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-610-M PERB Decision No. 2064-M September 25, 2009

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

Before McKeag, Neuwald and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (Board) on appeal by Stationary Engineers Local 39 (Local 39) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the City and County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA)[1] section 3505; PERB Regulation 32603(a)–(g);[2] and the City's Charter sections A8.409-3 and A8.409-4, by engaging in bad faith bargaining.

The Board has reviewed the dismissal and the record in light of Local 39's appeal, the City's response and the relevant law. Based on this review, the Board finds the Board agent's warning and dismissal letters to be a correct statement of the law and well reasoned, and

[1] MMBA is codified at Government Code section 3500 et seq.

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

therefore adopts them as the decision of the Board itself as supplemented by the discussion below.

DISCUSSION

Local 39 and the City are parties to a memorandum of understanding (MOU) with a term of July 1, 2006 through June 30, 2009.

In June 2008, the City proposed to extend the parties' MOU for one year, from July 1, 2009 to June 30, 2010, which would result in wages being frozen for that time. Local 39 agreed in principle with this proposal. There is no evidence of a formal agreement.

In a letter dated November 19, 2008, the City notified Local 39 that it sought to negotiate a successor MOU, provided the name and contact information for the City's chief negotiator, and invited Local 39 to schedule dates to begin negotiations. Attached to the letter, the City submitted a written proposal that there would be "no new economic benefits" for a total of 18 months, from July 1, 2009 through December 31, 2010.[3] Local 39 claims this is a regressive proposal and therefore amounts to bad faith bargaining by the City.

Additionally, the November 19, 2008 letter discussed the parties' obligations under the City Charter, stating in relevant part:

> As you know, Charter Section A 8.409-4 requires the parties to name their arbitration panel members no later than January 20th. Reserving its right of substitution, the City hereby names Jennifer Johnston as its arbitration panel member in the event impasse is reached.
>
> Please note that the Charter also sets deadlines for selection of a neutral party to chair the arbitration panel. We will be contacting you to discuss the selection of this individual.

[3] The proposal also included a "me-too" clause, such that if wage increases were given (or awarded by an arbitration panel) to other City unions during the period from July through December 2010, wage increases would be offered to Local 39 as well.

A follow up letter from the City, dated November 25, 2008, provided the names of three (3) neutral arbitrators as potential chairs of the arbitration panel.

Local 39 contends that because the Charter did not require the appointment of the arbitration panel until January 20, 2009, the reference to selection of the panel "compounded the pressure" on Local 39, and further demonstrated bad faith bargaining by the City.

The Board agent correctly held that even if the City's November 19, 2008, bargaining proposal was a regressive proposal, one indicia of bad faith bargaining is insufficient to establish unlawful conduct. Furthermore, the Board agent found that the charge failed to allege facts sufficient to establish that the totality of the City's conduct was intended to subvert the bargaining process or that it evidenced subjective bad faith.

On appeal, Local 39 asserts that the City's November 19 letter was a demand that "the Union take the first step in the impasse resolution process." Local 39 asserts that this demand demonstrates the City's intent to merely go through the motions of bargaining, and thereby should be considered a second indicia of bad faith bargaining.

As properly set forth in the dismissal, the Board has held several factors to be indicative of surface bargaining. However, merely informing a union of its obligations under a local city charter has not been recognized as such.

After a thorough review of the record in this matter, including the November 19 and 25, 2008 letters, we find no evidence to support the claim that the City demanded that Local 39 move to the impasse resolution process. Rather, the letter merely notifies Local 39 of the City's arbitration panel member and reminds Local 39 of the City Charter requirements. Accordingly, the City's reference to the arbitration panel and City Charter are not an indicia of surface bargaining, and Local 39's argument is without merit.

Therefore, based on the analysis in the Board agent's dismissal, and the findings above, the Board finds that the charge fails to state a prima facie case of bad faith bargaining.

ORDER

The unfair practice charge in Case No. SF-CE-610-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Neuwald joined in this Decision

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

May 6, 2009

Stewart Weinberg, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091

Re: *Stationary Engineers Local 39 v. City & County of San Francisco*
Unfair Practice Charge No. SF-CE-610-M
DISMISSAL LETTER

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 10, 2008. The Stationary Engineers Local 39 (Union or Charging Party) alleges that the City & County of San Francisco (City or Respondent) violated section 3505 of the Meyers-Milias-Brown Act (MMBA or Act),[1] PERB Regulation 32603(a) – (g), and the Charter of the City and County of San Francisco, sections A8.40-3 and A8.409-4 by engaging in bad faith bargaining.

Charging Party was informed in the attached Warning Letter dated April 16, 2009 that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to April 24, 2009, the charge would be dismissed.

PERB has not received either an amended charge or a request for withdrawal. On April 30, 2009 the undersigned left you a voicemail message stating that PERB had not received a response to the Warning Letter and that the charge would be dismissed. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the April 16, 2009 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

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

this dismissal. (Cal. Code Regs, tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 11020(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 PERB Regulation 32135(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, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, sec. 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, sec. 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By/_____
Laura Davis
Regional Attorney

Attachment

cc: Gina Roccanova

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
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April 16, 2009

Stewart Weinberg, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091

Re: *Stationary Engineers Local 39 v. City & County of San Francisco*
Unfair Practice Charge No. SF-CE-610-M
WARNING LETTER

Dear Mr. Weinberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 10, 2008. The Stationary Engineers Local 39 (Union or Charging Party) alleges that the City & County of San Francisco (City or Respondent) violated section 3505 of the Meyers-Milias-Brown Act (MMBA or Act),[1] PERB Regulation 32603(a) – (g), and the Charter of the City and County of San Francisco, sections A8.40-3 and A8.409-4 by engaging in bad faith bargaining.

Summary of Facts

My investigation reveals the following facts.

The Union and the City are parties to a Memorandum of Understanding (MOU) with a term of July 1, 2006 through June 30, 2009.

In June 2008, the City's voters passed Proposition B. Proposition B amended the City's Charter to establish a retiree health trust fund, restructure some retirement benefits, and freeze wages for all City workers from July 1, 2009 to June 30, 2010.

Accordingly, in June 2008, the City proposed to extend the MOU for one year, from July 1, 2009 to June 30, 2010, with the effect that wages would not be increased during this one-year extension. The Union agreed in principle with this proposal.

On November 19, 2008, the City notified the Union that it sought to negotiate a successor MOU and asked the Union to select a neutral arbitrator in accordance with the City's Charter, which provides for review by an arbitration panel in the event of a bargaining impasse.

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Charter section A 8.409-4 requires parties to name their arbitration panel members no later than January 20, 2009.

Also on November 19, 2008, the City made a written bargaining proposal to the Union. Therein, the City proposed that there would be "no new economic benefits" (i.e., a wage freeze) for a total of 18 months, from July 1, 2009 through December 31, 2010. The proposal includes a provision that wage increases would be offered in the last six months of the wage freeze (i.e., from July through December 2010) if such wage increases were given to other City unions, or awarded to other City unions by an arbitration panel (a "me-too" clause).

The City Charter, section A8.409-3 provides for an obligation to bargain in good faith with respect to labor relations. City Charter section A8.409-4 provides for impasse resolution procedures.

Bad Faith Bargaining

The charge alleges that the employer violated Government Code section 3505 and PERB Regulation 32603(c)[2] 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.) PERB has held it is the essence of surface bargaining 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.)[3] 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*, *supra*, 57 Cal.App.3d 9, 25.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (*Oakland Unified School District* (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (*Ibid.*) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-

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

[3] 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.)

and-take. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (*Stockton Unified School District* (1980) PERB Decision No. 143.); insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134.); and reneging on tentative agreements the parties already have made (*Charter Oak Unified School District* (1991) PERB Decision No. 873; *Stockton Unified School District*, *supra*; *Placerville Union School District* (1978) PERB Decision No. 69.).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (*Placentia Fire Fighters*, *supra*, 57 Cal.App.3d 9, 25; *Oakland Unified School District*, *supra*, PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229.)

The Union alleges that the City engaged in bad faith bargaining by making a single regressive proposal. Specifically, the Union alleges that in June 2008, the City proposed extending the MOU—and freezing wages— for 12 months, from June 2009 through June 2010. The Union alleges it "agreed in principle" with that proposal. Subsequently, in November 2008, the City notified the Union that it wanted to negotiate a successor labor agreement and proposed freezing wages for up to 18 months, from June 2009 through December 2010, with the last six months of that period subject to a "me-too" clause. Thus, the Union argues, the City replaced its original proposal with a different proposal that would freeze wages of its members for a longer period of time and therefore the second proposal is viewed by the Union as regressive.[4]

Regressive bargaining techniques may be an indicia of bad faith bargaining. (*Chino Valley Unified School District* (1999) PERB Decision No. 1326.) However, even if the 18-month wage freeze proposal was a regressive proposal, the Board has held that only one indicator of bad faith bargaining is insufficient to demonstrate a prima facie case of unlawful conduct. (*Ibid.*) The Union claims that the City also "compounded the pressure on the Charging Party" by requesting appointment of a neutral arbitrator to the arbitration panel[5] at the end of November 2008, when the panel did not have to be chosen until January 20, 2009. However,

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[4] The City alleges in its position statement that the 18-month proposal was made in June 2008 and that it believed the Union agreed to it. However, at this stage of the proceedings, PERB cannot resolve factual disputes and must accept Charging Party's facts as true. (*UPTE, CWA Local 9119 (Crisosto)* (2006) PERB Decision No. 1811-H; *Golden Plains Unified School District* (2002) PERB Decision No. 1489.)

[5] Selection of arbitrators for purposes of City impasse proceedings is governed by City Charge section A8.409-4.

the Union does not allege any facts to show that the City's desire to select an arbitration panel under the terms of the City Charter thwarted negotiations or constitutes bad faith bargaining. The Union does not allege any other indicia of bad faith, nor does it describe the overall course of bargaining in any detail. The Union, therefore, does not allege facts sufficient to establish that the totality of the City's conduct was intended to subvert the negotiating process or that it evidences subjective bad faith.

Violation of Local Rule

Although Charging Party alleges that the City has violated two provisions of the City Charter (sections A8.409-e and A8.409-4), it does not allege any facts demonstrating such a violation. Charging Party does not allege facts concerning specific language of the Charter sections that may have been violated, nor does it allege that the Charter provisions themselves are unreasonable local rules. (See, e.g., *City & County of San Francisco* (2007) PERB Decision No. 1890-M; *City of San Rafael* (2004) PERB Decision No. 1698-M.) Accordingly, to the extent that Charging Party alleges that the City's acts constitute a violation of local rules, or that the City's rules are unreasonable, it does not allege facts sufficient to state a prima facie case.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before **April 24, 2009**,[6] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Davis
Regional Attorney

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[6] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)