STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS LOCAL 39, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-355-M PERB Decision No. 1890-M March 12, 2007

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Stationary Engineers Local 39; Gina M. Roccanova, Deputy City Attorney, for City & County of San Francisco.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

SHEK, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Stationary Engineers Local 39 (Local 39) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the City & County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by engaging in bad faith bargaining. Local 39 alleged that this conduct constituted an unfair practice under the MMBA in violation of PERB Regulation 32603(a), (b), (c), (f) and (g).[2] Local 39 also alleged that this conduct violated Section 16.216 of the City's Employee Relations Ordinance (ERO). Additionally, Local 39 alleged that Section A8.409-4 of the City's Charter (Charter) was unreasonable on its face and as applied to the extent that it permitted the City to begin impasse procedures before an impasse had been reached.

[1]MMBA is codified at Government Code Section 3500, et seq. Unless otherwise noted, all statutory references 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 in this case, including but not limited to Local 39's unfair practice charge, the City's position statement, the amended unfair practice charge, the warning and dismissal letters, Local 39's appeal, and the City's response thereto. Based upon this review, we affirm the dismissal, subject to the discussion below.

BACKGROUND

Local 39's April 11, 2006, unfair practice charge alleged that Section A8.409-4 of the Charter was unreasonable to the extent that it allowed the City to declare impasse before there was a real impasse, and that the City engaged in surface bargaining and had no intention of bilaterally reaching an agreement with Local 39.

When Local 39 filed this unfair practice charge, there was a collective bargaining agreement (CBA) in effect between the parties that extended through June 30, 2006. Local 39 alleged that the City did not bargain in good faith during negotiations for a successor CBA because it intended to rely upon the mediation/arbitration procedures in the Charter[3] to resolve the basic economic issues to be negotiated.

Under the Charter, after engaging in good faith bargaining, either the authorized representative of the City or Local 39 may declare an impasse with regard to unresolved disputes over wages, hours, benefits or other terms and conditions of employment. Upon the declaration of an impasse, the unresolved disputes shall be submitted to a three-member mediation/arbitration board (board) for resolution. (Charter sec. A8.409-4(a).) The board has discretion to resolve disputes by mediation and/or arbitration, and may hold hearings and receive evidence from the parties. (Charter sec. A8.409-4(c).) The Charter provides that if no

[3]Besides the Charter provisions, Local 39 alleges a violation of Section 16.216 of the City's ERO, which provides for mediation procedures that differ from those in the Charter. However, the charge does not further explain how this section was violated. Additionally, the appeal does not raise this issue. Matters not raised on appeal are waived. (PERB Reg. 32300(c).)

agreement is reached prior to the conclusion of the arbitration hearings, the board shall direct each of the parties to submit, within such time limit as the board may establish, a last offer of settlement on each of the remaining issues in dispute. It provides that the board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most conforms to traditionally enumerated factors in determining wages, hours, benefits or other terms and conditions of employment. (Charter sec. A8.409-4(d).) The Charter states that the board shall reach a final decision no later than 60 days before the date the Mayor is required to submit a budget to the board of supervisors, except by mutual agreement of the parties. (Charter sec. A8.409-4(e).)

Charter section A8.409-4(b) requires that the parties involved in bargaining select and appoint one person to the board not later than January 20 of any year in which bargaining on a CBA takes place. It provides that the third member of the board shall be selected by agreement between the City and the recognized employee organization, and shall serve as the neutral chairperson of the board.

In January 2006, before negotiations began, the City demanded that Local 39 select its representative to the board pursuant to Charter section A8.409-4(b). On February 6, 2006, however, Local 39 advised the City that it did not believe that Charter section A8.409-4 was mandatory and declined to select a representative to the board. Throughout the contract negotiations that followed, Local 39's attorney continued to dispute the obligation to select a representative to the board. Local 39 alleged that it was not required to select a representative to the board because the parties were not at impasse.

On April 5, 2006, the City filed a petition to compel arbitration and a petition for writ of mandate in the San Francisco Superior Court, while negotiations were underway. On May 8, 2006, the superior court denied the City's petitions to compel arbitration and for writ of

mandate, holding that PERB had jurisdiction over the City's attempt to compel Local 39 to participate in arbitration under the collective bargaining provisions of the Charter.[4]

The parties engaged in twelve (12) negotiation sessions for a successor agreement between February 2 and April 7, 2006. During the first bargaining session on February 2, 2006, the City allegedly maintained its right to withdraw from negotiations because Local 39 was not participating in the mandatory impasse arbitration procedures. That same day, Local 39 offered an initial basic wage proposal that called for specified salary increases. In response, the City stated that it needed time to make calculations before it could meet again.

During the next several negotiating sessions, the parties discussed various terms and conditions of employment, but not basic wage proposals. On February 15, 2006, the City presented a cost analysis relating to Local 39's economic proposals. On February 16, 2006, the parties discussed the rates paid to Stationary Engineers in the private sector, and discussed the City's cost analysis. Local 39 alleged that the City's lead negotiator cut short the February 16 bargaining session by announcing in the morning that she would not be available after lunch.

Local 39 also alleged that the City arrived late or called caucuses immediately or almost immediately at the start of six bargaining sessions; that the City sometimes attended

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[4]On July 7, 2006, the City appealed the Superior Court's May 8, 2006 decision to the Court of Appeal, in Case No. Al 14815, which is currently pending.

Additionally, on May 10, 2006, the City filed an unfair practice charge, Case No. SF-CO-129-M, against Local 39 alleging a violation of PERB Regulation 32604(d) (employee organization unfair practices under MMBA) based on Local 39's refusal to name a neutral and refusal to participate in the mediation/arbitration process contained in the local rules. PERB issued a complaint in that case on May 12, 2006. PERB Administrative Law Judge Donn Ginoza held hearings in that case on January 11 and 12, 2007, and the matter is currently pending.

bargaining sessions without being prepared with written proposals; and that the City negotiator did not have authority to bargain.

According to Local 39, on or about March 23, 2006, the City made its first (and only) basic wage proposal. Subsequently, the parties exchanged package proposals.

After at least three additional bargaining sessions, on April 7, 2006, the City's representative stated that the parties appeared to be at impasse due to a "substantial gap on the economic issues." Local 39's negotiators protested that it "had every intention on bargaining to obtain a contract rather than have a contract imposed by third parties," and had "room to move," but that the City appeared to be not bargaining in good faith. However, at this point, the City stated that it would not resume bargaining until Local 39 agreed to use the impasse procedure.

Prior to the City's declaration of impasse, the parties had arrived at substantive tentative agreements for at least eight different subjects.[5]

On April 11, 2006, Local 39 filed its unfair practice charge. On May 9, 2006, the City Director of Employee Relations, Mikki Callahan, called Local 39 and proposed the "crafts deal," which was offered to other crafts unions, as a means of settling the contract dispute with Local 39. Local 39 did not accept this offer.

The Board agent issued a warning letter on May 26, 2006, and a dismissal letter on August 24, 2006, finding that Local 39 had failed to allege a prima facie case of surface bargaining.

[5]Local 39 alleged that the parties reached substantive tentative agreements in the following eight areas: dive pay (payment for performing underwater dives); apprentice training fund; vacation scheduling; grievance procedure; holidays; timely payment of compensation; jury duty; and in lieu holiday pay. In contrast, the City alleged that the parties reached tentative agreements in 17 different areas.

Local 39 appealed the dismissal on September 8, 2006. The appeal focuses upon the legal issue of whether the Charter unlawfully conflicts with the MMBA. It alleges that the process established in the Charter is a "contract of adhesion."[6] It alleges that "Charter section A8.409-4 is drafted in a way as to insulate the [City] from any Union proposal which it unilaterally deems to be objectionable."[7] It states, "To the extent that the [Charter] authorizes one party to declare an impasse regardless of whether or not the parties are truly at an impasse or whether the party which declares impasse has bargained in bad faith, the Charter is inconsistent with [the MMBA]." The appeal also alleges that the Board agent erred in finding that there was no prima facie case of surface bargaining. On September 28, 2006, the City filed a response to the appeal denying the allegations.

DISCUSSION

This case presents two primary issues: (1) whether Local 39 has demonstrated that Section A8.409-4 of the Charter is unreasonable; and (2) whether Local 39 has alleged a prima facie case of surface bargaining by the City. To determine whether a charge alleges a prima facie case, the Board must assume that the essential facts alleged in the charge are true. (San Juan Unified School District (1977) EERB[8] Decision No. 12.)

Whether Charter Section A8.409-4 Violates the MMBA

The MMBA authorizes local agencies to adopt "reasonable rules and regulations," governing collective bargaining matters, including "[a]dditional procedures for the resolution of

[6]We do not address the issue of whether the Charter was a contract of adhesion, because that allegation is outside of PERB's jurisdiction.

[7]We do not further address this allegation because the charge and appeal contain no supporting facts.

[8]Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

disputes involving wages, hours and other terms and conditions of employment." (MMBA sec. 3507(a)(5).)[9] The Board has the authority to review whether local agency rules are reasonable. (Gridley; City of San Rafael (2004) PERB Decision No. 1698-M.)

"Where a legislative action by a local governmental agency is attacked as unreasonable, the burden of proof is on the attacking party. Such regulations are presumed to be reasonable in the absence of proof to the contrary." (San Bernardino County Sheriff's Etc. Assn. v. Board of Supervisors (1992) 7 Cal.App.4th 602, 613 [8 Cal.Rptr.2d 658], citing Organization of Deputy Sheriffs v. County of San Mateo (1975) 48 Cal.App.3d 331, 338 [122 Cal.Rptr. 210].) However, a local governmental agency may not adopt rules and regulations that "would frustrate the declared policies and purposes of the [MMBA sec. 3500, et seq.]." (Huntington Beach Police Officers' Assn. v. City of Huntington Beach (1976) 58 Cal.App.3d 492, 502 [129 Cal.Rptr. 893].)

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[9]In enacting the MMBA, the Legislature intended "to set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations." The Legislature

> did not intend thereby to preempt the field of public employer-employee relations except where public agencies do not provide reasonable 'methods of administering employer-employee relations through . .. uniform and orderly methods of communication between employees and the public agencies by which they are employed.'
> (Los Angeles County Firefighters Local 1014 v. City of Monrovia (1972) 24 Cal.App.3d 289, 295 [101 Cal.Rptr. 78], emphasis added.)

This is consistent with the preamble of the MMBA, which contains the following language:

> Nothing contained herein shall be deemed to supersede the ... rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations ....
> (MMBA sec. 3500, cited in International Brotherhood of Electrical Workers v. City of Gridley (1983) 34 Cal. 3d 191, 197-198, fn. 4 [193 Cal.Rtpr. 518] (Gridley).)

The MMBA specifically authorizes local agencies to adopt their own impasse procedures, although adoption of such procedures is not mandatory. Section 3505 of the MMBA states that the meet and confer "process should include adequate time for the resolution of impasses" only "where local rules include impasse procedures." Additionally, Section 3505.4 of the MMBA references "impasse procedures, where applicable." Thus, local agencies have discretion to craft their own impasse resolution procedures.

The MMBA does not delineate what local agency impasse rules must contain. The MMBA states simply that negotiations must continue for a "reasonable period of time." Section 3505 of the MMBA states, in part, that the public agency and a recognized employee organization:

> shall have the 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 prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

Additionally, Section 3505.2 of the MMBA provides that if the parties fail to reach agreement "after a reasonable period of time," the parties may "agree upon the appointment of a mediator mutually agreeable to the parties."

The relevant provision of the Charter, section A8.409-4(a), states that disputes pertaining to wages, hours, benefits or other terms and conditions of employment "which remain unresolved after good faith bargaining" shall be submitted to the mediation/arbitration board "upon the declaration of an impasse either by the authorized representative of the city and county of San Francisco or by the authorized representative of the recognized employee organization involved in the dispute." The board has the discretion to resolve disputes by

mediation and/or arbitration, and may hold hearings and receive evidence from the parties. If no agreement is reached prior to the conclusion of the arbitration hearings, the board shall direct each of the parties to submit a last offer of settlement on each of the remaining issues in dispute. The board must then vote to adopt a last offer of settlement for each issue, based upon the traditionally enumerated factors in determining wages, hours, benefits or other terms and conditions of employment.

Under the principles discussed above, we find that Charter section A8.409-4(a) is reasonable on its face. The MMBA specifically allows local agencies the discretion to adopt their own impasse rules. The rules in this case restrict the use of the impasse procedure to situations where disputed issues remain unresolved after good faith bargaining. Moreover, the Charter provisions at issue appear to effectuate the MMBA's purpose of promoting "full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment." (Sec. 3500(a).) Additionally, the language of the Charter requiring good faith bargaining appears to be consistent with the MMBA requirement that negotiations "continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement." Therefore, the Board finds that Local 39 has failed to allege a prima face case that the City's Charter section A8.409-4 is unreasonable on its face under the MMBA.

Local 39 also alleges that Charter section A8.409-4 was unreasonable as applied in this situation, i.e., that the City declared "impasse" prematurely. As discussed in the following section, however, we find that based on the facts alleged, the City engaged in good faith bargaining. Local 39 alleged that the parties met over twelve separate bargaining sessions, exchanged information and proposals, and reached tentative agreements on at least eight

different subjects. Additionally, the parties exchanged basic wage proposals and held substantive discussions about those proposals. The City finally declared impasse when it allegedly believed there to be a substantial gap on the economic issues. Under these circumstances, we find that Local 39 has failed to allege a prima facie case that Charter section A8.409-4 was unreasonable as applied.

Whether Local 39 Has Established a Prima Facie Case of Surface Bargaining by the City

The unfair practice charge in this case alleged that the employer violated MMBA section 3505 and PERB Regulation 32603(c) by engaging in bad faith or "surface" bargaining. Bargaining in 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 [92 LRRM 3373] (Placentia Fire Fighters).) PERB has held that the essence of surface bargaining is that a party 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.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275; Placentia Fire Fighters.)

The Board has affirmed dismissals of surface bargaining charges when the facts indicate that the parties have not been impeded from negotiating due to alleged multiple indicia of bad faith behavior. For example, in City of Fresno (2006) PERB Decision No. 1841-M, the Board upheld dismissal of a surface bargaining charge where the city adamantly refused to consider increasing salaries for the Local 39 contract (because other city contracts include most

favored nation clauses, and because workers compensation costs and health care costs were high). The Board agent found that "[t]he facts seem to suggest that the city had a rational basis for their position." (Citing NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829, 2830].) In that case, the city cancelled two successive days of negotiation without explanation. At one bargaining session, city negotiators were without authority beyond the economic offers already made, and the city's lead negotiator was absent at a bargaining session. (The city explained that the outside negotiator's contract had expired and needed to be renewed.) The Board agent found that there was insufficient evidence of surface bargaining because both parties have offered several unique proposals. In that case, until the declaration of impasse, the parties were not delayed from negotiating because of the cited behavior by the city.

Similarly, in Ventura County Community College District (1998) PERB Decision No. 1264, the Board upheld a dismissal of a surface bargaining charge despite allegations of bad faith, where the charge failed to provide specific facts to establish that the district's behavior was indicative of an intent to frustrate the bargaining process.

The Board has likewise affirmed the dismissal of a surface bargaining charge where the factual allegations did not state that the employer was attempting to "torpedo" a proposed agreement or otherwise undermine the negotiations process (State of California (Department of Education) (1996) PERB Decision No. 1160-S); and where periodic unproductive negotiation sessions did not rise to the level of bad faith (County of Riverside (2004) PERB Decision No. 1715-M, at p. 8).

Under these authorities, the dismissal of Local 39's unfair practice charge was proper. Despite Local 39's allegations of the City's tardiness and dilatory tactics, the parties appeared to make progress in their negotiations. The City's behavior did not have the effect of frustrating

the negotiations. Local 39 has not alleged sufficient facts that the City negotiator lacked authority to bargain, or that the City's response to request for information was so inadequate that it frustrated the bargaining process. Local 39 has not demonstrated that the alleged delays in the bargaining process were sufficient to "torpedo" the negotiations process.

Instead, the record indicates that the parties conducted substantive discussions, exchanged proposals and information, asked and responded to questions, and that the City was willing to schedule negotiating sessions. The parties reached tentative agreements on at least eight different issues. Additionally, the City attempted to follow the impasse resolution procedures in the Charter, which are reasonable based on the above discussion. Furthermore, based on the alleged facts and circumstances, the City's lawsuit to compel arbitration did not frustrate the bargaining process, and thus does not constitute bad faith.

For these reasons, the Board finds that the unfair practice charge fails to state a prima facie case that under the MMBA, the City's Charter section A8.409-4 is unreasonable on its face or as applied, and that the City engaged in surface bargaining. Thus, the Board affirms the Board agent's dismissal of the charge.

ORDER

The unfair practice charge in Case No. SF-CE-355-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neuwald joined in this Decision.