STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SONOMA COUNTY LAW ENFORCEMENT ASSOCIATION, Charging Party, v. COUNTY OF SONOMA, Respondent.	Case No. SF-CE-523-M PERB Decision No. 2100-M February 25, 2010

Appearances: Mastagni, Holstedt, Amick, Miller, Johnsen & Uhrhammer by Kathleen N. Mastagni, Attorney, for Sonoma County Law Enforcement Association; Renne Sloan Holtzman Sakai by Timothy G. Yeung and Genevieve Ng, Attorneys, for County of Sonoma.

Before McKeag, Neuwald and Wesley, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the Sonoma County Law Enforcement Association (SCLEA) and the County of Sonoma (County) to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the County violated the Meyers-Milias-Brown Act (MMBA)[1] by: (1) unilaterally implementing its last, best and final offer prior to the completion of impasse procedures; (2) unilaterally implementing terms and conditions of employment not reasonably contemplated within the parties' pre-impasse negotiations; and (3) unilaterally imposing a waiver of SCLEA's right to negotiate health benefit changes for the upcoming year.

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

The ALJ found that the County violated MMBA section 3505.4[2] by refusing to participate in statutorily-mandated interest arbitration and unilaterally implementing terms and conditions as to those law enforcement employees who are entitled to interest arbitration, and thereby also denied SCLEA its right to represent bargaining unit employees, in violation of MMBA section 3505.[3] The ALJ dismissed the remaining allegations that the County violated MMBA by: (1) unilaterally implementing terms and conditions not reasonably contemplated within its last, best and final offer; and (2) depriving SCLEA of the right to negotiate on a yearly basis.

The County appeals only from that portion of the ALJ's proposed decision that found that it was required to submit to interest arbitration with respect to certain law enforcement employees, arguing that the governing statute is unconstitutional. SCLEA appeals from the findings that: (1) the County was not required to submit to interest arbitration as to all

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[2] MMBA section 3505.4 states:

> If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. 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, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

[3] The ALJ found that the County was not required to submit to interest arbitration with respect to employees not covered by MMBA section 3505.4.

employees; and (2) the County unilaterally implemented terms and conditions reasonably contemplated within its last, best and final offer.[4]

The Board has reviewed the proposed decision and the record in light of the parties' exceptions and responses thereto, and the relevant law. Based on this review, the Board reverses the proposed decision in part and affirms it in part for the reasons discussed below.

BACKGROUND[5]

The County is a public agency within the meaning of MMBA section 3501(c). SCLEA is an employee organization within the meaning of Section 3501(a).

SCLEA exclusively represents four bargaining units composed of sworn and non-sworn law enforcement employees. The units include classifications such as correctional officers, probation officers, district attorney investigators, welfare fraud investigators, park rangers, fire inspectors, communications dispatchers, and residential care counselors.

SCLEA and the County were parties to a memorandum of understanding (MOU) covering all four units, effective March 4, 2003 through June 18, 2007. The parties began negotiations for a single successor agreement in February 2007. The parties agreed to a number of ground rules: tentative agreements were to be signed by the teams' principals, but the principals lacked authority to enter into such agreements without first consulting with the team. It was understood that if neither side made a proposal as to an article in the MOU, the status quo would remain. The parties also agreed that all proposals and counterproposals would be presumed to be rejected unless specifically accepted by the other party.

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[4] SCLEA did not except to the dismissal of the allegation that the County denied SCLEA its statutory right to bargain on a yearly basis. Accordingly, the ALJ's determination on this issue is final. (PERB Reg. 32300(c); PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 3100 et seq.)

[5] The Board adopts the ALJ's findings of fact to the extent set forth herein.

During the Spring of 2007, the parties engaged in approximately 13 bargaining sessions. The parties agreed, at least in principle, to carry over many of the provisions of the existing MOU without change. The negotiations revolved primarily around the County's proposals offering a cost-of-living adjustment (COLA) for the entire unit, equity adjustments for particular positions, and changes in health and welfare benefits.

At the May 16, 2007 bargaining session, the County's lead negotiator, Kenneth Couch (Couch), provided SCLEA with a proposal on revisions to Article 18 of the MOU covering health and welfare benefits. In the past, the County had maintained a practice of contributing the same percentage of the monthly premium costs, regardless of the cost of the premium(s) associated with the selected health plan, for the employee (alone, with one dependent, or two or more dependents). The County proposed restricting that percentage to only the lowest-cost plan, beginning with the 2008-2009 plan year. In what the parties termed the "85-Y plan," the County's contribution dollar amount would be set at 85 percent of the lowest cost plan. For any higher cost plan, a "Y-rating" would freeze the County's contribution dollar amount at the 2007-2008 contribution dollar amount for those electing the more expensive plans, until the contribution dollar amount for the lowest-cost plan rose to the dollar amount of the higher-cost plan. Thereafter, any difference above the lowest-cost plan would be picked up by the employee. Having already adopted these provisions for its unrepresented employees, the County was interested in having these provisions apply to SCLEA's active bargaining unit employees as well as its future retirees, who received this benefit through the MOU. The County also offered an across-the-board COLA of 3.25 percent and, as a quid pro quo for acceptance of the 85-Y plan, equity adjustments to bring specified classifications to 100 percent of market wages, to be implemented in two steps.

The discussions during the May 16, 2007 bargaining session focused primarily on the COLA, equity adjustments, and the 85-Y health plan issues set forth in Article 18, sections 18.1, 18.2, and 18.3 of the MOU. The parties also discussed changes to future retiree health premiums, unpaid medical and pregnancy leaves, and long-term disability. During its review of the proposal, the SCLEA representatives noticed that three pages of the Article 18 text appeared to be missing and notified the County of the omission. Sections 18.1, 18.2 and 18.3 were not among the missing sections, and the parties continued to negotiate over those sections.

Although SCLEA requested that the County provide all new proposals in "legislative format," showing changes in strikeout and underlined text, the County determined it would be unfeasible to do so for Article 18, because the changes were numerous and were not of the type that lent itself to that type of formatting. Numerous sections were renumbered, previous whole sections split, and language was moved.

At the end of the May 16, 2007 session, SCLEA asserted that the parties were at impasse. The parties used a previously scheduled negotiation session on May 31, 2007 to identify issues for mediation, and formally declared impasse on that date. The County's local employee-relations ordinance (ERO) provides that mediation is the only mandatory impasse procedure, with factfinding optional. If factfinding is not undertaken, the County's negotiator may present the employer's last, best and final offer to the governing board for implementation. The ordinance makes no mention of interest arbitration proceedings as set forth in title 9.5 of the Code of Civil Procedure. (Code Civ. Proc., § 1299 et seq.; Stats. 2000, ch. 906 ["Arbitration of Firefighter and Law Enforcement Officer Disputes"].)

At the first mediation session on July 11, 2007, SCLEA presented a proposal, to which the County did not respond formally at that time. On July 17, 2007, Couch and SCLEA's chief

negotiator, Shaun DuFosee (DuFosee), met at a restaurant where Couch delivered the County's counter-proposal. The County's proposal consisted of two pages and stated:

> Acceptance by the SCLEA results in settlement of all issues raised by the parties in these negotiations for a successor Memorandum Of Understanding (MOU). Tentative agreements (T/As) signed by the parties on March 08, 2007, and the terms and conditions of this counter proposal will comprise the only changes to be incorporated in the successor MOU between the parties. All articles not previously tentatively agreed to, or included in this proposal as detailed below, shall remain unchanged from the current MOU.

The two-page document called for a one-year term (June 19, 2007 through June 16, 2008), the COLA, the equity adjustments, and the same 85-Y plan that had been included in the May 16, 2007 proposal. The proposal further stated that the County would implement the 85-Y plan as soon as possible, including plan design changes implemented on April 10, 2007 for both active and retired bargaining members, and that existing language concerning the retiree/active employee health insurance link would remain unchanged. The proposal further stated that if it was not accepted in writing by July 23, 2007, the offer would be withdrawn in its entirety. DuFosee testified that he did not consider this limitation to have any practical effect, as he believed the July 17, 2007 proposal did not materially differ from the County's May 16, 2007 proposal.

Couch testified that, as he was presenting the proposal to DuFosee, he realized that the version of Article 18 that was attached to the proposal was not the correct one, so he removed it from the rest of the document and promised to e-mail the correct version to DuFosee following the meeting.

Couch testified that on July 18, 2007, he e-mailed DuFosee the corrected version of the Article 18 proposal both at SCLEA and at work. Neither message was returned as undeliverable. Couch's testimony was corroborated by a copy of the e-mail transmission dated

July 18, 2007 stating that the settlement offer was attached, including the correct Article 18 proposal. DuFosee denied both that Couch removed a version of Article 18 from the July 17, 2007 proposal during their meeting or that he received the July 18, 2007, e-mail transmission at either address. He asserted he sometimes had difficulty retrieving e-mails at one of the addresses. Given Couch's credible testimony that he sent the e-mails and that the e-mail transmission was not returned as undeliverable, we adopt the ALJ's credibility determination that, on July 18, 2007, Couch e-mailed DuFosee a complete copy of proposed Article 18 and that DuFosee received it.

The language of Article 18 included in the July 18 transmission is identical to that set forth in the May 16, 2007 proposal with respect to Sections 18.1, 18.2 and 18.3. The cover e-mail states that current language contained in Article 18.16 would replace the County's proposed language in Sections 18.4 and 18.5 concerning retiree health insurance contributions. The July 18, 2007 transmission also appeared to contain the missing pages from the May 16, 2007 proposal concerning, *inter alia*, dental benefits, long-term disability, and unpaid medical/pregnancy disability leave. SCLEA rejected the proposal.

At a second mediation session on August 17, 2007, the County presented SCLEA with a revised offer, consisting of a two-page summary of the County's last offer on the three major issues in dispute: the 85-Y plan, COLAs, and equity adjustments. Couch informed SCLEA that Article 18 was still part of the County's last offer and had not changed since the May 16, 2007 proposal; therefore, it was not attached to the August 17, 2007 offer. The August 17, 2007 summary was substantially the same as the July 17, 2007 offer, but changed the timing of the second equity adjustment due to the passage of time during bargaining. The SCLEA team took this written proposal directly to the membership for a vote. The membership rejected this proposal as well.

After meeting again with SCLEA representatives in an effort to answer questions and come to a resolution on August 30, 2007, the County sent a letter to all bargaining unit employees explaining the County's August 17, 2007 offer and including a copy of the August 17, 2007 two-page proposal.

A final, unsuccessful, mediation session was held on November 13, 2007. On November 19, 2007, DuFosee submitted a request to the chair of the County's governing board that the matter be submitted for interest arbitration pursuant to Code of Civil Procedure section 1299.4. The County refused, asserting that Section 1299.4 was unconstitutional and that many of the bargaining unit classifications were not covered by that statute in any event.

By letter dated December 20, 2007 to the County, SCLEA requested the opening of negotiations for a successor memorandum, while acknowledging the ongoing bargaining impasse. By this time, DuFosee's term as president had expired and he was replaced by Thomas Gordon (Gordon), who had been a member of the bargaining team throughout the negotiations. In addition, Couch had ceased employment with the County and had been replaced by Interim Labor Relations Manager David Mackowiak (Mackowiak).

In late December 2007, Mackowiak attempted unsuccessfully to contact Gordon by telephone to inform him that the County intended to present an implementation resolution to the governing board at its January 8, 2008 meeting. On December 31, 2007, the County's human resources director, Ann Goodrich, sent Gordon and a representative of the law firm representing SCLEA an e-mail notifying them that the County had submitted an agenda item to the County's governing board to implement the County's last offer, and promised to send a copy of the agenda item on January 2, 2008. Gordon was out of town on vacation in late December 2007, but he acknowledged that he did receive the County's e-mail on January 2, 2008, with an attachment containing the finalized board agenda item. The attachment included

the language for Article 18 that was substantially the same as the version Couch sent to DuFosee on July 18, 2007. Gordon did not respond to Mackowiak or communicate any concerns to the County about the proposed implementation prior to January 8, 2008.

DuFosee was out of town on vacation between December 26, 2007 and January 15, 2008. He received an e-mail that included the implemented terms, which he reviewed after his return. DuFosee testified that he never conducted a side-by-side comparison of the existing Article 18 and the County's new proposal, because he felt it was confusing.

The staff recommendation called for implementation of the 3.25 percent COLA, effective January 15, 2008, together with the equity adjustments for identified classifications, one-half to be provided immediately and the remainder on July 15, 2008. In the summary section, the staff report described the health benefit changes as including changes in co-pays and deductibles for all three medical plans that would take effect "as soon as practical," and that changes in the amount of County contributions to premiums under its 85-Y proposal would take effect beginning with the 2008-2009 health plan year. The recommendation noted that the implemented terms would remain in effect through June 15, 2008, "the start of the normal contract cycle for this unit."

Gordon testified that he did not try to compare the proposed Article 18 language with the existing contract language because he was never confident he could ascertain all of the differences.

Gordon appeared at the January 8, 2008 governing board meeting to object to the implementation proposal. Among his comments he asserted:

> Finally, SCLEA has only had a brief time to review the text of this resolution. It appears to us that some changes may have been made after the date for final submission of proposals and/or after the County submitted its last, best, and final offer. We will be researching this issue further and will respond accordingly.

Mackowiak approached Gordon after the meeting to seek clarification about SCLEA's concerns. Gordon replied that he could not tell Mackowiak what the issues were, claiming he had not had sufficient time to review it. After Mackowiak scheduled a meeting with Gordon for January 18, 2008 to identify and address the purported errors, Gordon cancelled the meeting. Mackowiak tried unsuccessfully to reschedule the meeting with Gordon.

Sometime after the January 8, 2008 board action, the County reviewed the agenda item and discovered certain errors in its submission to the board. Therefore, it submitted an agenda item to the board requesting an amendment to the January 8, 2008 resolution. The written submittal identified as errors the omission of subdivision (b)(iii) of Section 18.3 ("Contributions Toward Medical Insurance for Employees"), omissions of the proper revisions to Section 18.5 ("Medical Insurance Eligibility & Contributions for Retirees Employed After January 1, 1990"), and designation of $9.00 per pay period as the employee contribution to dental insurance, when it should have been $11.00. The County notified SCLEA of the proposed changes. SCLEA did not respond to the notification. The board adopted the recommended amendment at its January 29, 2008 meeting.

In February 2008, the County held a special open enrollment period to allow bargaining unit members the opportunity to select other health plan choices in response to the plan design changes for the current year. In May 2008, the County held its customary open enrollment period prior to the 2008-2009 health plan year.

DISCUSSION

Request for Interest Arbitration

The County asserts that it was not required to submit to the binding interest arbitration provisions of Code of Civil Procedure section 1299 et seq. prior to implementing its last, best and final offer because that statute is unconstitutional. In *County of Riverside v. Superior*

Court (2003) 30 Cal.4th 278 (*Riverside*), the Supreme Court held that a prior version of section 1299 et seq. (SB 402, Stats. 2000, ch. 906, § 2) violated Article XI, section 1, subdivision (b) and section 11, subdivision of (a), the California Constitution by delegating to a private body the power to interfere with county financial affairs and to perform a municipal function. (*Riverside*, at p. 282.)[6] In response to the court's decision in *Riverside*, the Legislature adopted SB 440 (Stats. 2003, ch. 877), which amended Section 1299.7 to provide that the arbitrator's decision would be binding unless the county's governing body, by unanimous vote, rejects the arbitration.

While this matter was pending before PERB, the County filed a judicial action challenging the constitutionality of SB 440. On April 24, 2009, the First District Court of Appeal determined that the amendments did not cure the constitutional violation because: (a) it merely gave the county veto power over the arbitrator's decision but did not allow the county to "provide for" the compensation of county employees; and (b) empowered a minority of the governing board, via the requirement of unanimity, to make the arbitrator's decision binding on the county, even if the majority disagreed. (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 344, 346-347, review denied.)[7]

While we have no authority to declare a statute unconstitutional (Cal. Const., art. III, § 3.5), we are bound by the determination of the court of appeal that Code of Civil Procedure section 1299 et seq., the interest arbitration statute at issue in this case, constitutes an unlawful

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[6] Senate Bill 402, entitled "Arbitration of Firefighter and Law Enforcement Officer Labor Disputes," authorized public safety employee unions to declare an impasse in negotiations and require a local public agency to submit unresolved economic issues to binding interest arbitration.

[7] Given that the judicial proceedings are complete, we deny as moot the County's motion to abate and/or sever the allegation that the County unlawfully refused to submit to interest arbitration.

delegation of power in violation of Article IX of the Constitution. Accordingly, we reverse the ALJ's decision to the extent that it determined that the County violated the MMBA by refusing to submit to interest arbitration prior to implementing its last, best and final offer.[8]

Implementation of Last, Best and Final Offer

PERB has long held that an employer's unilateral change in terms and conditions of employment prior to reaching an impasse in negotiations or completion of statutory impasse resolution procedures is a per se violation of the statutory duty to bargain in good faith. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51; *Rowland Unified School District* (1994) PERB Decision No. 1053 (*Rowland*).) Once impasse has been reached and the parties have completed statutory impasse resolution procedures, the employer may thereafter implement changes reasonably contemplated within its last, best and final offer. (*Rowland*; *Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*); *Charter Oak Unified School District* (1991) PERB Decision No. 873 (*Charter Oak*).) "The employer need not implement changes *absolutely identical* with its last offer on a given issue. However, the unilateral adoptions must be reasonably comprehended within the preimpasse proposals." (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900 [citations omitted; emphasis in original].) Thus, PERB has stated, "matters reasonably comprehended within pre-impasse negotiations include neither proposals better than the last best offer nor proposals less than the status quo which were not previously discussed at the

[8] Because we conclude that the County was not required to submit to interest arbitration, we do not address the issue of whether the interest arbitration procedures of Code of Civil Procedure section 1299 et seq. apply to a mixed unit of public safety and non-public safety employees.

table." (*Modesto.*) PERB will not, however, dissect a package proposal to "separately compare each provision of the package to prior proposals concerning that provision." (*Charter Oak.*)

Under the MMBA, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer. (MMBA, § 3505.4.) The County complied with the mandatory impasse procedure specified in the ERO. As discussed above, we have concluded that the County was not required to proceed to interest arbitration after impasse once it completed the mediation procedures required under the ERO. Therefore, the only remaining question is whether the County unilaterally implemented changes "reasonably contemplated" within its pre-impasse proposals.

SCLEA asserts three exceptions to the ALJ's determination that the County did not violate the MMBA by unilaterally implementing terms of conditions of employment after impasse. First, SCLEA excepts to the ALJ's finding that DuFosee received the correct version of Article 18 on July 18, 2007. As discussed above, we find that the record supports the ALJ's determination that DuFosee received Couch's July 18, 2007 email transmitting Article 18 to him.

Second, SCLEA excepts to the ALJ's finding that the complete language of Article 18 was presented to SCLEA. Third, SCLEA excepts to the ALJ's conclusion of law that the entire Article 18 was reasonably comprehended in the County's last, best, and final offer. We address these two exceptions together.

The record reflects that the County provided SCLEA with copies of revised Article 18 on at least three occasions prior to implementation. First, the County provided SCLEA with a revised Article 18 on May 16, 2007, at the meeting where the parties first reached impasse. Although three pages were missing from the document, it is clear that the primary issues in

negotiations were included in the May 16, 2007 document provided to SCLEA: the health care provisions contained in Sections 18.1, 18.2 and 18.3. The May 16, 2007 proposal also included proposed language on retiree health benefits in Sections 18.4, 18.5 and 18.6.

Second, the County provided SCLEA with a complete copy of its proposed Article 18 on July 18, 2007, when Couch emailed it to DuFosee following their July 17, 2007 meeting. Again, this document included the health care provisions contained in Sections 18.1, 18.2 and 18.3, which remained unchanged from the May 16, 2007 proposal. In addition, both the July 17, 2007 and the August 17, 2007 proposals confirmed the County's agreement that the existing language for retiree health benefits set forth in Section 18.16 of the prior MOU would remain unchanged, but would be moved to Sections 18.4 and 18.5. Both DuFosee and his successor, Gordon, admitted that the County's July 17, 2007 and August 17, 2007 proposals, respectively, did not differ materially from the May 16, 2007 proposal. They admitted, however, that they did not go through the proposals line by line to determine whether any other changes had been proposed.

Finally, the County provided SCLEA with a copy of its proposed implementation of Article 18 prior to the January 8, 2008 governing board meeting. Although given the opportunity to do so, SCLEA never objected to that proposal prior to January 8, 2008. After SCLEA asserted at the governing board meeting that the implementation proposal contained matters not previously included in the County's proposals, the County attempted to meet with SCLEA to discuss this assertion, but SCLEA cancelled a scheduled meeting and did not respond to the County's requests to reschedule.

Although the County again changed some of the language of Article 18 in its January 29, 2008 resolution, we do not find that these changes represented a significant departure from the County's proposals during negotiations. The addition of subdivision (iii) to

Section 18.3(b) discusses the County's implementation of the 85-Y plan and is substantially similar to language contained in the County's July 17, 2007 and August 17, 2007 proposals. The changes to Sections 18.4 and 18.5 incorporate existing language from Section 18.16 of the original MOU. The change in employee dental insurance contributions reflects a return to language contained in the original MOU. We agree with the ALJ that all of the changes were reasonably comprehended within the County's pre-impasse proposals.

SCLEA's argument essentially is that the County failed to provide it with a copy of its final proposal that specifically identified all changes to Article 18 that it intended to implement. Therefore, SCLEA asserts, because the versions of Article 18 provided to it did not specifically highlight the specific language changes to the original agreement, the County's January 2008 implementation violated the MMBA. SCLEA has not, however, identified any specific terms implemented in January 2008 that were not reasonably contemplated within the County's pre-impasse proposals.[9] During the formal hearing, the burden is on the charging party to present evidence to prove the allegations in the complaint. (See, e.g., *Oakland Unified School District* (2009) PERB Decision No. 2061.) SCLEA has not established that the terms implemented in January 2008 deviated in any significant way from the proposals presented or discussed during negotiations. Accordingly, we conclude that SCLEA has failed to establish a violation of the MMBA.

[9] In the proceedings before the ALJ, SCLEA appeared to suggest that the implemented proposal made changes in the area of employee dental benefit contributions, coordination of leave benefits with statutory requirements, and long-term disability benefits. On appeal, SCLEA has not excepted to the ALJ's findings that all of these items were included in the parties' negotiations and were reasonably comprehended within the County's pre-impasse proposals. Therefore, we affirm the ALJ's findings that the County did not violate the MMBA with respect to these issues.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-523-M are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.