final offer was not the one-year 'offer' that it declared to be its last, best, and final offer, but the three-year offer that it presented together with that one-year 'offer.' As indicated by the use of apostrophes around the word "offer" in the phrase "one-year 'offer,'" and as also discussed below, I do not consider this one-year 'offer' to have been an offer.

[23] Asked, "How did you come to know that the unrepresented employee focus group accepted the package," St. Peter responded: "My recollection is that there are various components because I remember we were talking about the [health benefits] cafeteria, which of the three plans they wanted. We were talking about the nine eighty versus a four ten [work schedule]. We were talking about how to change the 75-hour employees to [80]-hour employees." By omitting the salary increases and the abolition of the Flexible Benefit Program, which took center stage in negotiations with FFA, St. Peter implied that these issues did not similarly take center stage in the meetings with the focus group of unrepresented employees and played at most a minor role there.

"City and bargaining unit representatives have not met in quite some time. In the interim, the City Council has authorized the City representatives to make the following modifications to the prior multi-year offer:

> "1. With respect to health insurance and salary, see the attached choice of Plan A, B, or C. Plan A provides a lower City contribution to medical insurance with a 4% COLA. Plans B and C provide higher City medical contributions with a 3% COLA. Your bargaining unit will[ ]need to select one of the plan options for your group: NOTE: All unrepresented employees have selected the Plan A Option.
>
> "2. The change to the City's contribution for health insurance will be effective January 1, 2018 rather than December 1, 2017. This represents an additional City-wide cost of approximately $88,000.
>
> "3. The COLA is retroactive to the first pay period in July 2017.
>
> "4. With respect to resolving *Flores*, the City Council has authorized payment of twice the amount shown on the attached, which is the same calculation as the amount paid to plaintiffs. This represents an additional City-wide cost of $122,000.[24]

[24] Attached to St. Peter's October 10 e-mail message was a "FLSA OT Damages Summary" indicating that, under the *Flores* decision, bargaining unit members were owed a total of $83,292.44 in additional overtime compensation for overtime performed between and including 2014 and 2017, all City employees—including bargaining unit members but excluding the *Flores* plaintiffs—were owed $121,676,66, and the *Flores* plaintiffs were owed $10,297.66.

> "The City's current offer will remain viable until November 17, 2017 at 5:00 PM; after that date it will expire, replaced by the attached one (1) year offer. If you would like to Meet and Confer prior to November 17, 2017, please let me know as soon as possible.
>
> "If we are unable to reach agreement by that date and time, the City will move forward with the attached Last, Best, and Final Offer.
>
> "Please give me a call if you have any questions."

Attached to St. Peter's October 10 e-mail message was a one-page document outlining the "2018 Health Plan Options" under the three plans. Under Plan A, bargaining unit employees would receive a 4 percent "COLA"—i.e., salary increase—and the City would contribute $536.00, $1,052.00, and $1,568.00 per month—the latter being the amount available to employees under the Flexible Benefit Program that the City sought to abolish—towards health insurance for "employee only," "employee + one," and "employee + family," respectively.[25] Under Plans B and C, employees would receive a "COLA" of only 3 percent but the City would contribute a higher monthly amount towards health insurance.[26] Under all three plans, the City would contribute $64.94 per month towards dental and vision care. Presumably,

[25] These contribution amounts are identical to those the City offered on August 29, 2017 together with a 2% salary increase in 2017-2018.

[26] The difference between newly proposed Plans B and C was that while Plan B envisioned a higher City contribution towards health insurance for the employee only than Plan C, Plan C envisioned higher City Contributions towards health insurance for "employee + one" and "employee + family."

under all three plans, the "COLA" would be 1 percent in each of 2018-2019 and 2019-2020.

Although St. Peter's October 10 e-mail message did not make that clear, the City's three-year offer thus consisted of three parts: (a) St. Peter's October 10 e-mail message and the "2018 Health Plan Options" attached to it; (b) the City's "2017 FFA Proposals – Revised 8/29/17" except for the first year salary increase proposal contained therein, which St. Peter's October 10 e-mail message changed from 2 percent to 4 percent; and (c) the City's October 29 "City-Wide Proposals." As is clear from the first two paragraphs of St. Peter's October 10 e-mail messages, FMG, POA, and PMG, the other "represented City bargaining units," received the same offer.

Also attached to St. Peter's e-mail message was a "1-Year Last, Best and Final Offer." This one-year 'offer' was largely identical to the City's revised August 29 proposal, consisting of the "2017 FFA Proposals – Revised 8/29/17" and the "City-Wide Proposals," except that it provided for a "1 year term effective upon City Council approval." Thus, like the City's revised August 29 proposal, this one-year 'offer' provided for a 2 percent salary increase in that one year, rather than for a 4 percent or 3 percent salary increase in the first year of the three-year agreement that the City was offering to FFA as an alternative to the one-year 'offer.' Also, the 2 percent salary increase was now to be "effective upon City Council approval," rather than "retroactive to the first pay period in July 2017." Missing from this 'offer' was the provision included in the City's August 29 proposal that "[e]ffective January 1, 2018, Holidays

credited in pay period in which they occur."[27] Conversely, included in this 'offer' was a new provision, viz., "Shift Schedule to begin at 7:00 AM rather than current start time of 8:00 AM." FMG, POA, and PMG received a similar one-year 'offer' to replace the three-year offer if they did not accept the latter by November 17, 2017, at 5:00 p.m.

At the hearing, St. Peter explained the November 17 deadline for accepting the City's three-year proposal as follows:

> "The City put the deadline on the offer because we had to take any changes to [City] Council[] [t]o get approval . . . we were looking at having payroll make changes then to the cafeteria plan for all of the employees so that we would have this in place by January 1[,] [2018].
>
> "[¶ . . . ¶]
>
> "[In addition,] [w]e have to get all that information and transmit it to CalPERS."

St. Peter further explained that the FFA-represented unit was "sort of lagging behind other bargaining units and other groups in terms of progress at the negotiating table." However, at the time, at least POA and PMG had not yet accepted the City's two key proposals—to raise salaries by 4, 1, and 1 percent over three years and to eliminate the Flexible Benefits Program—either.[28]

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[27] Also missing was the provision to "add additional 8 hours of holiday—4 hours on Christmas Eve and 4 hours on New Year's Eve *with the exception of sworn Fire personnel*." (Emphasis supplied.) Because of the italicized exception within this provision, it would never have been applicable to bargaining unit employees.

[28] There is no information in the record whether FMG had already accepted these proposals at that time. FMG was not part of the "San Gabriel Coalition of Public Safety" that consisted of FFA, POA, and PMG and that, as discussed below, would demand on October 11 that salaries be raised by 4.5%, 4.5%, and 4.5% over three

Filarsky added as another factor that went into the City's decision to establish the November 17 deadline the City's ongoing or continuing liability under the *Flores* decision, which would end only once the Flexible Benefit Program had been abolished, be it by agreement or through imposition after exhaustion of the impasse procedure. Filarsky claimed that the impasse procedure could add "six to nine months, perhaps even a year" to the bargaining process before the City could impose. The ongoing liability under the *Flores* decision was an issue of particular importance with respect to the Fire Department, because that department had an "inordinate" amount of overtime as compared to other departments.

As for why the City's "1-Year Last, Best and Final Offer" provided for a 2 percent salary increase instead of the 4 percent salary increase that the three-year offer provided for the first year, St. Peter explained:

> "That was because the City really sees a value in . . . having all of the groups on the same schedule and having a long-term arrangement with the employees. . . . We were offering all employee groups a three-year deal, and that three year deal was based on a four percent [increase] in the first year, one percent in the second year, and one percent in the third year.
>
> "So, for us to offer that same amount and not have a three-year deal we were looking to do, we were saying for long-term stability, something that the City can count on, we know what our expenditures are going to be forward, that the four[] [percent] made sense. Less than that, we then offered the two percent."

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years and that "the City's Flexible Benefit Program shall remain intact with the maximum City contribution of $1,568 per month," with the proviso that "the opt-out shall be reduced to one-half of the City's flex benefit contribution, or currently $784."

However, the City's "1-Year Last, Best and Final Offer" was not its last, best, and final offer, because it was not an 'offer' under the dictionary definition of that term. Merriam Webster defines an "offer" in relevant part as "a presenting of something *for acceptance*." (*Offer*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/offer [italics supplied].) Here, the City's one-year 'offer' does not satisfy the italicized element in that definition. The City did not present its one-year 'offer' to FFA "for acceptance." Rather, the City presented this 'offer' to FFA as something that it would unilaterally "move forward with"—i.e., implement—in case FFA did not accept its three-year offer by November 17, 2017, at 5:00 p.m. While the City invited FFA to accept or refuse the three-year offer, it did not similarly invite FFA to accept or refuse the one-year 'offer.'

It emerges that the City's October 10 three-year offer constituted its last, best and final offer—i.e., the last bona fide offer FFA could accept—and that its October 10 one-year 'offer' was merely a statement of what the City intended to implement should FFA fail to accept that last, best, and final offer by the date and time specified by the City. Apparently, even Filarsky believed at the time that the City's October 10 three-year offer constituted its last, best, and final offer, given that he would e-mail Turner on November 18, 2017 that "[y]esterday[,] Dave Milligan informed Theresa St. Peter that the Fire Association had rejected the City's last, best, [and] final 3 year offer" and that "[t]he City is now declaring impasse." Apparently, St. Peter did so, too, given that she would refer in her April 3, 2018 Staff Report to the City Council (on the subject of "adoption of Resolution 18-14 implementing salary and benefit changes for . . .

[]SGFFA[] effective July 1, 2017 through June 30, 2018") to "the City's 3-year Last Best and Final Offer" and again to its "3-year Last, Best and Final Offer."[29] Thus, the terms and conditions of employment eventually implemented by the City post-impasse must be evaluated by comparing them to the October 10 three-year offer, rather than by comparing them to the October 10 one-year 'offer.'[30]

On October 11, Milligan responded to St. Peter that FFA would like to meet and confer about "all options." Milligan explained that "[t]he City has proposed many options" and that "this takes time to process and come to a collective agreement." He stated that FFA would be holding a meeting on October 21, 2017, to discuss "all the proposed items" and that he would be in contact with St. Peter soon after the October meeting to set up a date for the meet and confer process to continue.

6. October 12: Second FFA Proposal as Counter to City's First Proposal

On October 12, FFA provided the City with its second proposal. That proposal consisted of separate responses to the FFA-specific and city-wide proposals in the City's first proposal, i.e., the August 29 proposal. It did not respond to the City's second proposal, i.e., the October 10 three-year proposal, which, as discussed above, constituted the City's last, best, and final offer, or the October 10 one-year 'offer.'[31]

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[29] In the same Staff Report, St. Peter also referred to the City's "1-year Last, Best and Final offer to be effective November 18, 2017." However, there can only be one last, best, and final offer. As discussed above, that last, best, and final offer is the three-year offer, not the one-year 'offer' "to be effective November 18, 2017" if FFA failed to accept the three-year offer by November 17.

[30] I will return to this issue in the legal conclusions below.

[31] But see below, footnote 32.

In response to the FFA-specific proposals in the City's August 29 proposal, FFA rejected the City's proposal to change the Paramedic Coordinator compensation from 3 percent to $250.00 per month and to increase the USAR bonus from $50.00 to $75.00 per month, as well as to require recipients of the USAR bonus to requalify every six months. FFA instead demanded that the Paramedic Coordinator compensation remain at 3 percent, but moved away from its demand that USAR compensation be changed from $50.00 per month to 3 percent. Instead, FFA now demanded that the USAR bonus be increased to $200.00 per month without a re-qualification requirement. FFA also rejected the City's proposal to change the Deputy Fire Marshall assignment to a non-sworn classification with a new salary range once the incumbent retires. FFA countered with two options:

> "*Option 1*- Hire the DFM position from any rank within the SGFFA. Position does not need to be filled from the Captain rank.
>
> "*Option 2*- If the City is going to reduce fire department staffing in fire prevention then we propose to increase minimum staffing to four on *one* of the [C]ity's fire engines. Initial proposal was to increase staffing [on] both fire engines."

Finally, in what it termed its "Last Best and Final Offer: Working Conditions," FFA stated: "The SGFFA does not agree to change its working hours from 0800 to 0700."[32]

[32] According to the evidence before me, the City first proposed this change in its October 10 one-year 'offer.'

FFA's response to the city-wide proposals in the City's August 29 proposal came in the form of a joint "Proposal & Response to 'City-Wide Proposal[s]'" from a newly formed—and apparently short-lived—"San Gabriel Coalition of Public Safety," consisting of FFA, POA, and PMG. This counter stated in full as follows:

> "**A. COALITION-WIDE PROPOSAL:**
>
> "1. 3 year MOU (7/1/17-6/30/20)
>
> "2. Wage increase of 4.5% effective first pay period including July 1, 2017, 4.5% effective first pay period including 7/1/18, and 4.5% effective first pay period including 7/1/19[.]
>
> "3. Health Insurance: the City's Flexible Benefit Program shall remain intact with the maximum City contribution of $1,568 per month. However, the opt-out shall be reduced to one-half of the City's flex benefit contribution, or currently $784. The Coalition is committed to working with the City Council to develop a plan that insures that the City's medical plan is *bona fide* 29 USC § 207(e)(4) and in compliance with *Flores v. City of San Gabriel*. To that end, the Coalition asks that City determine and assess what percentage would be paid out in cash under this proposal, to determine feasibility.
>
> "4. Accept the City's proposal on 'Vacation Maximum Accrual' (item 9), with the following modification: 1) the City will implement procedures that insure that members can utilize vacation such that members will not reach the cap and begin to lose accrual; 2) members do not have to cash out the new 'C bank;' they can cash those out as needed; and 3) any cash out will be based upon the members' rate of pay at the time of cash out, consistent with current practice.

> "**B. COALITION-WIDE RESPONSE TO 'CITY-WIDE PROPOSAL'**
>
> "Accept items 7 (assuming no substantive change), 8, 10, 11 (consistent with above), 13, and 15. All other City-wide proposal[s] are rejected.
>
> "**C. COALITION-MEMBER UNIQUE PROPOSALS**
>
> "The Coalition members may also be submitting, separately, their additional proposals unique to their bargaining unit. The unique proposals, in combination with this Coalition-wide proposal and response, constitute the entirety of the units' response."

In keeping with the last paragraph block-quoted immediately above, FFA in its response to the FFA-specific proposals in the City's August 29 proposal also rejected the city-wide proposal in the same proposal to count overtime in 15-minute increments and to round down between increments.

7. November 7: Third and Final Formal Bargaining Session, First Tentative Agreements

On October 26, St. Peter e-mailed Milligan and Eakman:

> "Since I will be meeting with Council in closed session on 11/1 [I] wanted to check with you to see when we can schedule another meeting. [I] [w]ould like to do it asap after 11/1 as next closed session with Council is scheduled for 11/7."

At the hearing, St. Peter explained that she was "moving forward with the other groups" and wanted to "move forward with Fire as well."

On November 7, the parties held their third and final formal pre-impasse meet and confer session. The City responded to FFA's October 12 proposal by withdrawing

its proposal to change the work start time from 8:00 to 7:00 a.m. and proposing to change the Paramedic Coordinator compensation from 3% to $300.00 per month, an increase of $50.00 as compared to its August 29 "revised" proposal.[33] The City reiterated its offer of "COLAs" of 4% in the first year and 1% in each of the second and third years, but added a "reopener for salary in Year 3," which would have given FFA the "exclusive and sole right to re-open the MOU on the subject of base salary increases" in March of 2019, with the limitation, however, that "[t]he failure to reach mutual agreement is not subject to the impasse procedure; the MOU grievance procedure; unfair labor practice proceedings before the Public Employment Relations Board; and/ or proceedings in the Superior Court." The City and the other three unions later included identical reopener language in their MOUs.

According to a "Negotiation Summary 11/7/17" that St. Peter provided to FFA, the parties on or by that date had reached tentative agreements regarding several items, including a three-year term for the successor MOU, vacation accrual and cash out limits,[34] the catastrophic leave policy, bereavement leave, development of a new

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[33] This would have increased the total compensation of a Paramedic Coordinator in classification Firefighter Step A, Fire Captain Step D, and Fire Captain Step E by 2.5 percent, 0.5 percent, and 0.4 percent, respectively. See *supra*, notes 17 and 18 and accompanying text.

[34] However, a "SGFFA Negotiation Response 11/16/17" indicates that, even at that later date, FFA still rejected the City's proposal of a 360 hours vacation accrual limit and a 56 hour vacation cash out limit. It is unclear when the City first proposed this 360 vacation accrual limit. The proposal first appears in St. Peter's "FFA- - Negotiation Summary 11/1617." By contrast, St. Peter's "FFA- Negotiation Summary 11/7/17" states: "Vac – clarify rates & max accrual." The City's October 10 one-year 'offer' similarly states: "Vacation – clarify accrual rates and maximum accumulation."

employee assistance program, as well as reopeners for a health reimbursement account, a comprehensive MOU, and updated Civil Service Rules. In addition, the City withdrew its demand to change the start time from 8:00 a.m. to 7:00 a.m. FFA's position regarding the remaining open items remained largely unchanged. Thus, FFA continued to demand a salary increase of 4.5% in each of the three contract years.

8. November 16 and 17: Exchange of Further Proposals

On November 13, St. Peter e-mailed Milligan:

> "Just wanted to check in and see if FFA will be providing a response to the City's latest proposal reviewed with you on 11/7/17. I have a Closed Session scheduled with City Council tomorrow @ 5:15 PM and wondering if you will have anything new for me to report to them or if you want to schedule another meeting prior to the Closed Session."

Later on the same day, Milligan e-mailed St. Peter:

> "The SGFFA will be having a meeting on Nov 15 to discuss meet and confer. I will get back to you on Nov 20 to see if we need to schedule a meeting or simply drop off a response. Thank you."

Still later on the same day, St. Peter e-mailed back to Milligan:

> "Any chance you can get back to me by the 16th or 17th? Per the City's memo to the FFA dated October 10, 2017, the City's current offer remains viable only until 11/17/17 @ 5:00PM. After that time, the City will move forward with its one year Last, Best and Final Offer."

The following day, November 14, Milligan responded to St. Peter:

> "The FFA is doing its best with responding in a timely manner. Our perspective is that we made some forward progress during the last meeting held November 7. We would like to continue the good faith bargaining process

> with open dialogue. I will do my best to give you a response on the 16th. Please keep in mind it is challenging to receive a collective response from the entire association in such a short time period. If for some reason the bargaining process exceeds the 11/17/17 deadline proposed by the [C]ity, we hope and request that this date can be extended. Again, I will do what I can to get you something in writing on the 16th. If I can not, I will call you. Thank you for your assistance."

The next day, November 15, 2017, St. Peter responded to Milligan:

> "The City will need your response prior to the deadline at 5:00 PM on November 17, 2017 or we will need to move forward with the City's Last, Best and Final Offer. The memo describing the deadline was provided to the FFA, PMG, and POA on October 10, 2017. Both the PMG and POA have now had a membership meeting and ratified an agreement with the City.[35] It would not be fair to the PMG or POA to now extend the deadline imposed for FFA. We are hopeful that the City and FFA can come to resolution before the deadline on November 17th."

At the hearing, St. Peter explained that she had "definite concerns" at the time because "the City was looking to get resolution with all employees and curb its costs related to the cafeteria plan," because, under *Flores*, "the full value of the [$]1,568" available to employees under that plan "was being considered as part of the base rate

[35] The agreements with PMG and POA were adopted by the City Council on December 19, 2017 and February 6, 2018, respectively. On the former date, the City Council also adopted an agreement with FMG and salary and benefit changes for its unrepresented employees. The agreements and salary and benefits changes entitled employees represented by PMG, POA, or FMG and unrepresented employees alike with salary increases of 4 percent in 2017-18, retroactive to June 24, 2017, and of 1 percent in each of 2018-2019 and 2019-2020.

for overtime purposes" and "there's always a lot of overtime with firefighters because of minimum staffing."

Later on November 15, Milligan responded to St. Peter that he would "be dropping off a response tomorrow 11/16, morning."

On November 16, FFA responded to the City's latest proposals. FFA proposed a two-year MOU with a 5 percent salary increase in each year. FFA rejected the City's proposal to base overtime on actual hours worked but to count vacation "if approved 30 days in advance." FFA also rejected the City's proposals to limit vacation accrual to 360 hours and vacation buy back to 56 hours per year[36] and to change the special assignment pay for the Paramedic Coordinator assignment from 3% to $300 per month. FFA further rejected the City's proposal to increase the USAR bonus from $50 to $75 per month. It countered: "The SGFFA no longer desires to participate in this special assignment, all members are willing to decertify their USAR qualifications." However, FFA accepted the City's proposals regarding the Deputy Fire Marshall classification. Also, according to a "FFA - Negotiation Summary 11/16/17" that St. Peter on that date provided to FFA and that Milligan deemed to "look[] good," the parties on or by that date had reached new tentative agreements on counting overtime in 15-minute increments and rounding down between increments, changing Firefighter Paramedic from an assignment to a classification, requiring the Paramedic Coordinator to maintain a Paramedic certification, and granting witness leave only to

[36] See *supra*, note 34. However, as noted below, St. Peter's "FFA-Negotiation Summary 11/16/17" again notes a tentative agreement on both issues.

City witnesses. Like the earlier summary, this summary also reflected a tentative agreement on vacation accrual and cash out limits.[37]

The next day, November 17, St. Peter e-mailed a counter-proposal to Milligan. The only changes reflected in that proposal were that educational incentive pay, Paramedic Coordinator pay, and paramedic pay for Fire Captains and Fire Engineers would be "increased and changed to flat rate[ ](see attached)"[38] and that the uniform alliance would be increased from $65.00 to $90.00, both effective January 1, 2018. In her cover e-mail message, St. Peter explained:

> "The City cannot provide any additional COLA but is willing to increase the special pays as indicated on Sheet 2 of the excel workbook.[39] The special pays will be converted from a % of pay . . . to a flat rate which represents an increase over t[h]e current amount paid. The uniform allowance will also be increased from $65 to $90/month. These increases . . . will provide some additional increase to all members of FFA."

In apparent contradiction to the statement in her negotiation summaries discussed above that the parties had reached a tentative agreement regarding a vacation accrual limit, St. Peter further explained:

> "I checked the current vacation accruals for FFA. Only 2 members currently have balances in excess of 360 hours, the newly proposed vacation maximum accrual. Therefore,

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[37] See *supra*, note 36. According to the summary, it was the City's position that vacation should count towards overtime if approved 14 days in advance. This is not reflected in any of the City's prior proposals or summaries in evidence.

[38] The attachment is not in evidence and the amount of the flat rate is unknown.

[39] This Excel workbook is not in evidence.

> the City's vacation cash out language s[hould]not be an issue for the vast majority of your members."

St. Peter finally stated:

> "This proposal represents the maximum change the City can provide for FFA. I will be waiting for your response prior to the deadline of 5:00 PM today. Please note that this 3-year offer will expire at 5:00 PM today 11/17/1[7]."

9. November 17: FFA Rejects the City's August 29 Three-Year Proposal as Modified by the Subsequent Exchange of Further Proposals

At 5:12 p.m. on November 17, FFA rejected the City's August 29 three-year proposal as modified by the subsequent exchange of further proposals discussed above. FFA's rejection stated in pertinent part:

> "The main focus of our proposals was to increase our base pay, to keep us from the very bottom of our ten-city survey, and to add a couple of 'special pay' bonuses to members who go above and beyond their job duties. . . .
>
> "While preparing our proposals, a lot of time and through went into the process. Reasons for each item w[ere] given, and given in detail. The [C]ity's response was usually a one-word response . . . No!
>
> "We again have given thought to the [C]ity's latest proposal . . . and, well, as much time as you gave us to come to our decision . . . No!"

(Second and third ellipsis in original.)

10. January 9 and 26, 2018: Mediation Results in Comprehensive Tentative Agreement that Is Later Rejected by FFA Membership

The next day, November 18, Filarsky e-mailed Turner:

> "Yesterday, Dave Milligan informed Theresa St. Peter that [FFA] had rejected the City's last, best, final 3-year offer. The City is now declaring impasse. Would you/[FFA] like to proceed to mediation or would you like to skip it? Please let me know."

On November 29, Joseph Bolander, counsel for FFA, e-mailed Filarsky and informed him that FFA wanted to proceed to meditation.

On January 9, 2018 a mediation was conducted by a Conciliator of the State Mediation and Conciliation Service. At the mediation, the City re-offered its October 10 three-year proposal as modified by the subsequent exchange of further proposals through November 17 and the parties reached tentative agreements on all open items along the terms reflected in these proposals, "except," in St. Peter's words at the hearing, "for the discussion about the paramedic coordinator and USAR," which "was status quo with a possible exception of USAR because the members had talked about decertifying their qualifications." Counsel for FFA and the City signed these tentative agreements. Ratification by the FFA membership was to occur by Friday, January 26, 2018. On that day, St. Peter provided Milligan with draft MOU language reflecting the tentative agreements for his review and asked him when he expected to know the outcome of the ratification vote. However, on Monday, January 29, 2018, Counsel for FFA informed St. Peter that the FFA membership had rejected the proposed MOU and

the tentative agreements and that FFA was requesting factfinding. That request was later withdrawn.

11. February 21 and March 5, 2018: The City Re-Offers the Three-Year Proposal, Which FFA Rejects Again

On February 21, 2018, Filarsky e-mailed Bolander:

> "Met with the City. First, the City Council would prefer not to impose, but is fully prepared to do so. In one last ditch effort to avoid a one-year imposition, the City Council is making the same three (3) year offer rejected by the Association, effective January 1, 2018 (rather than July 1, 2017). . . . This three (3) year offer must be accepted by no later than Tuesday, March 6, 2018 at 5 pm. If the three (3) year offer is rejected, the City will proceed with unilateral implementation on March 20, 2018. Please call or email if you have any questions."

On March 5, 2018, Bolander e-mailed Filarsky to inform him that "[FFA] has declined to accept the City's offer of the three-year deal."

12. April 3, 2018: The City Imposes Terms and Conditions of Employment

On April 3, 2018, the City Council adopted a resolution "to implement the Last, Best and Final Offer as terms and conditions of employment related to the [FFA] effective July 1, 2017 through June 30, 2018 . . . as indicated in the attached documents." Attached to the resolution was a document captioned "1-Year Last, Best and Final [¶] Terms and Conditions of Employment" (TCEs) that, with certain exceptions, spelled-out and formalized the provisions of the October 10 one-year 'offer.'

Article 1 of the TCEs provided that "[t]hese terms and conditions of employment shall be effective July 1, 2017 and shall remain in effect until June 30, 2018."

Article 2 of the TCEs provided that "[e]ffective April 14, 2018, the first pay period following City Council approval, employees shall receive a two percent (2%) increase in base salary . . . ."

Article 3 of the TCEs provided inter alia that "[t]he standard shift shall consist of forty-eight (48) consecutive hours, which commences at 0700 and ends at 0700 hours on the second day," despite the fact that, on November 7, 2017, the City had withdrawn the demand to change the work start time from 8:00 to 7:00 a.m.

Article 4 of the TCEs provided inter alia that "[f]or purposes of overtime computation, time worked shall only include actual hours worked" and that "[t]he only exception is that vacation hours approved by the Fire Chief fourteen (14) days in advance, or more, shall count as hours worked." Neither the October 10 three-year offer nor the one-year 'offer' contained the latter provision, which first appears in St. Peter's "FAA - Negotiation Summary 11/16/17."[40]

Article 5 of the TCEs eliminated the cash-in-lieu-of-benefits option and replaced the predecessor MOU's Flexible Benefit Program with the Health Insurance provisions outlined in the October 10 one-year 'offer.'

Article 6 of the TCEs provided inter alia that "[e]ffective April 14, 2018, . . . the maximum vacation accrual rate for all employees shall be 504 hours," despite the fact that the expired MOU allowed bargaining unit employees to carry over only a maximum of 192 hours of accrued vacation to the next year, the October 10 one-year

[40] See *supra*, note 37.

'offer' had only envisioned to "clarify . . . maximum [vacation] accumulation," and from at least November 16, 2017, onward, the City had demanded a "max[imum] [vacation] accrual of 360 hours."

Article 7, 8, and 9 of the TCEs implemented the changes envisioned in the October 10 one-year 'offer' regarding sick and bereavement leave and the new Fire Fighter Paramedic and Deputy Fire Marshall classifications.

Article 10 of the TCEs changed the Paramedic Coordinator compensation from $50 in the predecessor MOU to $250 per month as envisioned in the City's October 10 one-year 'offer.' However, on November 7, 2017, the City had increased its offer to $300 per month.

Article 11 and 12 of the TCEs implemented changes envisioned in the October 10 one-year 'offer' regarding USAR compensation and witness leave pay.

Article 13 of the TCEs provided: "The City and FFA will meet and confer regarding the development of a comprehensive MOU, update of the City's Civil Service Rules and Regulations, Catastrophic Leave Administrative Policy, changes to the City's Employee Assistance Program (EAP) and implementation of a Health Reimbursement Account."

13. Summary

Because the bargaining history detailed above is confusing, it is summarized in table-form below. Several details remain obscure. For example, it is unclear whether the City's first offer, dated August 29, 2017,[41] already envisioned retroactivity for the

[41] Reference here and in the table is to the "2017 FFA Proposals – Revised 8/29/17."

salary increases proposed therein. St. Peter testified that the salary increases contained in the City's second and last, best, and final offer, dated October 10, 2017,[42] "would *still* be retroactive to the first pay period in July of 2017 (italics supplied). That suggests that the City envisioned retroactivity already on August 29, 2017, but the evidence is inconclusive. It is also unclear when the City first proposed a vacation accrual maximum of 360 hours. This proposal first appears unambiguously in St. Peter's "FFA – Negotiation Summary 11/16/17," which lists "Vacation – max accrual of 360 hours." Her "FFA – Negotiation Summary 11/7/17" lists "Vac – clarify rates & max accrual" with a handwritten notation "360" next to it, but there was no testimony or other evidence as to who made that notation and when. Neither of these details is of significance with respect to the legal analysis that follows.[43]

[42] Reference here and in the table is to the three-year offer that the City extended to FFA on that date. The City's "1-Year Last, Best and Final offer" of the same date is not reflected in the table, given that—as discussed above—it did not constitute an offer.

[43] In the table, the first line in each proposal refers to the duration of the proposed agreement or imposed terms and conditions of employment, the second refers to the salary increases for each year, the third to special assignment pay (SAP), the fourth to the health benefits allowance, the fifth to the vacation accrual maximum, and the sixth to the shift start.

	4/12/17	8/29/17	10/10/17	10/12/17	11/7/17	11/16/17	11/17/17	4/3/18
Formal Bargaining Session	1st	2d			3d			
FFA Proposals	3 years 5%, 5%, 5% SAP: 3%			3 years 4.5%, 4.5%, 4.5% SAP: PC 3%, USAR $200 cash out up to $784		2 years 5%, 5% SAP: PC 3% decert. USAR cash out up to $784		
City Proposals (next seven columns) & Imposed Terms and Conditions (eighth column)		3 years 2%, 1%, 1% SAP: PC $250, USAR $75 “use it or lose it” clarify vacation accrual max.	3 years 4%, 1%, 1% retro to 7/17 SAP: PC $250 USAR $75 “use it or lose it” clarify vacation accrual max. 7:00 a.m. shift start		3 years 4%, 1%, 1% retro to 7/17 SAP: PC $300 USAR $75 “use it or lose it” clarify vacation accrual max. withdrawn		3 years 4%, 1%, 1% retro to 7/17 SAP: PC $300 USAR $75 “use it or lose it” 360 hrs. vacation accrual max. withdrawn	1 year 2% no retro pay SAP: PC $250 USAR $75 “use it or lose it” 504 hrs. vacation accrual max. 7:00 a.m. shift start

ISSUES

1. Did the City fail to meet and confer in good faith with FFA, in violation of MMBA sections 3505 and 3506.5, subdivision (c), when it engaged in conduct that included, but was not limited to, the following:

a. entering successor MOU negotiations with a "take it or leave it" attitude, or

b. on October 10, 2017, and again on February 21, 2018, proposing a three-year agreement with a 4 percent salary increase in the first year and successive 1 percent salary increases in each of the second and third year and, on April 3, 2018, imposing a one-year agreement with a 2 percent salary increase?

2. Did the City discriminate against bargaining unit employees because of their exercise of rights guaranteed by the MMBA, in violation of MMBA sections 3506 and 3506.5, subdivision (a), when, on April 3, 2018, it imposed the one-year agreement described in 1(b) above because, on March 5, 2018, the bargaining unit employees had rejected the proposed three-year agreement described in 1(b) above?

CONCLUSIONS OF LAW

A. Failure or Refusal to Meet and Confer in Good Faith

The Complaint alleges that the City engaged in bad faith or surface bargaining over a successor MOU with FFA. Public agencies and recognized employee organizations each have a duty to meet and confer in good faith over matters within the scope of representation, as defined in MMBA section 3504. (MMBA, § 3505.)

Good faith in bargaining is a subjective attitude that requires a genuine desire to reach an agreement. (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 (*City of Placentia*), citing *NLRB v. MacMillan Ring-Free Oil Company, Inc*. (9th Cir. 1968) 394 F.2d 26, *NLRB v. Mrs. Fay's Pies* (9th Cir. 1965) 341 F.2d 489.)[44] By contrast, bad faith in bargaining, also known as surface bargaining, describes the subjective attitude of a respondent who approaches its bargaining obligations under MMBA section 3505 without any actual intent to reach an agreement. At its essence, surface bargaining occurs when a party "merely goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement." (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 13, citing *Inter-Polymer Industries* (1972) 196 NLRB 729, 759-760.)

PERB evaluates surface bargaining allegations under a "totality of conduct" analysis, which examines the parties' conduct as a whole to ascertain their subjective intent. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 12-13, citing *City of Placentia*, *supra*, 57 Cal.App.3d at p. 25, other citations omitted.) Under this analysis, PERB typically looks for the presence or absence of common "indicia" of bad faith, including, but not limited to, the following: (1) entering negotiations with a take-it-or-leave-it attitude (*General Electric Co.* (1964) 150 NLRB 192, *enfd. NLRB v. General*

[44] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 13, fn. 4.)

Electric Co. (2d Cir. 1969) 418 F.2d 736, *cert. den.* 397 U.S. 965); (2) failure to exchange reasonable proposals, offer counterproposals, act on the other side's proposals, explain positions, and attempt to reconcile differences (*City of San Jose* (2013) PERB Decision No. 2341-M (*San Jose*); *Compton Community College District* (1989) PERB Decision No. 728 (*Compton*); *Gonzales Union High School District* (1985) PERB Decision No. 480 (*Gonzales*); *Jefferson School District* (1980) PERB Decision No. 133; (3) reneging on ground rules (*Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton*)); (4) insistence on conditions before starting and/or during negotiations (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485 (*Petaluma*); *San Jose*; *Lake Elsinore School District* (1986) PERB Decision No. 603); (5) negotiator's lack of authority which delays and/or thwarts the bargaining process (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22; *Ventura County Community College District* (1998) PERB Decision No. 1264; *Oakland Unified School District* (1983) PERB Decision No. 326 (*Oakland*); *Stockton*); (6) refusal to provide information (*Stockton*); (7) dilatory or evasive conduct and cancelling, missing, or failing to prepare for scheduled negotiating sessions (*Gonzales*; *Oakland*; *Stockton*); (8) refusing to discuss a mandatory subject of bargaining or conditioning its discussion on prior agreement on other subjects (*Petaluma*; *San Jose*; *San Ysidro School District* (1980) PERB Decision No. 134; (9) committing separate contemporaneous unfair practices at or away from the table (*San Jose*; *Beaumont Unified School District* (1984) PERB Decision No. 429); (10) premature or unfounded declaration of impasse (*County of Riverside* (2014) PERB Decision No. 2360-M (*Riverside*); *San Jose*; *Regents of the University of*

California (1985) PERB Decision No. 520-H (*Regents*)); and (11) making regressive proposals, attempting to modify previously settled issues, or reneging on TAs (*Campbell Municipal Employees Association v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *City & County of San Francisco* (2009) PERB Decision No. 2064-M; *Charter Oak Unified School District* (1991) PERB Decision No. 873; *Compton*; *Alhambra City and High School Districts* (1986) PERB Decision No. 560; *Stockton*; *Santa Ana Unified School District* (1978) PERB Decision No. 73; *Pajaro Valley Unified School District* (1978) PERB Decision No. 51).

In general, the Board has held that one indicator is typically not enough to establish a finding of overall bad faith. (See *Contra Costa Community College District* (2005) PERB Decision No. 1756, p. 3, citing *Chino Valley Unified School District* (1999) PERB Decision No. 1326 and *Regents*, *supra*, PERB Decision No. 520-H.) However, it remains possible that a single action could have such a profound and detrimental effect on the bargain process as a whole that it obstructs the possibility of an agreement in good faith. (*San Jose*, *supra*, PERB Decision No. 2341-M, pp. 18-19, 32-33.)

Moreover, some individual actions are considered "per se" violations of the duty to bargain because of their inherent ability to frustrate the bargaining process and undermine the authority of exclusive bargaining representatives. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 13, citing *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, p. 823.) Per se violations generally involve conduct that is contrary to the procedures for bargaining or the express language or purposes of the statute, irrespective of the party's intent. (*Fresno County In-Home Supportive*

Services Public Authority (2015) PERB Decision No. 2418-M, p. 13 (*Fresno)*, citing *San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 14-17, other citations omitted.)

In this case, FFA contends that the City's bargaining conduct, viewed in its totality between February 2017 and April 2018, demonstrates an overall pattern of bad faith. I agree, although for reasons that are in large part different from those offered by FFA.

1. The City Did Not Enter Negotiations with a Take-It-or-Leave-It Attitude

The Complaint alleges that the City entered negotiations with a take-it-or-leave-it attitude when, early in negotiations, Filarsky stated that the meet and confer process could be done "incrementally" or the City could "cut to the chase" and give FFA the best offer it would make. "Entering negotiations with a 'take-it-or-leave-it' attitude is evidence of bad faith," but "differentiating this type of surface bargaining from lawful 'hard bargaining' is a difficult and fact-intensive inquiry." (California Public Sector Labor Relations, Ch. 6, § 6.03[3][f] (Matthew Bender); see *City of San Ramon* (2018) PERB Decision No. 2571-M, p. 8 (*San Ramon*).) The duty to bargain does not compel either party to reach agreement or make concessions. (*County of San Luis Obispo* (2015) PERB Decision No. 2427, p. 29.) "An employer is not required to lead with his best offer; he is free to bargain." (*NLRB. v. Katz* (1962) 369 U.S. 736, 745; cf. *United Technologies. Corp.* (1989) 296 NLRB 571, 572.) The Board has differentiated lawful hard bargaining from improper take-it-or-leave-it tactics based primarily on whether the accused party has provided an adequate explanation for pursuing its inflexible

position. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 8.) Thus, "if a party's inflexible position is fairly maintained and rationally supported, such facts do not amount to bad faith, absent other evidence." (*Ibid*.) Here, the evidence does not support the conclusion that the City strayed beyond a lawful "hard bargaining" approach, at least not early in negotiations through the City's "cut to the chase" offer.

The dictionary definitions of the phrases "take it or leave it" and "cut to the chase" do not support FFA's claim. According to the Cambridge Dictionary, to "take it or leave it" means to "either accept something without any changes or refuse it." (*Take it or leave it*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/take-it-or-leave-it.) The Merriam Webster Dictionary similarly states that "take it or leave it" is "used to say that one will not make a better offer than the offer one has made." (*Take it or leave it*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/take%20it%20or%20leave%20it.) By contrast, "cut to the chase" means "to talk about or deal with the important parts of a subject and not waste time with things that are not important" (*Cut to the Chase*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/cut-to-the-chase) or simply "to get to the point" (*Cut*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/cut). According to these dictionary definitions, an employer does not exhibit a take-it-or-leave-it attitude simply by offering to "cut to the chase," because whereas the former leaves no room for negotiations, the latter does.

Nor has FFA proven that St. Peter or Filarsky ever stated, as alleged in the Complaint, that under the "cut to the chase" approach, the City would "give Charging

Party the best offer it will make." To the contrary, Golterman testified that when asked to define what "cut to the chase" meant, the City's representatives failed or refused to do so and only replied that "That's what you really want." Therein lies no implication that "cut to the chase" really meant "take it or leave it."

St. Peter's and Filarsky's testimony about their understanding of the phrase "cut to the chase" also lends no support to this claim. St. Peter testified that "cut to the chase . . . , from the City's perspective, mean[t] we would put our best offer on the table, [i.e.,] what we had authority from Council to offer *at that point*." (Italics supplied.) Filarsky similarly testified that, under the "cut to the chase" approach, "once the City Council gave me authorization to negotiate[,] [w]e would put that authorization on the table sooner rather than later." According to the Filarsky, he explained to the unions, including FFA, at the time that "by virtue of using the cut to the chase approach they were not precluded from submitting additional offers to the City Council, which would then be shared with the City Council, [and] which the City Council could chose to accept or reject." He further explained to the unions that he was not the decision maker with respect to "the amount of money that the City wanted to spend," which was "a decision that had to be made by the City Council."

St Peter's and Filarsky's testimony was credible in this regard, based on their general demeanor and ability to recall details. Their understanding of the phrase "cut to the chase," as communicated to FFA at the time, left room for good faith bargaining and the offer to engage in "cut to the case" negotiations is therefore not evidence of a take-it-or-leave-it attitude and bad faith bargaining. The City's offer to "cut to the chase" is therefore not evidence of bad faith or surface bargaining.

2. The City Did Not Engage in Regressive Bargaining by Imposing a 2 Percent Salary Increase Rather than the Previously Offered 4 Percent

The Complaint alleges that the City failed or refused to meet and confer in good faith with FFA when, having previously offered a 4 percent salary increase in the first year of a three-year agreement, "[i]n or around April 2018, [it] imposed a one-year agreement with a two percent wage increase," i.e., that the City engaged in regressive bargaining. Both the language of the MMBA, as interpreted by PERB, and FFA's own bargaining conduct negate this allegation.

MMBA section 3505.7 provides in pertinent part: "After any applicable mediation and factfinding procedures have been exhausted, . . . a public agency . . . *may*, after holding a public hearing regarding the impasse, implement its last, best, and final offer . . . ." (Italics supplied.) The Board has observed that "[t]his language is permissive, not mandatory," and that "[t]herefore, while the parties are properly at impasse, the [employer] is not obligated to implement its last, best, and final offer." (*City of Clovis* (2009) PERB Decision No. 2074-M, p. 5, fn. 5.) Rather, "[t]he employer's only obligation is to refrain from implementing changes not reasonably comprehended in its [last, best, and final offer]." (*County of Tulare* (2015) PERB Decision No. 2461-M, p. 17.) It may also refrain from making any changes at all and "simply maintain[] the status quo after impasse." (*Ibid*.) This is "especially" so "where, as here, the union has not accepted the [last, best, and final offer] and has manifested clear objection to the proposed language." (*Ibid*.)

Here, I have found above that the City's proposed three-year agreement, with a 4 percent salary increase in the first year, constituted the City's last, best, and final

offer. Post-impasse, the City was not obligated to implement this last, best, and final offer or the 4 percent salary increase contained within it. It could simply have maintained the status quo after impasse and implemented no salary increase at all. However, because a 2 percent salary increase is more than the status quo but less than 4 percent salary increase contained in the City's last, best, and final offer, it is reasonably comprehended in that last, best, and final offer, and the City was well within its right to implement this change. This was not regressive bargaining.

Moreover, what is good for the goose is good for the gander. As part of the totality of circumstances relevant to a surface bargaining charge, PERB may consider the charging party's own conduct, regardless of whether the respondent has filed a countercharge. (*Fresno*, *supra*, PERB Decision No. 2418-M, p. 52; *San Jose*, *supra*, PERB Decision No. 2341-M, p. 41.) If it was regressive bargaining for the City to first propose a three-year agreement with a 4 percent salary increase in the first year and a 1 percent salary increase in each of the second and third year, but to later implement one-year terms including a 2 percent salary increase in that year, then it also was regressive bargaining for FFA to first propose, on October 12, 2017, a three-year agreement with a salary increase of 4.5 percent in each of the three years, but to later propose, on November 16, 2017, a two-year agreement with a 5 percent increase in each of the two years.

At the hearing, St. Peter explained the difference between offering a three-year agreement with a 4 percent increase in year one and a 1 percent increase in each of years two and three, on the one hand, and implementing one-year terms with a 2 percent increase in that year, on the other. She stated:

> "That was because the City really sees a value in . . . having all of the groups on the same schedule and having a long-term arrangement with the employees. . . . We were offering all employee groups a three-year deal, and that three year deal was based on a four percent in the first year, one percent in the second year, and one percent in the third year.
>
> "So, for us to offer that same amount and not have a three-year deal we were looking to do, we were saying for long-term stability, something that the City can count on, we know what our expenditures are going to be forward, that the four[] [percent] made sense. Less than that, we then offered the two percent."

In other words, the City was willing to offer a 4 percent increase for 2017-2018 if it could count on an increase of only 1 percent in each of 2018-2019 and 2019-2020. But it would offer only a 2 percent increase for 2017-2018 if it was facing the likely possibility that FFA would demand increases in excess of 1 percent in 2018-2019 or 2019-2020.[45]

As similar rationale presumably explains FFA's change in position: It was willing to live with only a 4.5 percent increase in each of 2017-2018 and 2018-2019 if it could also count on a 4.5 percent increase in 2019-2020. But it would insist on a 5 percent

[45] MMBA section 3505.7 provides in pertinent part: "The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation . . . ." FFA's claim that "there was nothing preventing the City from imposing a three year contract" is in direct conflict with this statutory language.

increase in each of 2017-2018 and 2018-2019 if it was facing the equally likely possibility that the City would resist an increase of 4.5 percent in 2019-2020.

The City's stated rationale for the change in its position is as sound as FFA's presumed rationale for the change in its position. Neither change in position reflects bad faith bargaining.

3. The City Imposed a Durational Term and an MOU

The Complaint alleges that the City failed and refused to meet and confer in good faith with FFA when, "[i]n or around April 2018, [it] imposed a one-year agreement."[46] Unlike the evidence of take-it-or-leave-it and regressive bargaining tactics, the evidence here indeed points to bad faith or surface bargaining.

MMBA section 3505.7 provides in pertinent part: "After any applicable mediation and factfinding procedures have been exhausted, . . . a public agency . . . may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, *but shall not implement a memorandum of understanding*." (Italics supplied.)

In *Fresno*, *supra*, PERB Decision No. 2418-M, the Board held: "To effectuate the legislative purpose of MMBA section 3505.7, and to avoid precisely the kind of confusion created in the present case, we hold that an employer has a duty to

[46] The language just quoted as giving rise to the allegation that the City imposed a durational term and an MOU is part and parcel of the language quoted earlier as giving rise to a separate regressive bargaining allegation. I see no reason why the same language, or—as here—a part of it, could or should not be read as giving rise to two different allegations that are logically contained within it. Moreover, as discussed *infra*, note 47, even if this allegation had not been raised in the Complaint, I could still consider it as evidence of surface bargaining. (*City of Davis* (2018) PERB Decision No. 2582-M, pp. 10-13.)

segregate or excise from its imposed terms language purporting to 'establish a memorandum of understanding' or other agreement, *as well as language that is reasonably susceptible to such an interpretation*." (*Id*. at p. 40 [italics supplied].) The Board also held that because an employer's unilateral post-impasse imposition of such language violates the purpose of MMBA section 3505.7, it constitutes a per se violation of the duty to bargain, and "what motivated the [employer] to implement that provision or whether it took effect is [thus] not germane to this analysis." (*Ibid*.; see also *id*. at p. 13 (stating that "[p]er se violations generally involve conduct that is contrary to the procedures for bargaining or the express language or purposes of the statute, irrespective of the parties intent" [citations omitted]).)

In *San Ramon*, *supra*, PERB Decision No. 2571-M, the Board further developed the holdings in *Fresno*. At issue in *San Ramon* was inter alia the city's imposition of the following language as part of its last, best, and final offer:

> "This Memorandum of Understanding shall remain in full force and effect from July 1, 2011 through June 30, 2012. During the term of this Agreement, the City may initiate negotiations concerning the impacts of management rights decisions, amendments to this Agreement necessitated by a change in law and/or legal judgement or a concern about the City's budget or any other negotiable subject."

(*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 12.)

The Board held that "the City violated the[] principles [established in *Fresno* as quoted above] by purporting to impose an MOU, by imposing a durational term, and by imposing a reopener provision that was available, on its face, only to the City." (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 13.) The Board clarified that imposition

of any one of these three terms, and specifically imposition of a durational term, by itself constitutes a per se violation of the duty to bargain: "The City *also* violated its duty to bargain in good faith by imposing a durational term, because unilaterally imposing new terms for a set duration places an obstacle in the path of good faith bargaining." (*Id*. at p. 14 [italics supplied], citing *Roosevelt Memorial Medical* Center (2006) 348 NLRB 1116, 1117 and *City of Santa Rosa* (2013) PERB Decision No. 2308-M, p. 5.) "Our precedents treat this allegation as a per se violation for which the employer's motive or intent is irrelevant." (*Ibid*. citing *Fresno*, *supra*, PERB Decision No. 2418-M, pp. 2-3, 15, 37-40.)

In fact, the Board could not have been clearer: "We . . . hold that . . . an employer cannot impose new terms and conditions for a set duration." (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 14.) This prohibition covered the imposition of the one-year term, "from July 1, 2011 through June 30, 2012," that was at issue in that case. (*Id*. at pp. 12, 14.)

The same prohibition also covers the similar imposition of the one-year term at issue in the present case. Accordingly, had this been alleged in the Complaint as a separate violation, I would conclude that the City committed a per-se violation of its duty to bargain when, on April 3, 2018, it imposed its "1-Year Last, Best and Final Terms and Conditions of Employment," of which "Article 1" was entitled "Term" and provided that "[t]hese terms and conditions of employment shall be effective July 1, 2017 and shall remain in effect until June 30, 2018,". (See *Fresno*, *supra*, PERB Decision No. 2418-M, p. 40, and *San Ramon*, *supra*, PERB Decision No. 2571-M, p. 14.) As it was not so alleged in the Complaint, I cannot reach that conclusion. (See

City of Roseville (2016) PERB Decision No. 2505-M, p. 15 (*Roseville*) ["Where conduct allegedly constitutes *both* evidence of the respondent's bad faith *and* a separate unfair practice, the essential facts for each theory of liability should be stated in the complaint and identified as separate unfair practices" (italics in original, citations omitted)].) As it stands, this conduct is an indication of bad faith or surface bargaining under the totality of conduct test. (See *San Jose*, *supra*, PERB Decision No. 2341-M, p. 23.)

Although the April 3 "1-Year Last, Best and Final Terms and Conditions of Employment" were not labeled an agreement, MOU, or the like, and although none of the other documents in the record so label them, the City nevertheless seems to have been operating under the assumption that these imposed terms and conditions did, in fact, constitute an agreement. Filarsky, counsel to the City and a member of its bargaining team at the relevant times, testified at the hearing that "in a situation where we have to unilaterally implement, we can only unilaterally implement a one-year agreement." He further testified: "You have a choice of unilaterally implementing your first year of your multi-year agreement or unilaterally implementing a separate one-year agreement." And in its Post-Hearing Brief, the City claims: "The City was privileged to unilaterally adopt the one-year agreement because the parties had exhausted post-impasse procedures." (Capitalization omitted.)

Thus, the City, by virtue of imposing a durational term, appears to have been a victim of "precisely the kind of confusion" that the Board intended to eliminate when it first held in *Fresno* that "an employer has a duty to segregate or excise from its imposed terms language purporting to 'establish a memorandum of understanding' or

other agreement, as well as language that is reasonably susceptible to such an interpretation" (*Fresno*, *supra*, PERB Decision No. 2418-M, p. 40) and when it later held in *San Ramon* that "an employer cannot impose new terms for a set duration" (*San Ramon*, *supra*, PERB Decision No. 2571-M). Unsurprisingly, FFA appears to be a victim of the same confusion, stating in its Post-Hearing Brief that "[t]he consequence of not accepting th[e] [October 10, 2017 three-year offer] was that the City would reduce the salary increase, impose its terms regarding special[] [assignment pay], and impose a one-year agreement."

Matters are not improved by the inclusion of "Article 13," entitled "Re-Openers," in the April 3 "1-Year Last, Best and Final Terms and Conditions of Employment," which stated in pertinent part that "[t]he City and FFA will meet and confer regarding the development of a comprehensive MOU." This provision is reasonably susceptible to an understanding that the parties were to undertake the clerical task of integrating the imposed one-year terms with the surviving terms from the expired MOU into "a comprehensive [one-year] MOU," rather than a substantive reopener. Such an understanding is all the more reasonable as a similar provision was already included in the City's August 29 three-year offer, specifically the "City-Wide Proposals," which also stated: "Comprehensive MOU – reopener to complete." Only a "clerical" rather than a "substantive" reopener makes sense in the context of the latter offer, and it therefore is reasonable that only a "clerical" rather than a "substantive" reopener was intended also in the April 3 "1-Year Last, Best and Final Terms and Conditions of Employment." However, a "clerical" reopener presumes the existence of an MOU that

merely has to be assembled from the imposed terms and the surviving terms. That MOU would have been imposed by the City, in violation of MMBA section 3505.7.

As in the case of the imposition of a durational term, had the imposition of an MOU been alleged in the Complaint as a separate violation, I would conclude that the City committed a per se violation of its duty to bargain in good faith with FFA by this conduct. Because it was not so alleged in the Complaint, I cannot reach that conclusion. (See *Roseville*, *supra*, PERB Decision No. 2505-M, p. 15.) Nevertheless, this conduct is a further indication of bad faith or surface bargaining under the totality of conduct test. (See *San Jose*, *supra*, PERB Decision No. 2341-M, p. 23.)

4. The City Made an Exploding Offer Without Adequate Justification

On October 10, 2017, St. Peter e-mailed Milligan a three-year proposal, with a salary increase of 4 percent in 2017-2018 and increases of 1 percent each in 2018-2019 and 2019-2020. St. Peter's message included a separate one-year proposal with a salary increase of 2 percent in 2017-2018. As discussed in the Findings of Fact above, although the City labeled the one-year proposal its "Last, Best, and Final Offer," it was actually the three-year proposal that constituted its last, best, and final offer and the one-year proposal constituted no more than a statement of what the City intended to implement should FFA fail to accept the three-year proposal by a date and time specified by the City. St. Peter wrote:

> "The City's current offer will remain viable until November 17, 2017 at 5:00 PM; after that date it will expire, replaced by the attached one[-](1) year offer. If you would like to Meet and Confer prior to November 17, 2017, please let me know as soon as possible.

> "If we are unable to reach agreement by that date and time, the City will move forward with the attached Last, Best, and Final Offer."

The City thus made an exploding offer. "An exploding offer is one that expires on a given date." (*City of Arcadia* (2019) PERB Decision No. 2648-M, p. 2, fn. 3 (*Arcadia*), citing Abramson, *Fashioning an Effective Negotiations Style: Choosing between Good Practices, Tactics, and Tricks* (2018) 23 Harv. Negot. L. Rev. 319, 333.) As the Board recently held in *Arcadia*, "a party cannot in good faith make an exploding proposal unless it can adequately explain a legitimate basis for doing so." (*Id*. at p. 39.) As explained below, the City failed to offer a legitimate basis for making the exploding offer. While making the exploding offer under these circumstances was not a per se violation, it is an indicator of bad faith. (*Id*. at p. 43.)[47]

[47] In its Post-Hearing Brief, the City argues that the Complaint gave it insufficient notice of this "theory of liability." However, the City's exploding offer is considered here not as a new theory of liability, but as potential evidence of surface bargaining, a theory of liability that was clearly articulated in the Complaint. The Board held in *Davis*, *supra*, PERB Decision No. 2582-M that "the unalleged violation doctrine does not apply to allegations of conduct that may serve as potential evidence in support of a surface bargaining allegation." (*Id*. at pp. 11-12, citing *Roseville*, *supra*, PERB Decision No. 2505-M, p. 14.) The Board also noted that "the typical surface bargaining complaint alleges that the respondent's conduct, *including but not limited to specifically pleaded acts or evidence*, establishes a failure or refusal to meet and confer in good faith," and that "[t]his pleading practice . . . adequately 'identifies the specific acts or indicia that are sufficient to state a prima facie case, while also giving respondent notice that . . . these acts or indicia are not exhaustive of the evidence the charging party may present at hearing.'" (*Id*. at p. 12, italics supplied, second ellipsis in original, quoting *Roseville* at p. 12.) The same pleading practice was also followed in the instant case, and the City's argument is therefore without merit. For the same reasons, it is also appropriate for me to consider the additional indicia of bad faith discussed in the next two subsections although they were not explicitly mentioned in the Complaint.

The Board explained in *Arcadia*:

> "Our holding is rooted in the fact that regressive bargaining—making proposals that are, as a whole, less generous to the other party than prior offers—manifestly moves bargaining parties further away from agreement and therefore indicates bad faith unless such regressive bargaining is supported by an adequate explanation. (*Anaheim Union High School District* (2016) PERB Decision No. 2504, adopting proposed decision at p. 43.) . . . . [¶] An exploding offer should be held to the same standard, as it telegraphs a threat to move the parties further apart unless the other party accedes to a particular unilaterally-established deadline. . . . If a party was free to make an exploding offer at any time and offer no justification for threatened or actual regressive bargaining other than the other side's failure to accept the proposal by a given deadline, then exploding offers would amount to an exception that swallows the regressive bargaining rule."

(*Id*. at p. 39.) The Board further explained that "when a party issues an exploding offer without an adequate explanation as to why its bargaining position should become less generous on a given date in the future, it effectively imposes its own ground rule and deadline, evidences unlawful inflexibility, and manifests a take-it-or-leave-it attitude." (*Id*. at p. 40, citing *San Ramon*, *supra*, PERB Decision 2571-M, pp. 8-10.)

For an illustration of a permissible, because adequately explained, exploding offer, the Board pointed to *County of Solano* (2014) PERB Decision No. 2402-M (*Solano*), in which the ALJ had declined to find an employer engaged in bad faith when it made an exploding wage proposal and ultimately withdrew the offer after the union did not accept it by the employer's deadline. (*Arcadia*, *supra*, PERB Decision

No. 2648-M, p. 41, citing *Solano*, adopting proposed decision at pp. 10, 15 & 22-23.)[48]

The Board in *Arcadia* summarized the exploding offer issue in *Solano* as follows:[49]

> "The employer in *Solano* entered negotiations with a significant budget deficit, and from the outset the employer insisted on concessionary proposals that would substantially narrow the budget gap; although it included the exploding wage increase in its package proposal, this increase was more than offset by the employer's concessionary demands on pension, health benefits, and furloughs. (*Solano*, *supra*, PERB Decision No. 2402-M, adopting proposed decision at p. 8.) The employer explained its exploding wage offer, and its eventual withdrawal of that proposal, in a legally sufficient manner: the employer could only afford the wage increase if it started the overall concessionary package by a given date, and when that date elapsed with the employer still unable to begin reaping any net savings, it had to pay off its continuing structural deficit by taking the wage increase off the table. (*Id.*, adopting proposed decision at pp. 22-23.) This rationale adequately supported the employer's exploding offer, as the MMBA required it to maintain the status quo until impasse or agreement, and it could only implement retroactive wage or benefit cuts via agreement, but not via imposition."

(*Arcadia*, *supra*, PERB Decision No. 2648-M, pp. 41-42.)

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[48] "Because neither party excepted to this finding, it was not before the Board and the ALJ's finding is not precedential. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, pp. 7-8, fn. 6 [even where Board adopts a proposed decision, ALJ conclusions are binding only on the parties if there are no exceptions to such conclusions and the Board declines to reach the issues sua sponte]; accord *County of Orange* (2018) PERB Decision No. 2611-M, p. 2, fn. 2; *City of Torrance* (2009) PERB Decision No. 2004, p. 12.)" (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 41.)

[49] Because the ALJ's findings in *Solano* regarding the exploding offer are non-precedential (see *supra*, fn. 48), *Arcadia*'s description of those finding has more weight than those findings themselves, if, indeed, the latter have any weight.

The Board cautioned in *Arcadia* that, when an employer's net proposals are not concessionary, as they had been in *Solano*, different considerations apply:

> For instance, when an employer offers a retroactive wage increase, its initial lump sum wage cost invariably escalates the longer negotiations continue, but many employers in such circumstances can set aside the money needed to pay the retroactive wage increase as time goes on without a ratified contract. A party asserting that it cannot set aside money in this manner, or asserting a different basis for its exploding offer, must be in a position to prove its rationale if requested to do so."

(*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 42, citing *Davis*, *supra*, PERB Decision No. 2582-M.)

Similarly, "[PERB] precedent generally rejects an employer's contention that an upcoming budget deadline constitutes exigent circumstances allowing the employer to accelerate negotiations unilaterally." (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 10, citing *City of Selma* (2014) PERB Decision No. 2380-M, p. 20 (*Selma*).) And in *Arcadia* itself, the Board found insufficient the employer's stated reason for establishing a November deadline for its exploding offer, i.e., that the City would be holding a City Council election the following spring, given the significant time lag between the City's unilaterally-imposed deadline and the City Council election and the inherent uncertainty as to whether the eventual election would lead to a new Council majority favoring a less generous bargaining position. (*Arcadia*, *supra*, PERB Decision No. 2648-M, p. 43.)

Here, the only reason for the City's exploding offer given by St. Peter when she extended that offer to FFA was that "[t]he City will be presenting the compensation

package for all unrepresented employees to the City Council for approval at the November 7, 2017 City Council Meeting" and that "[t]he City is also looking for resolution of the Meet and Confer process with all represented City bargaining units."

In so far the first statement quoted above can be reasonably read to suggest that the City's non-bargaining dealings with unrepresented employees established a timeframe for its bargaining dealings with represented employees, this would itself be evidence of bad faith bargaining, especially as there is an implication by omission in St. Peter's testimony that the issues that took center stage in negotiations with FFA—the salary increases and the abolition of the Flexible Benefit Program—did not similarly take center stage in the meetings with the focus group of unrepresented employees.[50] The strong suspicion is that the City presented these key changes to unrepresented employees as a fait accompli, as it had every right to do, but then used the focus group's "agreement" to these changes to pressure FFA and the other unions to agree to them as well, which it had no right to do. In any event, this does not constitute an adequate explanation for making an exploding offer that forced these unions to accept or reject the City's three-year last, best, and final offer by November 17, 2017.

The second statement quoted above merely expresses the City's desire to conclude the bargaining process in the near future but gives no objective basis for imposing a deadline. As such, it also does not constitute an adequate explanation for the exploding offer.

[50] See *supra*, fn. 23.

On November 15, 2017, St. Peter gave another reason for insisting on the November 17 deadline for accepting or rejecting the City's three-year proposal when she e-mailed Milligan that "[t]he memo describing the deadline was provided to the FFA, PMG, and POA on October 10, 2017," that "[b]oth the PMG and POA have now had a membership meeting and ratified an agreement with the City" and that "[i]t would not be fair to the PMG or POA to now extend the deadline imposed for FFA." The Board has noted that "an employer comes 'perilously close' to bad faith when it insists that it will not under any circumstances agree to different terms for different employee groups" (*City of Yuba City* (2018) PERB Decision No. 2603-M, p. 12 (*Yuba City*), quoting *San Ramon*, *supra*, PERB Decision No. 2571-M, p. 8, fn. 10), which presumably extends to ground rules such as a deadline to conclude bargaining. Moreover, in the absence of an adequate explanation for extending an exploding offer to PMG and POA, the fact that these unions accepted the exploding offer by the deadline stated therein cannot constitute an adequate explanation for insisting that FFA accept the same exploding offer by the same deadline, as it proves no more than that the City's unlawful tactic was successful with respect to these other unions.

Not having provided FFA with an adequate explanation for its exploding offer at the time it was extended, or in fact at any time before imposition, the explanations that the City provided at the hearing have to be viewed with the suspicion that that they are no more than post-facto rationalizations. However, even if taken at face value, these explanations do not hold water.

At the hearing, St. Peter explained the November 17 deadline for accepting the City's three-year proposal as follows:

> "The City put the deadline on the offer because we had to take any changes to [City] Council[] [t]o get approval . . . we were looking at having payroll make changes then to the cafeteria plan for all of the employees so that we would have this in place by January 1[,] [2018].
>
> "[¶ . . . ¶]
>
> "[In addition,] [w]e have to get all that information and transmit it to CalPERS."

The problem with this explanation is that, as stated above, St. Peter informed Milligan on November 15, 2017, that "POA ha[s] now had a membership meeting and ratified an agreement with the City," yet those changes were taken to the City Council for approval only on February 6, 2018, which was too late for "having payroll make changes *then* to the cafeteria plan for all of the employees so that we would have this in place by January 1[,] [2018]." (Italics supplied.) In addition, the fact that, on February 21, 2018, Filarsky informed Bolander that "the City Council is making the same three (3) year offer rejected by the [A]ssociation, effective January 1, 2018 (rather than July 1, 2017)" confirms that the City had no valid reason to insist initially that this offer had to be accepted by November 17, 2017, and to declare impasse thereafter.

St. Peter testified that she also had "definite concerns" at the time because "the City was looking to get resolution with all employees and curb its costs related to the cafeteria plan," because, under *Flores*, "the full value of the [$]1,568" available to employees under that plan "was being considered as part of the base rate for overtime purposes" and "there's always a lot of overtime with firefighters because of minimum

staffing." Filarsky elaborated on this concern by noting that the City's liability under the *Flores* decision would end only once the Flexible Benefit Program had been abolished. Filarsky claimed that the impasse procedure could add "six to nine months, perhaps even a year" to the bargaining process before the City could impose. The ongoing liability under *Flores* was of particular importance with respect to the Fire Department, because it had an "inordinate" amount of overtime compared to other departments.

But this was a problem that the City had created itself by waiting for the *Flores* decision to become final on May 15, 2017, before making its first contract proposal on August 29, 2017. The City knew of its liability under *Flores* since June 2, 2016, when the Ninth Circuit had issued its decision. Nothing prevented the City from preparing a first contract proposal in time for the parties' first formal bargaining session on April 12, 2017, including a proposal to eliminate the Flexible Benefit Program and its cash-lieu-of-benefits option in the likely event that the Supreme Court would deny the City's petition for writ of certiorari. This would have given the parties four more months to reach agreement about this issue. That the City failed to do so no more constitutes an adequate explanation for its exploding offer than an upcoming budget deadline constitutes exigent circumstances allowing the employer to accelerate negotiations unilaterally. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 10, citing *City of Selma*, *supra*, PERB Decision No. 2380-M, p. 20.) And, as before, the fact that the City adopted its three-year agreement with POA, including the elimination of the cash-lieu-of-benefits option, only on February 6, 2018, and reoffered the three-year offer to

FFA on February 21, 2018, disproves that the City was justified in requiring acceptance of that three-year offer by November 17, 2017.

The City's exploding offer is therefore an indicator of bad faith.

5. The City Rushed to Impasse

The City's unexcused exploding offer discussed in the previous subsection was part and parcel of a rush to impasse. "A party demonstrates bad faith when it rushes to impasse, or if its impasse declaration is 'premature, unfounded, or insincere.'" (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 10, quoting *Fresno*, *supra*, PERB Decision No. 2418-M, p. 53, fn. 20.) Whether a respondent has rushed to impasse turns on "whether the respondent's strategy was to move negotiations as rapidly as possible to impasse and then impose its demands unilaterally, without taking the presumably more time-consuming route of bargaining in good faith to a bona fide impasse or agreement." (*Fresno*, *supra*, p. 53, fn. 20 (citing *San Jose*, *supra*, PERB Decision No. 2341-M, pp. 40-41.)) Such allegations are analyzed under the totality of circumstances test. (*Ibid*., citing *Riverside*, *supra*, PERB Decision No. 2360-M, pp. 11-12, 15, 19 and *Selma*, *supra*, PERB Decision No. 2380-M, pp. 12-13.)

Here, the parties first met on April 12, 2017, when FFA presented its first package proposal to the City. They next met on August 29, at which point the City presented its first package proposal to FFA. Before the parties had met again or FFA had responded to the City's first package proposal, the City, via e-mail dated October 10, presented its second package proposal and last, best, and final offer, conditioned on FFA's acceptance by November 17. Two days later, on October 12, FFA provided its second package proposal in response to the City's August 29 proposal. The

parties held their third and final pre-impasse meet and confer session on November 7. While no package proposals were exchanged at this meeting, several tentative agreements were reached for the first time. The parties subsequently made some additional minor concessions to each other via e-mail but did not meet again in person or exchange further package proposals before the November 17 deadline. On November 18, the City declared impasse.

These facts are remarkably close to those in cases in which the Board has concluded that a respondent rushed to impasse. Thus, in *Selma*, *supra*, PERB Decision No. 2380-M, only two meetings occurred before the employer presented its last, best, and final offer, having presented its first proposal to the union at the second meeting. (*Id.* at p. 13.) Before the union had responded to that first proposal, the employer called an emergency meeting at which it presented a last, best, and final offer. (*Id*.at p. 14.) After a counter-proposal from the union, the employer declared impasse. (*Ibid*.) The Board concluded that the employer had rushed to impasse. (*Id*. at p. 15.)

The Board reached the same conclusion in *San Ramon*, *supra*, PERB Decision No. 2571-M. There, the employer presented its last, best, and final offer to the union after only two rounds of comprehensive proposals had been exchanged. It subsequently rejected the union's counter-proposal to the last, best, and final offer, established a deadline for accepting the latter, and declared impasse after that deadline had expired. (*Id*. at pp. 3-4.) The Board found that "the City's bargaining conduct was designed to conclude negotiations and adopt new cost-saving measures by the onset of the City's new budget cycle." (*Id*. at p. 11.) It concluded that "[t]he

City's rush to impasse here was even more pronounced than in *Selma*, where the employer delayed its budget vote by several weeks to allow more time for negotiations." (*Ibid*., citing *Selma*, *supra*, PERB Decision No. 2380-M, p. 8.)[51]

Under the totality of circumstances test, no single fact present in those cases or the instant one was or is by itself determinative of a rush to impasse. The Board cautioned in *Selma* that "[c]ontrary to the City's exception, the ALJ did not base her conclusion that the impasse declaration was premature on the single factor that there had been only two negotiation sessions" and that, instead, "[h]er conclusion was based appropriately on the totality of circumstances" present there. (*Selma*, *supra*, PERB Decision No. 2380-M, pp. 14-15.) Nor do I base my conclusion that the City rushed to impasse in the instant case on a single factor or even the combination of the factors enumerated above. Rather, I base it on the totality of the circumstances.

One factor present both here and in *Selma* is, however, particularly telling, and that is the fact that the City did not even wait until FFA had responded to its first package proposal before it presented its last, best, and final offer to FFA only 42 days later. This strikes me as a strong indicator of a rush to impasse, especially as the City itself was responsible, at least in part, for the fact that FFA had not yet responded to its first package proposal. Anticipating that "[t]he City . . . may propose changes [to the Flexible Benefit Program] in light of the decision in *Flores*," FFA on August 14, 2017, requested certain information regarding the implementation of that decision,

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[51] See also *San Jose*, *supra*, PERB Decision No. 2341-M, p. 40 (prima facie case of surface bargaining where union alleged that employer declared impasse after only two rounds of comprehensive proposals had been exchanged).

noting that “it is important for the membership to know more about [said implementation] *before formulating proposals regarding the future of the plan*.” (Italics supplied.) The City first responded to this information request on August 29, the day on which it also provided its first contract proposal to FFA, by stating that it expected to be “ready to address this with the bargaining units by mid to late September.” It implicitly answered the first of four questions posed in the information request on September 28. There is no evidence in the record that it ever answered any of the other three questions. In light of the timing and content of the City’s response to the information request, FFA cannot be faulted for the fact that it took two more weeks before it “formulat[ed] proposals regarding the future of the plan” and responded to the City’s August 29 proposal on October 12.

Another factor present here that was not present in any of the cases discussed above is also particularly telling. Filarsky testified that in those instances in which the unions cut to the chase rather than engaging in incremental bargaining, “instead of having 30 meetings to reach agreement, we might have five or six.” If, in Filarsky’s experience, it took five or six meetings to reach agreement even under the cut to the chase approach, then it remains a mystery how he could in good faith give up on reaching agreement and inform Turner on November 18 that the City was declaring impasse after only three meetings under the incremental approach to bargaining chosen by FFA, which could require 30 meetings to reach agreement. In the absence

of a satisfactory answer to this question, and in light of all the other circumstances present in this case, I must conclude that the City rushed to impasse.[52]

The City's rush to impasse is another indicator of bad faith.[53]

6. The City Imposed Terms and Conditions of Employment that Were Not Reasonably Comprehended Within Its Last, Best, and Final Offer

As discussed above, under the MMBA, "[a]fter any applicable mediation and factfinding procedures have been exhausted, . . . a public agency . . . may, after holding a public hearing regarding the impasse, implement the last, best, and final offer." (MMBA, § 3505.7.) The Board held almost four decades ago that "[t]he changes implemented need not be exactly those offered during negotiations, but must be reasonably 'comprehended within the impasse proposals,'" i.e., the changes must be "neither proposals better than the last best offer nor proposals less than the status quo which were not previously discussed at the table." (*Modesto City Schools* (1983) PERB Decision No. 291, p. 46-47, citation omitted (*Modesto*).)

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[52] The reasons proffered by the City for imposing the November 17 deadline for accepting its last, best, and final offer or facing imposition have already been rejected above and will not be repeated here.

[53] "If an employer declares impasse without reaching a bona fide impasse after good faith negotiations, but the employer neither changes employment terms nor refuses to continue bargaining, the Board considers that evidence under the totality of conduct test. (*Riverside supra*, PERB Decision No. 2360-M, p. 12.) In contrast, if the employer in those circumstances refuses to bargain further or proceeds to change employment terms, that constitutes further evidence of bad faith under the totality test, and it also constitutes a per se violation. (*Id*. at p. 11.)" (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 7, fn. 9.) However, as discussed above, because no separate per se violation is alleged in the Complaint, I cannot reach the conclusion that one occurred here. (See *Roseville*, *supra*, PERB Decision No. 2505-M, p. 15.)

Although oft-repeated, the language just quoted is less than precise, because it suggests that changes may be "reasonably 'comprehended within the impasse proposals,'" and may thus be implemented post impasse, if they are "less than the status quo" but were "previously discussed at the table," even if they were ultimately not included in the last, best, and final offer. That this is not the case is evident from the Board's recent decision in *City of Glendale* (2020) PERB Decision No. 2694-M (*Glendale*).[54] In that case, a proposal identified by the employer as its last, best, and final offer demanded several economic concessions, including that employees pay 75 percent of any medical premium increases. (*Id*. at p. 11.) The union rejected that proposal and the employer considered the parties to be at impasse. (*Id*. at p. 13.) The employer subsequently made what it called an "Impasse Related Settlement Proposal" that softened the economic concessions it had demanded earlier, including that "[t]he City accepted the Union's proposal of a 50/50 split for increased medical premiums, thereby moving off the City's prior proposal that employees contribute 75 percent." (*Id*. at pp. 13-14.) Still later, the employer imposed new terms that included the following: "Employees' contribution to increased medical premiums: 75 percent (in contrast to the 50 percent offered in the City's [Impasse Related Settlement Proposal]." (*Id*. at p. 35.) The Board concluded: "[T]he ALJ was correct that the City's imposition of less generous terms than its [Impasse Related Settlement Offer] was

[54] That case is the subject of a petition of extraordinary relief under MMBA section 3509.5, subdivision (a). (See *City of Glendale v. Public Employment Relations Board* (B304702, petition filed March 9, 2020).) The analysis in that case remains the most current assertion of the Board's position and reasoning on the subject.

regressive, and [that] those terms were not reasonably comprehended within the City's *true* last, best, and final offer." (*Id*. at p. 62, italics supplied.)

Two points emerge from *Glendale*. First, when an employer makes a last, best, and final offer but subsequently improves upon it prior to implementation, the improved offer becomes the "true" last, best, and final offer. Second, when the employer then implements "less than the status quo," this change must have been included in the employer's "true" last, best, and final offer; it is not enough for it to have been "previously discussed at the table" at some point prior to that, even if it was included in the employers original last, best, and final offer. (Compare *Modesto*, *supra*, PERB Decision No. 291, p. 47.) Imposition of "less generous terms" than those in the employer's "true" last, best, and final offer is "regressive." (*Glendale*, *supra*, PERB Decision No. 2694-M, p. 62.)

Here, the City's original last, best, and final offer—namely, its October 10 three-year proposal—included a new provision, viz., "Shift Schedule to begin at 7:00 AM rather than current start time of 8:00 AM." However, by November 7, the City had withdrawn this demand, and it remained withdrawn until the City declared impasse on November 18. Crucially, there were no take-backs in the City's post-October 10 proposals that would have balanced this concession, as the City merely sweetened the deal in an attempt to convince FFA to agree to it.[55] Accordingly, the proposed shift schedule change was not part of the City's true last, best, and final offer, and the City was therefore not at liberty to implement it, as it represented "less than the status quo." (See *Modesto*, *supra*, PERB Decision No. 291, p. 47.)

[55] See *supra*, p. 48.

But implement the shift schedule change it did on April 3, 2018. "[T]he City's imposition of less generous terms than its [true last, best, and final offer] was regressive." (*Glendale*, *supra*, PERB Decision No. 2694-M, p. 62.) The City's regressive imposition of the shift schedule change was not a minor detail that could be easily excused, as that proposal, when it was originally made, prompted FFA to make, on October 12, the only last, best, and final offer of its own throughout the entire period of negotiations under analysis here, stating flatly: "The SGFFA does not agree to change its working hours from 0800 to 0700."

Conversely, the City also implemented a change that was "better than the last best offer" and thus not "reasonably comprehended" within that offer. (*Modesto*, *supra*, PERB Decision No. 291, p. 47.) The expired MOU allowed shift employees to "carry over a maximum of . . . one hundred ninety two (192) hours . . . of credited vacation to the succeeding year." On November 16, two days before the City declared impasse, it proposed a vacation accrual maximum of 360 hours. It maintained that position during factfinding on January 9, 2018. But on April 3, 2018, it implemented a vacation accrual maximum of 504 hours, allowing shift employees to carry over far more than the 192 hours of credited vacation to the succeeding year that they had been allowed to carry over under the expired MOU. This, too, was not a minor issue that could be easily excused, given that FFA rejected the proposal on the same day it was first made and demanded to "continue past practice." St. Peter defended the proposed vacation accrual maximum of 360 hours on November 17 via e-mail message to Milligan as follows: "I checked the current vacation accruals for FFA. Only 2 members currently have balances in excess of 360 hours, the newly proposed

vacation maximum accrual. Therefore, the City's vacation cash out language s/not be an issue for the vast majority of your members." This clearly mattered to the parties.

The City's implementation of terms and conditions of employment that were not reasonably comprehended within its last, best, and final offer is a final indicator of bad faith.

7. Summary

I have found indicators of bad faith under the totality of conduct test for surface bargaining in the City's imposition of a durational term and an MOU, its unexcused exploding offer, its rush to impasse, and its imposition of terms and conditions of employment that were not reasonably comprehended within its last, best, and final offer. I now conclude that, considering the totality of the City's conduct, it engaged in bad faith or surface bargaining. It thereby violated MMBA sections 3505 and 3506.5, subdivision (c), and committed an unfair practice under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivision (c). By the same conduct, the City also interfered with the right of bargaining unit employees to be represented by FFA, as well as with FFA's right to represent bargaining unit employees. It thereby violated MMBA sections 3506 and 3506.5, subdivision (a), as well as MMBA sections 3503 and 3506.5, subdivision (b), respectively, and thus committed unfair practices under MMBA section 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a) and (b), respectively.

B. Discrimination Because of Exercise of Rights Guaranteed by the MMBA

The Complaint alleges that on March 5, 2018, bargaining unit employees exercised rights guaranteed by the MMBA when they refused the City-proposed three-

year MOU with a salary increase of 4 percent in the first year and 1 percent in each of the two subsequent years, and that in or around April 2018, the City retaliated against these employees because of their exercise of said rights by imposing one-year terms with a salary increase of only 2 percent in that single year. For the following reasons, this allegation fails.

Depending on the nature of a discrimination allegation, the Board analyzes it either under *Campbell*, *supra*, 131 Cal.App.3d 416 or under *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*). As the Board recently explained, "a prima facie case is established under *Campbell* by 'discrimination in its simplest form,' i.e., conduct that is facially or inherently discriminatory, such that the employer's unlawful motive can be inferred *without specific evidence*." (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 14, italics supplied (*Los Angeles Superior Court*).) Common examples of facially or inherently discriminatory conduct include: (1) providing different pay, benefits, or other working conditions based explicitly on union membership or other protected activity; and (2) changing policies in response to protected activity, where the operative comparison is not between two different groups of employees, but between an employer's policies before and after the exercise of protected rights. (*Yuba City*, *supra*, PERB Decision No. 2603-M, pp. 10-11, citing *Los Angeles Superior Court*, pp. 14-15.) If the employer has engaged in this type of conduct, it bears the burden of justifying its conduct by coming forward with a legitimate business justification. (*Campbell*, supra, at p. 424.)

On the other hand, if the employer's conduct is not facially or inherently discriminatory, the charging party must prove the employer's unlawful motive under

Novato. (*Los Angeles Superior Court*, *supra*, at p. 17.) To do so, the charging party must prove that: (1) bargaining unit employees exercised rights protected under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the bargaining unit employees; and (4) the employer took the adverse action *because of* the exercise of those rights. (*Novato*, *supra*, at pp. 6-8.)

In determining whether the employer took the adverse action because of the exercise of protected rights, the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor. (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*).) However, such timing does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee(s) (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee(s) (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008), PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee(s) justification at

the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that demonstrate the employer's unlawful motive (*North Sacramento*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)[56]

Once the charging party has made out this prima facie case, the burden shifts to the employer to prove both: (1) that it had an alternative non-discriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 18 (*Palo Verde*), citing *Novato*, *supra*; *Wright Line, A Division of Wright Line, Inc.* (1980) 251 NLRB 1083; and *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393).)

In *Yuba City*, *supra*, PERB Decision No. 2603-M, the Board recently examined and dismissed under both *Campbell* and *Novato* a discrimination allegation, the facts of which were strikingly similar to those of the instant one. In that case, Yuba City opened contract negotiations by offering seven bargaining units, including the Miscellaneous Unit represented by Local 1, a one-year agreement which included: (1)

[56] Many if not most of these factors apply more straightforwardly, if at all, to the more common case of individual discrimination than the less common case of group discrimination, at least of the type alleged here.

requiring employees to pay 50 percent of normal pension costs; (2) eliminating a "base furlough," in which the City closed its offices every other Friday and reduced employee work hours and salaries by 5 percent; (3) capping healthcare premiums at the then-current contribution rate, (4) eliminating a "me-too" clause; and (5) eliminating layoff protections. (*Id*. at p. 3.) None of the bargaining units were interested in this proposal. (*Ibid*.) Yuba City then offered the unions a two-year agreement which included: (1) phasing in payment of pension contributions over two years, with employees eventually paying 50 percent of normal cost; (2) eliminating the "base furlough" in the first year and a "banked furlough," which reduced salaries by another 5 percent for banked leave time, in the second year; and (3) splitting healthcare premiums 8/20. (*Ibid*.) As negotiations progressed, Yuba City continued to offer one- and two-year options, with the two-year option becoming progressively "richer." (*Ibid*.)

Several of the other unions ultimately agreed to a two-year agreement that incorporated the terms of the two-year agreement described above. (*Yuba City*, *supra*, PERB Decision No. 2603-M, p. 8.) Local 1 did not and declared impasse. (*Id*. at p. 4.) Following factfinding, Yuba City issued the agenda for a City Council meeting that included as one of its items the adoption of a resolution imposing the terms of the one-year proposal, which it considered its last, best, and final offer, on the bargaining unit represented by Local 1. (*Id*. at pp. 6-7.) Prior to the City Council meeting, Local 1 members participated in informational picketing near City Hall. (*Id*. at p. 7.) At its subsequent meeting, the City Council adopted the resolution imposing the terms of the one-year proposal on the bargaining unit represented by Local 1. (*Id*. at pp. 7-8.)

Local 1 then filed an unfair practice charge alleging that Yuba City had discriminated against Local-1 represented employees for various protected activities, including the informational picketing, "by implementing a last, best, and final offer that included terms and conditions of employment that were worse than the terms and conditions of employment agreed to by . . . other . . . bargaining units." (*Yuba City*, *supra*, PERB Decision No. 2603-M, p. 8.)

Analyzing these facts first under *Campbell*, *supra*, 131 Cal.App.3d 416, the Board concluded that Yuba City's conduct was not facially or inherently discriminatory. (*Yuba City*, *supra*, PERB Decision No. 2603-M, p. 12.) The Board observed that, "[c]ritically, [Yuba City] made ["the same one-and two-year contract"] proposals to Local 1 and the other units before Local 1 [engaged in any protected activity]" and that "the only units that obtained the more favorable two-year terms were the units that agreed to them." (*Id*. at p. 13 (italics in original).) The Board concluded that "[t]hus, rather than discrimination for protected activity, the most obvious explanation for the City's disparate treatment of the Miscellaneous Unit is Local 1's decision not to agree to the more favorable two-year terms." (*Ibid*.)[57] The Board distinguished *Campbell*, *supra*, 131 Cal.App.3d 416, and *Los Angeles County Employees Association, Local 660* v. *County of Los Angeles* (1985) 168 Cal.App.3d 683 (*Los Angeles*), in which the Court of Appeal had found the employer's conduct to have been facially or inherently discriminatory, on the basis that "[i]n both [of these] cases, there was no question that

[57] Accordingly, without more, it is not facially or inherently discriminatory for an employer to impose less favorable terms once bargaining unit employees have rejected more favorable terms, with the provisos that follow below.

the employer adopted a position that was less favorable to the union [only] *after* the protected activity occurred." (*Id*. at p. 14 (italics supplied).) The Board noted that it would reach a different conclusion "if the City, after Local 1 invoked impasse procedures, had refused to agree to the type of two-year agreement most of the other units reached." (*Ibid*.) But "[t]hat never happened because Local 1 never expressed a willingness to agree to those terms at any time before imposition." (*Ibid*.) The Board held: "Because Local 1 rejected the City's more favorable two-year proposal of its won volition, the City's refusal to impose the terms of that proposal is not inherently or facially discriminatory." (*Id*. at p. 15, citing *County of Tulare*, *supra*, PERB Decision No. 2461-M, p. 16 ["Having passed up an opportunity to agree to 'an objectively beneficial' proposal, [the union] cannot now complain that it was surprised by the [employer's] entirely reasonable decision not to impose something that [the union] repeatedly said it was not interested in"].)

Here, the facts align with those in *Yuba City*, *supra*, PERB Decision No. 2603-M, rather than those in *Campbell*, *supra*, 131 Cal.App.3d 416, or *Los Angeles*, *supra*, 168 Cal.App.3d 683. As in *Yuba City*, the City in the present case made the same one-year and three-year contract proposals to FFA and the other units on October 10, 2017, *before* FFA-represented employees refused that proposal on March 5, 2018, which refusal constitutes the only protected activity alleged in the Complaint. Further as in *Yuba City*, the only units in the present case that obtained the more favorable three-year terms were the units that agreed to them. Finally as in *Yuba City*, the City did not refuse to agree to the three-year agreement after FFA-represented employees had refused that proposal on March 5, 2018, because FFA never expressed a

willingness to agree to those terms at any time before imposition. As the Board did in *Yuba City*, I conclude here that, because FFA rejected the City's more favorable three-year proposal of its own volition, the City's refusal to impose the terms of that proposal, and its decision to impose the terms of the one-year proposal in its stead, is not inherently facially or inherently discriminatory. (*Yuba City*, *supra*, p. 15.)

The *Yuba City* Board then analyzed the facts present there under *Novato*. (*Yuba City*, *supra*, p. 15.) It did so because, although Local 1 had argued its case exclusively under *Campbell* because, nevertheless, Local 1 had pointed to what it claimed was evidence of Yuba City's unlawful motive. (*Ibid*.) Here, too, FFA argues its case solely under *Campbell*. In contrast to what occurred in *Yuba City*, however, FFA does not point to any alleged evidence of the City's unlawful motive.[58] I therefore decline to analyze the discrimination allegation in this case under *Novato*.

But even if I were to do so, and assuming that I would find FFA has proven its prima facie case under that framework, I would still conclude that this allegation must fail because the the City has proven (1) that it had an alternative non-discriminatory reason for the challenged action; *and* (2) that it acted because of this alternative non-

[58] In its post-hearing brief, FFA merely claims that "[t]he City's stated nondiscriminatory justifications for distinguishing among employees ["based solely on whether they exercised their protected right to reject the 4-1-1 proposal"] lack credence," but does not point to any discriminatory reasons for imposing the one-year terms on bargaining unit employees. Its claim that the City "dislikes the bargaining process," even if true, is not evidence of an unlawful motive. The City is not obligated to like the bargaining process. It is only obligated to engage in it in good faith. Moreover, the hearing testimony and other evidence only supports the conclusion that the City was concerned about the resources that would have to be devoted to the bargaining process if, in the absence of a multi-year agreement, if was to recur each year. That concern is not unlawful. In fact, it is entirely understandable.

discriminatory reason and not because of the employee's protected activity. (*Palo Verde*, *supra*, PERB Decision No. 2337, p. 18, citations omitted.) As discussed above in section A, subsection 2, the City was willing to offer a 4 percent increase for 2017-2018 if it could count on an increase of only 1 percent in each of 2018-2019 and 2019-2020. But it would offer only a 2 percent increase for 2017-2018 if it was facing the likely possibility that FFA would demand increases in excess of 1 percent in 2018-2019 or 2019-2020. This is a sound non-discriminatory reason for imposing the terms of the one-year proposal rather than the terms for the first year of the three-year proposal, and all the evidence in the record supports the conclusion that the City acted because of this non-discriminatory reason rather than because of any protected activity on the part of the bargaining unit employees. This allegation is dismissed.

REMEDY

I concluded above that the City violated its duty to meet and confer with FFA in good faith under the totality of the conduct test. I further concluded that by the same conduct, the City also interfered with the right of bargaining unit employees to be represented by FFA, as well as with FFA's right to represent bargaining unit employees.

The Legislature has delegated to PERB broad powers to remedy unfair practices or other violations of the MMBA and to take any action the Board deems necessary to effectuate the Act's purposes. (MMBA, §§ 3509, subd. (b), 3510; *City of San Diego* (2015) PERB Decision No. 2464-M, p. 42, affirmed *sub nom. Boling v. PERB* (2018) 5 Cal.5th 898, 920, *reh'g denied* (Oct. 10, 2018); *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d

178, 189-190.) A "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto*, *supra*, PERB Decision No. 291, pp. 67-68.) An appropriate remedy therefore should compensate affected employees and other injured parties, and should withhold from the wrongdoer the fruits of its violation. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13; *Mead Corp. v. NLRB* (11th Cir. 1983) 697 F.2d 1013, 1023 (*Mead Corp*.), enforcing *The Mead Corp.* (1981) 256 NLRB 686; *Carian v. Agricultural Labor Relations Bd.* (1984) 36 Cal.3d 654, 673-674.) In addition to these restorative and compensatory functions, a Board-ordered remedy should also serve as a deterrent to future misconduct, so long as the order is not a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. (*City of San Diego*, *supra*, PERB Decision No. 2464-M, pp. 40-42; *City of Pasadena*, *supra*, pp. 12-13.)

If a party has withdrawn a contract proposal as part of an overall course of bad faith conduct, it may be properly ordered to reinstate the withdrawn offer. (*Mead Corp*., *supra*, 697 F.2d at pp. 1022–1023.) Because PERB's task is to assure fair collective bargaining rather than to impose contractual terms on parties, it does not normally order a bargaining party to put forward a particular proposal that it has never before made in bargaining. (See, e.g., *City of Pasadena*, supra, PERB Order No. Ad-406-M, pp. 13-14 [discussing landmark decision interpreting federal law, *H. K Porter Co. v. NLRB* (1970) 397 U.S. 99, 106 (*H. K. Porter*), and related PERB precedent].) In contrast, it is appropriate to order a bargaining party to return to a prior bargaining position that it abandoned in bad faith, a remedy that is fundamentally different from

ordering a party to make a proposal that it never previously offered. (*Mead Corp*., *supra*, 697 F.2d 1013, 1022–1023 [discussing propriety of such a remedy under *H.K. Porter* principles]; *Hyatt Management Corp. of New York, Inc. v. NLRB* (D.C. Cir. 1987) 817 F.2d 140, 143, fn. 3 [explaining why order—requiring that bargaining party return to position it abandoned as part of its bad faith conduct—comports with *Mead Corp*. and does not conflict with *H. K. Porter*]; *TNT USA, Inc. v. NLRB* (2nd Cir. 2000) 208 F.3d 362, 367 [citing *Mead Corp*., *supra*, 697 F.2d at p. 1023, and upholding National Labor Relations Board's (NLRB) order that employer "reinstate a proposal it previously voluntarily presented during negotiations and subsequently withdrew"].)

I conclude that a *Mead Corp*. order is necessary also here to restore the situation as nearly as possible to that which would have existed but for the City's bad faith conduct. Such an order is also integral to requiring the City to cease and desist from its unlawful conduct. I therefore direct the City to put back on the table the October 10, 2017 three-year offer, with the sole exception of the deadline for its acceptance originally contained therein, if FFA so requests. I find it appropriate to do so despite the fact that FFA rejected this proposal on November 17, 2017, January 29, 2018, and March 5, 2018, because it had been presented as an exploding offer without adequate explanation and the City was rushing to impasse when FFA first rejected this offer. These were identified above as major indicators of the City's bad faith under the totality of the conduct test for surface bargaining. The offer was also accompanied by what I have described above as a promise or threat of the imposition of a one-year durational term and an MOU should FFA reject the three-year offer, i.e., a promise or threat of per se violations of the City's duty to bargain in good faith.

Therefore, the City had already been bargaining in bad faith when FFA first rejected the three-year offer. The City's unlawful conduct infected the subsequent bargaining process and, as it were, "excuses" FFA's rejection of the three-year offer. It is therefore appropriate to order the City, upon request by FFA, and at FFA's choice, to either re-offer the October 10, 2017 three-year proposal, with the sole exception of the deadline for its acceptance that was parcel of its unlawful conduct, or meet and confer in good faith with FFA regarding wages, hours, and other terms and conditions of employment, as that duty is defined in Government Code, section 3505, retroactive to July 1, 2017.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the CITY OF SAN GABRIEL violated the Meyers-Milias-Brown Act (Act), Government Code section 3500 et seq. The City of San Gabriel violated the Act by failing to meet and confer in good faith with the exclusive representative of an appropriate bargaining unit, pursuant to MMBA section 3505. By this conduct, the City also interfered with the right of unit employees to participate in the activities of an employee organization of their own choosing, in violation of Government code section 3506 and PERB Regulation 32603, subdivision (a), and denied the SAN GABRIEL FIRE FIGHTERS ASSOCIATION the right to represent employees in their employment relations with a public agency in violation of Government Code section 3503 and PERB Regulation 32603, subdivision (b). Pursuant to section 3509 of the Government Code, it hereby is ORDERED that the City of San Gabriel, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with the San Gabriel Fire Fighters Association.

2. Interfering with the right of bargaining unit employees to be represented by an employee organization of their own choosing.

3. Denying the San Gabriel Fire Fighters Association its right to represent employees in their employment relations with the City of San Gabriel.

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

1. Upon request by the San Gabriel Fire Fighters Association, and at the latter's choice, within 10 workdays of the service of a final decision in this matter, EITHER

a. reoffer to the San Gabriel Fire Fighters Association the three-year offer that it first offered to it on October 10, 2017, with the sole exception of the deadline for its acceptance originally contained therein, OR

b. meet and confer in good faith with representatives of the San Gabriel Fire Fighters Association regarding wages, hours, and other terms and conditions of employment, as that duty is defined in Government Code, section 3505, retroactive to July 1, 2017.

2. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the bargaining unit represented by the San Gabriel Fire Fighters Association customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by

an authorized agent of the City of San Gabriel, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City of San Gabriel to communicate with employees in the bargaining unit represented by the San Gabriel Fire Fighters Association. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the San Gabriel Fire Fighters Association.

RIGHT TO APPEAL

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-8231
Facsimile: (916) 327-9425
E-File: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c), and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-1297-M, *SAN GABRIEL FIRE FIGHTERS ASSOCIATION v. CITY OF SAN GABRIEL*, in which all parties had the right to participate, it has been found that the CITY OF SAN GABRIEL (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by failing to meet and confer in good faith with the exclusive representative of an appropriate bargaining unit, pursuant to MMBA section 3505. By this conduct, the City also interfered with the right of unit employees to participate in the activities of an employee organization of their own choosing, in violation of Government code section 3506 and PERB Regulation 32603, subdivision (a), and denied the SAN GABRIEL FIRE FIGHTERS ASSOCIATION (SGFFA) the right to represent employees in their employment relations with a public agency in violation of Government Code section 3503 and PERB Regulation 32603, subdivision (b).

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

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with the SGFFA.

2. Interfering with the right of bargaining unit employees to be represented by an employee organization of their own choosing.

3. Denying the SGFFA its right to represent employees in their employment relations with the City.

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

1. Upon request by the SGFFA, and at the latter's choice, within 10 workdays of the service of a final decision in this matter, EITHER

a. reoffer to the SGFFA the three-year offer that we first offered to it on October 10, 2017, with the sole exception of the deadline for its acceptance originally contained therein, OR

b. meet and confer in good faith with representatives of the SGFFA regarding wages, hours, and other terms and conditions of employment, as that duty is defined in Government Code, section 3505, retroactive to July 1, 2017.

Dated: _____ CITY OF SAN GABRIEL

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.