STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SELMA FIREFIGHTERS ASSOCIATION, IAFF, LOCAL 3716, Charging Party, v. CITY OF SELMA, Respondent.	Case No. SA-CE-747-M PERB Decision No. 2380-M June 27, 2014

Appearances: Law Offices of Bennett & Sharpe by Thomas M. Sharpe, Attorney, for Selma Firefighters Association, IAFF, Local 3716; Costanzo & Associates by Neal E. Costanzo, Attorney, for City of Selma.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by the City of Selma (City) to a proposed decision (attached) by an administrative law judge (ALJ). The charge by the Selma Firefighters Association, IAFF, Local 3716 (Association) alleged that the City violated the Meyers-Milias-Brown Act (MMBA)[1] by refusing to meet in good faith with the Association and failing to bargain to impasse before implementing its last, best and final offer (LBFO).[2] The Association alleged that this conduct constituted a violation of MMBA sections 3505 and 3505.4. The ALJ

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

[2] The charge also alleges that the City failed to respond to information requests by the Association. The ALJ dismissed this charge, and the Association did not except to the dismissal.

concluded that the City engaged in surface bargaining and prematurely declared impasse in negotiations with the Association. The City excepts to the ALJ's findings that the parties were not at genuine impasse when the City unilaterally imposed its LBFO.

The Board itself has reviewed the record in this matter, including the pleadings, the hearing record, the proposed decision, the City's exceptions and the Association's response.[3] We conclude that the ALJ's findings of fact are supported by the hearing record, and we adopt them as the Board's, consistent with our discussion of the facts below which addresses the City's exceptions. The ALJ's conclusions of law are well-reasoned and in accordance with applicable law, and we adopt them as the Board's. We, therefore, affirm the ALJ's proposed decision, supplemented by the following discussion of the issues raised by the parties' exceptions.

FACTUAL SUMMARY

The Association and the City were parties to a memorandum of understanding (MOU) with a term of July 7, 2007 through January 2, 2009.[4]

Anthony Rivas (Rivas), a former firefighter/paramedic for the City, served as president of the Association from January 2010 to May 2012. Thomas Sharpe (Sharpe) was the Association's chief negotiator. D-B Heusser (Heusser) was the City Manager at all relevant times.

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[3] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Our regulations governing appeals to the Board itself (PERB Regs. 32300 - 32325) make no provision for a reply to a response. Without foreclosing our discretion in an appropriate future case to request or consider a reply, we note that in this case we did not consider the reply.

[4] The record is inconclusive as to whether the MOU was extended and, if so, the MOU extension's effective dates.

In March 2011,[5] the City held a roundtable meeting to brief representatives of the City's six bargaining units on the City's budget and financial situation. Representatives of the Association were not present at the meeting. Heusser described the roundtable meeting as "an informal meeting. . . . with individuals at the beginning [of negotiations] to let them know where we were going to go." (Reporter's Transcript (RT).) The evidence indicates that the parties did not exchange proposals or otherwise engage in substantive negotiations at the March 2011 roundtable meeting.

The City excepts to the ALJ's determination that a roundtable meeting was conducted on March 16, arguing that the only event occurring on March 16 was Heusser's issuance of a "MEMORANDUM" (Memorandum) dated March 16, in which he indicated that at "a previous meeting," he had proposed graduated employee California Public Employees' Retirement System (CalPERS) contributions, a furlough of a maximum of 10 percent, and a reopener provision for the 2012-2013 year to discuss the salary of those within the various bargaining units. However, the City's single witness, Heusser, testified as follows to questioning by the City's counsel:

> Q Do you recall conducting this initial roundtable meeting with the various bargaining units during the month of March of 2011?
>
> A Yes.
>
> Q And do you recall which bargaining units were represented at that meeting?
>
> A I do think that all the units except the fire were at this unit.
>
> Q Okay.
>
> A Or at this meeting. I'm sorry.

[5] Hereafter all dates refer to 2011, unless otherwise noted.

Q Do you know why the fire were not there?

A I have no idea.

(RT.)

Although Heusser did not explicitly state that the meeting occurred on March 16, it was reasonable for the ALJ to deduce from the record that the meeting occurred on that date, since the aforementioned Memorandum to the various employee associations was dated March 16. Regardless, the exact date of this March roundtable meeting has no bearing on our analysis. The City concedes that this meeting was not a meet-and-confer session with the Association, and fails to explain in its exceptions the import of the date of this meeting. For this reason, this exception is rejected.

The City and the bargaining unit representatives held a second roundtable meeting on May 10. Rivas attended the meeting on behalf of the Association. Heusser reported that the City was still working on budget numbers, but expected that the City would need concessions from the employees for the 2011-2012 fiscal year because of a budget shortfall. At the time, every City employee was already subject to furloughs.[6] Heusser did not make specific proposals for employee concessions, but he said that the City wanted to eliminate furloughs for the new fiscal year while achieving cost reductions and asked the representatives to brainstorm and come up with ideas to address the budget shortfall. This meeting was not a meet and confer session with the Association, as the City did not even request bargaining until May 19. The parties' first meeting pursuant to this request occurred on June 2.

[6] The firefighters unit had been subject to a ten percent furlough for three years, equating to one day off per month without pay. (RT.)

The City excepts to the ALJ's finding that the City made no specific proposals at the May 10 meeting, citing to its Memorandum dated March 16, 2011. However, there is no evidence that this Memorandum was distributed to the Association at the May 10 meeting. The only other date referenced on the document is a hand-written date of June 16, 2011, which Association Chief Negotiator Sharpe is alleged to have added when he first received this document. The City also cites to a fax dated June 26, 2011 listing a number of substantive bargaining issues. Again, there is no reference to the May 10 meeting. Neither of these exhibits supports the City's exception, and we therefore reject it. By the City's own admission, negotiations with the Association were not even requested by the City until May 19 and did not commence until June 2.

On May 16, the bargaining unit representatives from all bargaining units (including the Association) returned for a third roundtable meeting. Heusser reported the City was projecting a budget deficit of $1.7 million for fiscal year 2011-2012. According to Heusser, revenues were up slightly, but expenses were up as well, including CalPERS retirement, health insurance, and miscellaneous costs. Heusser asked representatives from each bargaining unit what they could do to help bridge the budget gap. Rivas responded by asking Heusser for a breakdown of the increased costs.

On May 19, Heusser sent a letter to Sharpe stating:

> This letter is written to request a meeting in which to open the meet and confer process as it pertains to the 2011-2012 fiscal year budget and the proposed transition agreement between Selma Firefighters Local #3716 and CalFire.

At that time, the City was considering contracting with the California Department of Forestry and Fire Protection (CalFire) to provide fire and emergency medical services. If a contract were to be approved, the City's firefighters would become employees of CalFire.

The Association and the City met for their first bargaining session on June 2. Heusser again discussed the need for employee concessions. He verbally proposed that the Association members pay a part of the employee's share of the CalPERS contribution, 5 percent for two years, and thereafter an additional 1 percent each year, until the employee's share reached 8 percent.[7] Heusser also stated that furloughs might have to continue.

The Association requested information on the increased retirement, insurance, and miscellaneous costs. It also asked for a calculation of 1 percent of the CalPERS cost for the Association members. Heusser left the room and returned with the 1 percent cost information. The Association also asked for a City expenditure report. Later that day, the Association and the City discussed a possible transition from the fire department to CalFire.

The parties resumed negotiations on June 16. Heusser distributed a written proposal dated March 16, 2011, which stated:[8]

> At a previous meeting I proposed the following change in the M.O.U. between the City of Selma and the Selma Firefighter Bargaining Unit.
>
> - The employees are asked to participate in the PERS at 5% for 2011-12; 5% for 2012-13; 6% 2013-14; 7% 2014-15 and 8% 2015-2016. This means that employees would be contributing to the employee side of the PERS retirement program.
>
> - That the employees offer a furlough of a maximum of 10%.

[7] It appears from the record that prior to the City's imposition of the LBFO, the City was picking up the entire employee's share of the CalPERS contribution.

[8] Rivas testified that he first saw the written proposal on June 16. Heusser testified he prepared the proposal on March 16, and had previously distributed similar memos to the other bargaining units. Heusser knew the Association was not at the March 2011 roundtable meeting, but could not recall if the memo had been given to the Association before the June 16 meeting.

- That, if the unit agrees, to the above the City Manager will for the 2012-2013 year open discussion on salary of those with in the bargaining unit.

The City excepts to the ALJ's finding that the Memorandum dated March 16, 2011, was not distributed to the Association until June 16. The City cites to the record, including Rivas' testimony, in arguing that the Memorandum was distributed to the Association both on May 10 and June 2. However, Rivas' testimony does not support the City's exception. Rivas' above-referenced testimony indicates that the parties made no specific proposals at the May 10 meeting. Rivas testified as follows regarding the parties' initial negotiating session on June 2:

> A What he said was that we -- that the city wanted us to pay five percent for two years and then one percent each subsequent year until a total of eight percent.
>
> Q Was that couched in terms of a formal proposal from the city?
>
> A No.
>
> Q How was it couched?
>
> A He just told us verbally. He verbally told us.
>
> [¶ . . . ¶]
>
> Q And according to your testimony, sir, that's the first occasion on which the firefighters contributing to the PERS was discussed; is that true?
>
> A Correct.

(RT.)

No agreements were reached on June 2 or June 16.

The "verbal" nature of the City's proposal indicates that no written proposals were provided to the Association on June 2. Rivas' testimony that he first saw the Memorandum

when it was "handed to us on our meeting on June 16th," is not credibly contradicted by any other evidence offered by the City. (RT.) This exception is therefore rejected.

By June, the projected budget deficit had been reduced. Heusser informed the Association the budget deficit was now approximately $830,000.

The City Council (Council) held a budget workshop during the June 29 Council meeting, which Rivas attended. Council members were given two options, reflecting a City budget with and without employee concessions.

The City asserts without contradiction that, as a general law city, it is required to have a budget adopted by July 1 of each year or it cannot expend funds, including paying bills and issuing payroll. However, it may apparently extend this deadline by a vote of the Council. At the June 29 meeting, the Council did exactly this. Because it was not ready to adopt a final budget, it adopted a resolution allowing the City to continue to operate and expend funds until a final budget was approved. Heusser testified that the resolution was adopted to allow time "[t]o finalize our budget and finalize any negotiations that might be underway." (RT.) The resolution did not specify the duration of the budget extension, or establish a new deadline for a budget to be adopted.

On June 30, Rivas was summoned by Heusser to an emergency meeting the next day, July 1. Rivas did not bring Sharpe to the meeting.

On July 1, Association representatives Rivas, Jeremy Owens and Paul Demers attended the meeting with Heusser and Steve Yribarren, the City's finance consultant. Heusser distributed a memo, which stated, in part:

> The Selma City Council has agreed to the following and has directed me to present this our last, best and final offer to the Selma Firefighters Union.

1. The City of Selma will place all members of the Union at 100% and thus eliminate the use of furloughs.

2. The members of the Union would pay 8% of the employee contribution side of the Calpers retirement program.

The memo requested a written response by July 7.

The City offered no explanation for the change in its proposal. Rivas commented on the short response time and Heusser gave the Association an additional day or two to respond.

On July 8, Sharpe sent the Association's counter-proposal to Heusser, which stated, in relevant part:

> Please regard the following as a comprehensive counter-proposal to the City proposal dated 1 July 2011. The proposal is intended as a package proposal, which means that we are prepared to recommend that our members accept a contract that includes each of the components set out in our counter-proposal. Should the City not accept the package counter-proposal set out below, we remain willing to continue the meet and confer process with the goal of reaching agreement on an MOU for F/Y 2011-2012. The proposed terms are as follows:
>
> (1) 1 year term, from July 1, 2011 through June 30, 2012.
>
> (2) No furloughs of bargaining unit employees during term.
>
> (3) The Employer-Paid Member Contribution or EPMC (the amount paid by the City that otherwise would be paid by bargaining unit employees) will be reduced from the current 9% to 1%, with the result being that bargaining unit employees will pay 8% of the member contribution, while the City will pay 1% EPMC.
>
> (4) If the City does not enter a contract with the State of California, Department of Forestry and Fire Protection (CAL FIRE) prior to January 1, 2012 for CAL FIRE to provide full-service fire protection and emergency medical response for the City of Selma, the base salaries for all bargaining unit employees will be increased by six percent (6%) effective January 1, 2012.

(5) The City will not enter into any contract or agreement with any party other than Cal Fire to provide the services currently provided by the covered employees.

Having not received a response from the City, Rivas e-mailed Heusser on July 12, inquiring if he had received the Association's counter-proposal and reiterating the Association's continued willingness to meet and confer if the City did not accept the counter-proposal. Heusser responded immediately, saying he planned to take the counter-proposal to the Council.

The following day, Heusser informed Sharpe by letter that the Council had rejected the Association's "package proposal" and that the City believed the parties were at impasse due to the "prolonged" negotiations and the significant differences between the parties' positions. The letter further stated that the City would consider adopting a budget at its July 13 council meeting that incorporated the City's LBFO. The letter concluded:

> The City is certainly willing to listen to any further proposals the Fire Fighters may wish to make. However, our current fiscal situation does not provide us with many options other than taking appropriate measures to decrease employee costs.

Upon receiving this letter on July 15, Rivas tried unsuccessfully to contact Heusser.

On Monday, July 18, before 8:00 a.m., Rivas sent an e-mail to Heusser stating that the Association wanted to continue the meet and confer process and was available to meet that day. Sharpe also called and left a voicemail message for Heusser that the Association wanted to meet. Heusser responded to both Rivas and Sharpe by e-mail that he was busy preparing for the Council meeting and did not have time to meet that day.

The Council adopted a resolution immediately imposing the City's LBFO on July 18.

The ALJ concluded that, considering the totality of the circumstances, the City had not bargained in good faith prior to declaring impasse and imposing its LBFO. The City's conduct relied on by the ALJ in support of this conclusion included: the limited number of face-to-face negotiation sessions, lack of discussion of the changes in the City's successive proposals, failure to bargain with the Association after receiving the Association's counter-proposal, rushing to conclude negotiations and adopt a budget, failing to discuss or clarify positions, and failing to determine if there was room for movement.

The ALJ concluded that the City violated MMBA sections 3505 and 3509(b), and PERB Regulation 32603(c), by failing to meet and confer in good faith and by prematurely declaring impasse. This same conduct interfered with the rights of employees to be represented by the Association in violation of MMBA section 3506 and PERB Regulation 32603(a), and denied the Association its right to represent employees in their employment relations with the City in violation of MMBA section 3503 and PERB Regulation 32603(b). Because the City did not satisfy its obligation to meet and confer in good faith, its declaration of impasse was premature and it was therefore not permitted to implement the LBFO, according to the ALJ.

To remedy this violation, the ALJ ordered the City to cease and desist from such unlawful conduct, to restore the status quo by rescinding adoption of its LBFO, and to make employees "whole" for any losses resulting from the implementation of the LBFO. Negotiations were to be resumed at the request of the Association. Recognizing that this remedy could require "calculations, offsets, and tax consequences considering furlough pay and retirement deductions," the ALJ ordered that the remedy be stayed for 45 days to provide

the parties an opportunity to negotiate a different remedy. If the parties were unwilling or unable to reach agreement, the ordered remedy would go into effect.

CITY'S EXCEPTIONS TO ALJ'S LEGAL CONCLUSIONS

The City excepts to the ALJ's legal conclusions, claiming that she erred in finding the City had engaged in surface bargaining because "the complaint does not allege 'surface bargaining,'" and because the ALJ failed to make any determination concerning the existence or non-existence of "surface bargaining." According to the City, the ALJ used an inappropriate standard to erroneously conclude that the City prematurely declared impasse. The City asserts that this conclusion is erroneously premised upon speculation.

THE ASSOCIATION'S RESPONSE TO CITY'S EXCEPTIONS

The Association asserts that the evidence establishes that the City's declaration of impasse was premature under the totality of bargaining conduct analysis applied in the proposed decision. The Association asserts that the ALJ's finding of premature declaration of impasse was based on the application of the correct legal standard, viz., that a valid request for bargaining had been made on a subject within the scope of bargaining and that there was a premature declaration of impasse. The Association also asserts that the ALJ's conclusions were not based on speculation.

DISCUSSION

As we recently noted in *County of Riverside* (2014) PERB Decision No. 2360 (*Riverside*), an employer may impose terms and conditions of employment reasonably comprehended within its LBFO, "but only after reaching a bona fide impasse in negotiations after negotiating in good faith." (*Riverside*, at p. 11.) Thus, imposition of an LBFO prior to reaching a bona fide impasse is an illegal unilateral change. An employer's premature declaration of impasse has also been found to demonstrate an intent to subvert the negotiating

process, even in the absence of a unilateral imposition of terms and conditions of employment. (*Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M; *Regents of the University of California* (1985) PERB Decision No. 520-H.)

The question therefore in this case is whether the impasse declared by the City on July 18 was bona fide, i.e., whether it was reached after the parties had engaged in good faith bargaining and "nonetheless, reached a point in their negotiations where continued [negotiations] would be futile." (*Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124, p. 5 (*Mt. San Antonio*).) If an impasse has not been preceded by good faith bargaining, assessed by a consideration of the totality of circumstances, it is not bona fide. (*Riverside, supra,* PERB Decision No. 2360; *Mt. San Antonio*.)

We conclude, with the ALJ, that the City's bargaining conduct prior to its imposition of its LBFO demonstrated a lack of intent to reach an agreement with the Association. The City engaged in surface bargaining and prematurely declared impasse on July 1, demonstrating a rush to impasse, which we have condemned in *City of San Jose* (2013) PERB Decision No. 2341-M, pp. 20-21, 39-43. After such declaration, the City continued its bad faith conduct by refusing to meet with the Association, thereby foreclosing the possibility of genuinely bridging the differences between them. (*Oakland Unified School District* (1981) PERB Decision No. 178.)

The ALJ's conclusion that the City engaged in surface bargaining up to and after its declaration of impasse is amply supported by the facts. Negotiations did not begin until May 19, at the earliest, when the City requested that the Association meet and confer. Only two meetings occurred, and no proposals were presented to the Association until the second meeting on June 16. At that meeting, the Association did not present a counter-offer, instead reiterating its request for expense reports showing the increase in the City's CalPERS costs. In

response, Heusser provided the Association with responsive expense reports. Heusser requested that the Association put in writing its request for the City's target amount of employee concessions for bridging the gap in CalPERS costs. The record does not reflect that the City solicited a counter-offer or otherwise expressed urgency in getting a response from the Association.

On July 1, the City called an emergency meeting and presented the Association with its LBFO, which, without explanation, significantly changed the City's proposal by demanding an immediate 8 percent employee contribution to CalPERS costs and rescinding the furlough.[9] The Association responded with its counter-proposal accepting this new economic landscape in principle, albeit with an additional proposal concerning a future conditional wage increase. Despite the Association's multiple requests to continue negotiations if the City found the Association's counter-proposal unacceptable, the City refused to meet to discuss the proposal, thereby foreclosing an opportunity to clarify positions or determine if there actually was no room for further movement.[10] As the ALJ observed, the City appeared to be "in a rush to conclude negotiations and adopt a budget," even though the City had given itself more time to adopt a budget and complete negotiations.

Contrary 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

[9] The obligation to bargain in good faith requires parties to explain their reasons for a particular bargaining position to permit bargaining to proceed on the basis of mutual understanding. (*Jefferson School District* (1980) PERB Decision No. 133.)

[10] As PERB has previously held, failing to act on the Association's proposals or to offer counter-proposals is an indicium of surface bargaining. (*San Mateo Community College District* (1983) PERB Order No. Ad-133.)

sessions. Her conclusion was based appropriately on the totality of circumstances described above.

The City asserts that the ALJ's conclusion regarding surface bargaining was improper because "surface bargaining" was not alleged in the complaint. We reject this exception. The City was on clear notice of the scope of the allegations and had sufficient opportunity to address all relevant facts. Both the initial unfair practice charge and the complaint allege that the City refused to meet in good faith with the Association and failed to bargain to impasse before implementing its LBFO. The concept of surface bargaining is reasonably contemplated within allegations of bad faith bargaining. (*See, e.g., Muroc Unified School District* (1978) PERB Decision No. 80, pp. 13, 22.)

In light of the City's conduct, we agree with the ALJ that the impasse declared by the City on July 1 was not bona fide because it was not reached after good faith negotiations and was therefore premature. Its imposition of the LBFO on July 18 therefore constitutes a unilateral change in terms and conditions of employment, a per se violation of the duty to bargain in good faith.

The City's refusal to negotiate after presenting its revised July 1 proposal, the limited number of face-to-face bargaining sessions that preceded the July 1 declaration, and the City's refusal to provide any explanation for its sudden change in its LBFO, considered together, indicate that the City prematurely declared impasse without bargaining in good faith. This bad faith conduct continued after July 1 when the City refused to meet with the Association after receiving its July 8 counter-proposal.

We disagree with the City's characterization of the Association's July 8 salary proposal as outside of a pre-determined range of bargaining subjects. The City asserts that the parties' negotiations "were solely for terms and conditions of employment for the 2011-2012 fiscal

year," and that "negotiations with all units, including the Firefighters, were limited to addressing implementation of furloughs and measures requiring employee contributions for retirement benefits as a means of cutting costs and closing the budget deficit."

This assertion is refuted by Heusser's March 16 "Memorandum" in which he indicated that at "a previous meeting," he had proposed graduated employee CalPERS contributions, a furlough of a maximum of 10 percent, and a reopener provision for the 2012-2013 year to discuss salary of those within the bargaining unit. The salary reopener, by its own terms, would not apply to "terms and conditions of employment for the 2011-2012 fiscal year," and goes beyond the issues of furloughs and employee contributions for retirement benefits.

Given the City's initial salary-related reopener proposal, the Association's later salary-related counter-proposal (albeit linked to whether or not the City contracted with CalFire) was directly related to the City's reopener proposal. Even had it not been, there was no evidence of mutually negotiated ground rules that restricted the scope of bargaining subjects.

We also reject the City's assertion that the Association's bargaining request lacked specificity as to subjects of bargaining. The Association's request was to negotiate over its July 8 counter-proposal, which clearly described the subjects of bargaining—furlough, CalPERS contribution, salary, and potential contracting out to CalFire. If the City was unclear about the meaning of any of these proposals, it had a duty to seek clarification. (*Jefferson School District* (1980) PERB Decision No. 133, p. 11; *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, pp. 8-10). It made no effort to do so. As noted above, the range of issues encompassed by the parties' discussions and proposals covered implementation of furloughs, measures requiring employee contributions for retirement benefits, and employee salaries. The City was clearly on notice of the scope of the bargaining subjects subsumed under the

Association's request, and cannot be heard to complain that it was ignorant of what the Association wanted to negotiate about.

The Association's proposal tying a salary increase to a CalFire subcontracting provision (discussed in further detail below) did not excuse the City's failure to bargain prior to implementing its LBFO, especially given the City's inclusion of a salary-related reopener in its initial bargaining proposal. Employee compensation is a negotiable subject matter, and the City was obligated to bargain over the Association's compensation proposal, regardless of whether or not the parties had considered this topic in previous proposals or discussions.

The City is correct that as of June 2 the parties engaged in separate but sequential negotiations over employee concessions on the one hand, and over the proposed transition agreement between the Association and CalFire to provide fire and emergency medical services on the other hand. However, the Association's July 8 counter-proposal merged these two topics by proposing that the possible lack of a CalFire agreement by a certain date would trigger a proposed salary increase. Contrary to the City's claim, there is nothing improper with the Association's inclusion of this term in its July 8 counter-proposal. The parties were simultaneously negotiating over wages at the same time they were discussing furloughs and the increase of employees' contribution to CalPERS. Wages are obviously within the scope of negotiations, and the City has failed to show how the Association's proposal thwarted further negotiations. This salary counter-proposal cannot be carved out from the wider MOU negotiations simply because it references the potential CalFire contract. It was part and parcel of the ongoing negotiations for a new MOU.

The City argues that the Association's inclusion of this salary counter-proposal "is conduct which subverts an agreement and it is an attempt to insist on the negotiations covering a topic that is not a mandatory subject of bargaining." The City also argues that "[i]t is the

Firefighters who engaged in surface bargaining, not the City." We need not address the negotiability of the issues to which the City refers, since the record does not indicate that the City objected to the Association's proposal on these grounds, indicating that the Association's alleged conduct had no effect on the progress of bargaining. (See, e.g., *San Mateo County Community College District* (1993) PERB Decision No. 1030 [insistence to impasse on a non-mandatory subject will not be found unlawful unless opposition to the proposal was communicated to the proponent during bargaining].)[11]

We also reject the City's assertion that the Association's "package" counter-proposal required either full acceptance or rejection by the City. This argument is belied by the wording of the counter-offer itself: "Should the City not accept the package counter-proposal set out below, we remain willing to continue the meet and confer process with the goal of reaching agreement on an MOU for F/Y 2011-2012." The Association never characterized its proposal as an "all-or-nothing" proposition. The City was reasonably on notice that a party may make a "package proposal" with the intention that all proposals be considered by the parties at the same time, without any implication that the recipient party must accept all or none of the proposals. The wording of the Association's counter-proposal, coupled with Rivas' July 12 e-mail to Heusser reiterating that the Association would be willing to continue bargaining, even if the City rejected the July 8 counter-proposal, demonstrates that the Association did not intend its July 8 proposal to be an "all-or-nothing" proposal. From these facts, it is apparent

[11] We note that subcontracting has been found to be within the scope of negotiations under the MMBA where the employer seeks to provide the same or similar services through a subcontractor instead of continuing to use its own employees. (*Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295.) See also *Lucia Mar Unified School District* (2001) PERB Decision No. 1440, where PERB held that the school district's subcontracting its transportation services to a private company and laying off District bus drivers was not a "core restructuring" of District operations and was therefore negotiable.

that the Association was willing to continue negotiations even if its package was not accepted in total.

The City claims that the Association was untimely in its July 8 counter-proposal, implying that this justifies its imposition of its LBFO. We reject this claim, as it is based on a false premise that the Association had long known of the City's likely proposals by the time the Association made its July 8 counter-proposal. The City misreads Rivas' testimony on this point. Rivas testified that at a May 10 meeting with Heusser and representatives of all the various bargaining units in the City, the parties talked about the upcoming budget year, but that "I don't know if it was terms and conditions." (RT.) Rivas added that "[t]here wasn't any specific about concessions. It was that there was going to be a budget deficit, but there wasn't anything in regards to specifics. He didn't have any specific information." (RT.)

According to Rivas, the May 10 meeting "consisted of all bargaining groups meeting around a roundtable with the city manager and just discussion, open discussions of what the city was doing and where they were at." (RT.) Rivas testified that there were no specific proposals as to concessions that the City was requesting, but rather that the meeting was an "open little roundtable," and that Heusser "didn't have any numbers. He said they were still working on figures and numbers and they didn't have anything specific." (RT.)

Rivas also testified that during the May 10 meeting, Heusser did not discuss a need for employees to contribute a portion of the employee's share of the CalPERS contribution, and that Rivas requested more information about the increase in CalPERS costs. (RT.) The only substantive proposal Rivas recalled arising at the May 10 meeting was Heusser's proposal that the City not issue any employee furloughs for the following fiscal year, but it did not include the amount of concessions the City would be requesting from the Association.

According to Rivas, the first meeting at which the parties discussed any hard numbers was on May 16, when Heusser mentioned the City's budget deficit being $1.7 million and requested that the various bargaining units help to "bridge that gap." (RT.)

Rivas testified that on May 16, the various employee organizations made separate presentations, but that no bargaining proposals were exchanged. (RT.)

In alleging that Heusser made substantive demands for concessions to the Association on May 10, the City appears to be basing its argument on a pregnant negative in a question posed by its own counsel to Rivas:

> Q So is your testimony that absolutely no meetings whatsoever relating in any way, shape, or form to the terms and conditions for the upcoming fiscal year for bargaining units with the city occurred at any time prior to May 10?
>
> A That is correct.

(RT.)

The City's argument, based on this quoted language, appears to infer that, since no meetings relating to the terms and conditions for the upcoming fiscal year for bargaining units with the City occurred at any time prior to May 10, such terms and conditions should be assumed to have been discussed at the May 10 meeting. In light of Rivas' earlier testimony as quoted above, this inference is unsupported.

We also disagree with the City's premise that it was obligated to present the LBFO and then declare impasse because of the proximity to the July 1 deadline for the Council to adopt a budget by the beginning of the fiscal year. This ostensible deadline was rendered moot when the Council adopted a resolution on June 29 that allowed the City to continue to operate beyond July 1 by authorizing expenditures according to the prior year budget appropriations.

The City does not point to any exigent circumstances justifying its need to declare impasse and impose the LBFO on July 18. Even if it had presented such evidence,

> [i]t has long been noted that such economic exigency provides no justification for suspending the duty to bargain in good faith. (*San Francisco Community College District* (1979) PERB Decision No. 105; *San Mateo* [*County Community College District* (1979)] PERB Decision No. 94; *Pleasant Valley School District* (1985) PERB Decision No. 488. See also, *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 303-314.) Nor is an employer's deadline, such as the beginning of a budget year or the expiration of an MOU, an excuse to avoid bargaining in good faith. (*Newcor Bay City*, [*Div. of Newcor, Inc.* (2005)] 345 NLRB 1229; *Salinas Valley* [*Memorial Healthcare System* (2012)] PERB Decision No. 2298-M, fn. 9; *Calexico Unified School District* (1983) PERB Decision No. 357; *City of Davis* (2012) PERB Decision No. 2271-M, Proposed Dec., pp. 45-47.)

(*Riverside*, *supra*, PERB Decision No. 2360, p. 20)

The City argues the ALJ's statement that the City was in a rush to conclude negotiations and adopt a budget should not have factored into her totality of the circumstances analysis. Even if it had been in such a rush, the City argues it was justified by the fact that "[t]he necessity for a budget and its adoption only after conclusion of negotiations is expressly recognized by [MMBA] § 3505 . . . ."

MMBA section 3505, defining the concept of "meet and confer in good faith," states, in relevant part, that the parties shall

> 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.

Section 3517 of the Dills Act,[12] nearly identically to MMBA section 3505, states that the parties shall

> endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

This Dills Act language was addressed by PERB in *State of California* (1994) PERB Decision No. 1067-S, in its adoption of an ALJ proposed decision:

> [C]ollective bargaining has no necessary linkage with the State budgetary process. The two activities can take place at the same time and no resolution of collective bargaining is required before introduction or approval of the budget.

(Id., ALJ Proposed Dec., at p. 9.)

Consistent with this reasoning, the City was not justified in its rush to conclude bargaining, declare impasse and impose its LBFO prior to its adoption of its budget. As we noted in *Riverside, supra,* PERB Decision No. 2360, p. 20, budget exigencies may have consequences on an employer's proposals, but do not suspend the duty to meet and confer in good faith.

We disagree with the City's contention that the Association's request to meet with Heusser subsequent to the City's July 1 LBFO and the Association's July 8 counter-proposal was unreasonable in its timing, because the date it was received by Heusser (July 18) coincided with the date the Council was scheduled to implement the LBFO. The coincidence of Rivas' July 18 e-mail with the Council meeting implementing the LBFO does not indicate that the Association delayed its request unreasonably, especially in light of Rivas' July 12 e-mail to Heusser stating: "[S]hould the City not accept the package counter-proposal, we remain willing to continue the meet and confer process with the goal of reaching an agreement on an

[12] The Dills Act is codified at Government Code section 3512 et seq.

MOU for F/Y 2011-2012." Furthermore, the date of the Council's implementation of the LBFO was irrelevant, since the City prematurely declared impasse.

We find irrelevant the City's argument that it had forewarned the Association of the City's LBFO terms. The City's first proposal for the Association members to immediately bear 8 percent of the employee's contribution of CalPERS costs was made in its July 1 LBFO.[13] This was a significant change from the City's earlier proposals to phase in the increases in employee contribution over a three-year period. The City refused to meet face-to-face to discuss and explain the immediate 8 percent CalPERS contribution proposal prior to the implementation of the LBFO. Whether or not the immediate 8 percent proposal "came as a surprise" to the Association or not, the Association's July 8 counter-proposal did not constitute a delay sufficient to justify the City's impasse declaration.

The City is incorrect that "the only reason [the Association requested or desired a further negotiation session] after July 13 is the false assertion that the [Association] did not have the 'target' number and therefore could not formulate or calculate an appropriate response to the renewal of the LBFO sent in response to the July 8, 2011 counter-proposal." The very testimony by Rivas to which the City cites is clear that the "target number" was only "one of the items" the Association wished to negotiate. (RT.) Therefore, whether or not the Association was satisfied with the City's information about the "target number," the record does not show that the Association indicated that this was the only subject of bargaining it wished to address as of July 18.

We disagree with the City's contention that "the [proposed decision] is premised on rank speculation . . . that the 'absence of a further negotiating session' . . . 'precluded the

[13] In its prior proposal, the City had proposed a graduated increase in the employees' contribution from 5 percent to 8 percent.

opportunity to explore the proposals, resolve differences, and possibly reach a final agreement'." (Respondent's Brief Supporting Exceptions, p 3.) Such alleged speculation was not the basis for the ALJ's conclusion; nor is it the basis for our affirmance of that conclusion. The ALJ's finding of the possibility of resolving differences and perhaps reaching agreement explains why the City's premature declaration of impasse impermissibly thwarted good faith negotiations. A premature declaration of impasse precludes the parties from participating in additional bargaining sessions. Neither the parties nor the ALJ can know with certainty whether or not such additional bargaining sessions would have proven fruitful. However, the ALJ must have latitude to make reasonable inferences, based on the totality of the circumstances in the record, of whether future negotiations would be futile. We agree with the ALJ's reasoning that all prospects of reaching agreement had not been exhausted. This does not mean we can foresee with certainty that future rounds of bargaining would have led to any particular outcome or agreement, but, rather, that the parties had not reached a point where further negotiations would be futile.

The City does not cite to any part of the record in support of its argument that Rivas was inconsistent in his testimony about the information that the City provided to him regarding the City's CalPERS costs. Rivas was consistent in his testimony that the City provided him the amount of the increase of what an employee would pay in CalPERS contributions, but did not provide him with the amount of the increase in the City's CalPERS costs.

REMEDY

We affirm the remedy ordered by the ALJ for the following reasons.

In *California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 946, the court held:

> Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members' exclusive representative an opportunity to meet and confer over the decision and its effects. [Citations omitted.] This is usually accomplished by requiring the employer to rescind the unilateral change and make the employees "whole" from losses suffered as a result of the unlawful unilateral change.

(See also, *San Bernardino City Unified School District* (1998) PERB Decision No. 1270.)

It is therefore appropriate that the City be ordered to rescind its adoption of its LBFO by reinstating the 10 percent furlough and making the affected employees whole for the deductions from their salary that the City applied to the 8 percent employee share of the CalPERS contribution, including interest at 7 percent per annum.

In restoring the parties' status quo, we take note of the ALJ's statement that "the status quo at the time of the unlawful conduct included employee furloughs." We infer from the record that subsequent to the City's premature implementation of the LBFO, it rescinded all furloughs for the employees represented by the Association. In exchange for the employees' return from 90 percent time to 100 percent time, the City presumably tendered to them their expected pay and benefits for full-time employment. While the City must prospectively reinstate the furloughs as they existed under the status quo ante, the City's prior rescission of furloughs should have no effect on the make-whole remedy concerning the employees' increased CalPERS contributions under the LBFO.[14]

However, as the ALJ observed, implementing this remedy could have tax consequences, and require more sophisticated calculations than usually required in a traditional

[14] This reinstatement of furloughs is consistent with the remedy the Association requested in its post-hearing brief, which requests, in relevant part: "To rescind any and all changes to working conditions unilaterally implemented unless or until the City has complied with its statutory duty to meet and confer in good faith with representatives of Charging Party." (Association Post-Hearing Brief, p. 18.)

back pay remedy. We, therefore, believe it is desirable to give the parties a limited time to negotiate over the remedy, knowing what the Board's order will be if they are unwilling or unable to reach an agreement different from this order. As far as the record in this case indicates, the parties have not reached agreement on the matters included in their respective bargaining proposals. In addition, there may be several different methods for these affected employees to be made whole. Therefore, a negotiated remedy is quite likely the best way to determine the scope of a make-whole remedy in this case.

In order to give the parties an opportunity to negotiate over the remedy, we will order the parties to negotiate, at the request of either party, for a period of 45 days to attempt to reach a mutually satisfactory agreement before the matter is submitted for compliance. (See *Desert Sands Unified School District* (2010) PERB Decision No. 2092; *Santa Ana Unified School District* (2013) PERB Decision No. 2332.) If the parties have not reached an agreement regarding the remedy within that time, we will order the City, upon demand by the Association, to comply with the above-stated remedy.

Finally, it is the ordinary remedy in PERB cases to order that the party found to have committed an unfair practice to post a notice incorporating the terms of the order. Posting of such a notice informs employees of the resolution of the matter and of the employer's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.) We order that remedy here.

We agree with the ALJ's conclusion that the City failed to meet and confer in good faith in violation of MMBA sections 3505 and 3509(b), and PERB Regulation 32603(c), when it prematurely declared the parties were at impasse. As a result of this violation, the City also interfered with the rights of employees to be represented by the Association in violation of MMBA section 3506 and PERB Regulation 32603(a), and denied the Association its right to

represent employees in their employment relations with the City in violation of MMBA section 3503 and PERB Regulation 32603(b).

ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the City of Selma (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3506 and 3509(b), and Public Employment Relations Board (PERB) Regulation 32603(a), (b) and (c) (Cal. Code Regs., tit. 8, § 31001 et seq.), by prematurely declaring the parties were at impasse without satisfying its obligation to meet and confer in good faith with the Selma Firefighters Association, IAFF, Local 3716 (Association), and by imposing its last, best, and final offer (LBFO).

Pursuant to section 3509(b) of the Government Code, it is hereby ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith by prematurely declaring the parties are at impasse.

2. Denying the Association its right to represent bargaining unit employees in their employment relations with the City.

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

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

1. Rescind the adoption of the LBFO and return to the status quo as it existed before the City imposed its LBFO on July 18, 2011, and upon request of the Association, resume negotiations with the Association.

2. Make all affected employees whole for any loss of wages or benefits due to the City's violation of the MMBA, including interest at 7 percent per annum.

With regard to the make whole remedy and the order to return to the status quo, this Order shall be stayed for 45 days to provide the parties an opportunity to meet and confer over a mutually acceptable remedy. In the event no agreement is reached within 45 days and the parties have not mutually agreed to an extension of time within which to do so, the Association shall notify the General Counsel of PERB, or the General Counsel's designee, so that compliance proceedings may be initiated.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the City are customarily posted, copies of the Notice attached hereto as an Appendix. 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 thirty (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. In addition to the physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with its employees in the bargaining unit represented by the Association. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The City shall provide reports in writing, as directed by the General Counsel or her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

Chair Martinez and Member Banks joined in this Decision.

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. SA-CE-747-M, *Selma Firefighters Association, IAFF, Local 3716 v. City of Selma*, in which all parties had the right to participate, it has been found that the City of Selma (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., by prematurely declaring the parties were at impasse without satisfying its obligation to meet and confer in good faith with the Selma Firefighters Association, IAFF, Local 3716 (Association).

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 by prematurely declaring the parties are at impasse.

2. Denying the Association its right to represent bargaining unit employees in their employment relations with the City.

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

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

1. Rescind the adoption of the last, best and final offer (LBFO) and return to the status quo as it existed before the City imposed its LBFO on July 18, 2011, and upon request of the Association, resume negotiations with the Association.

2. Make all affected employees whole for any loss of wages or benefits due to the City's violation of the MMBA, including interest at 7 percent per annum.

With regard to the make whole remedy and the order to return to the status quo, this Order shall be stayed for 45 days to provide the parties an opportunity to meet and confer over a mutually acceptable remedy. In the event no agreement is reached within 45 days and the

parties have not mutually agreed to an extension of time within which to do so, the Association shall notify the General Counsel of PERB, or the General Counsel's designee, so that compliance proceedings may be initiated.

Dated: _____ CITY OF SELMA

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (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

SELMA FIREFIGHTERS ASSOCIATION, IAFF, LOCAL 3716, Charging Party, v. CITY OF SELMA, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-747-M PROPOSED DECISION (01/08/2013)

Appearances: Law Offices of Bennett & Sharpe by Thomas M. Sharpe, Attorney, for Selma Firefighters Association, IAFF, Local 3716; Costanzo & Associates by Neal E. Costanzo, Attorney, for City of Selma.

Before Robin W. Wesley, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges that an employer engaged in bad faith bargaining during negotiations for a new contract in violation of the Meyers-Milias-Brown Act (MMBA)[1] by prematurely declaring the parties were at impasse. The employer denies violating the MMBA.

On August 8, 2011, the Selma Firefighters Association, IAFF, Local 3716 (Association) filed an unfair practice charge against the City of Selma (City). The City filed a position statement in response to the charge on August 26, 2011.

On January 19, 2012, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint that alleged the City (1) failed to provide requested information, and (2) prematurely declared impasse. The City filed an answer to the complaint on February 14, 2012, denying the substantive allegations and asserting affirmative defenses.

[1] The MMBA is codified at Government Code section 3500 et seq. All references are to the Government Code, unless otherwise noted.

The parties participated in a settlement conference on February 16, 2012, but the matter was not resolved.

A formal hearing was held on June 28, 2012. The case was submitted for decision on August 27, 2012, after the filing of post-hearing briefs.

FINDINGS OF FACT

The City is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a).[2] The Association is an exclusive representative within the meaning of PERB Regulation 32016(b), and represents a bargaining unit of firefighters employed by the City.

The Association and the City are parties to a memorandum of understanding with a term of July 7, 2007 through January 2, 2009.

Anthony Rivas (Rivas) was employed by the City as a firefighter/paramedic from 2008 to May 2012. Rivas served as president of the Association from January 2010 to May 2012. Thomas Sharpe (Sharpe) is the Association's chief negotiator. D-B Heusser (Heusser) is the City Manager.

On March 16, 2011,[3] the City held a roundtable meeting for representatives of the City's six bargaining units to brief them on the City's budget and financial situation. Representatives of the Association were not present at the meeting.

A second roundtable meeting was held on May 10. Rivas attended the meeting on behalf of the Association. Heusser reported the City was still working on budget numbers, but expected the City would need concessions from the employees for the 2011-2012 fiscal year.

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

[3] Hereafter all dates refer to 2011, unless otherwise noted.

At the time, every City employee was subject to furloughs.[4] Heusser did not have specific proposals for employee concessions, but he wanted to eliminate furloughs for the new fiscal year while achieving cost reductions. Heusser asked the representatives to brainstorm and come up with ideas to address the budget shortfall.

On May 16, the bargaining unit representatives returned for a third roundtable meeting. Heusser reported the City was projecting a budget deficit of $1.7 million for 2011-2012. Revenues were up slightly, but expenses were up as well, including CalPERS retirement, health insurance, and miscellaneous costs. Heusser asked representatives from each bargaining unit what they could do to help bridge the budget gap. Rivas responded by asking Heusser for a breakdown of the increased costs.

On May 19, Heusser sent a letter to Sharpe, stating:

> This letter is written to request a meeting in which to open the meet and confer process as it pertains to the 2011-2012 fiscal year budget and the proposed transition agreement between Selma Firefighters Local #3716 and CalFire.[5]

The Association and the City met for a bargaining session on June 2. Present for the Association were Sharpe, Rivas, Jeremy Owens (Owens) and Paul Demers (Demers). Heusser discussed the need for employee concessions. He verbally proposed that the firefighters pay a part of the employee's share of the CalPERS contribution, 5 percent for two years, and thereafter an additional 1 percent each year until the employee's share reached 8 percent. Heusser also stated that furloughs might have to continue. The Association requested information on the increased retirement, insurance, and miscellaneous costs. They also asked for a calculation of 1 percent of the CalPERS cost for the firefighters. Heusser left the room

[4] The firefighters unit had been subject to a ten percent furlough for three years.

[5] The City was considering contracting with CalFire to provide fire and emergency medical services. If a contract was approved, the City's firefighters would become employees of CalFire.

and returned with the 1 percent cost information. The Association also asked for a City expenditure report.

Later that day, the Association and the City discussed a possible transition from the fire department to CalFire.

The parties resumed negotiations on June 16. Heusser distributed a written proposal dated March 16, 2011, which stated:[6]

> At a previous meeting I proposed the following change in the M.O.U. between the City of Selma and the Selma Firefighter Bargaining Unit.
>
> - The employees are asked to participate in the PERS at 5% for 2011-12; 5% for 2012-13; 6% 2013-14; 7% 2014-15 and 8% 2015-2016. This means that employees would be contributing to the employee side of the PERS retirement program.
>
> - That the employees offer a furlough of a maximum of 10%.
>
> - That, if the unit agrees, to the above the City Manager will for the 2012-2013 year open discussion on salary of those within the bargaining unit.

By June, the projected budget deficit had been reduced. Heusser informed the Association the budget deficit was now approximately $830,000. The Association again asked for information on the increased costs for retirement and insurance, copies of expense reports, and the specific number or "target" that represented the firefighters' share of the budget deficit. Heusser left the meeting and returned with expense reports that showed payroll and employee expenses for the fire department. The information did not contain the target number. Heusser

[6] Rivas testified that he first saw the written proposal on June 16. Heusser testified he prepared the proposal on March 16, and had previously distributed similar memos to the other bargaining units. Heusser knew the firefighters were not at the March 16 roundtable meeting, but could not recall if the memo had been given to the Association before the June 16 meeting.

asked the Association to put its information request in writing so he would be sure to provide the information they were seeking. The Association did not make a proposal at this meeting.

On June 23, Sharpe emailed to Heusser a letter that contained the Association's information request. Heusser replied to the request for information by typing responses into the electronic version of Sharpe's letter. Heusser's responses were set out in bold and underlined text. Heusser emailed the letter to Sharpe on or about June 23. Rivas did not recall seeing Heusser's response.[7]

The City Council held a budget workshop during the June 29 Council meeting. Rivas attended the Council meeting and received copies of the budget documents distributed to the Council. Council members were given two options, reflecting a City budget with and without employee concessions. Following a closed session, the Council announced approval of a "management realignment." Rivas believed this action meant that the Council had voted to eliminate a fire chief position.

As a general law city, the City must have a budget adopted by July 1 of each year or it cannot expend funds, including paying bills and issuing payroll. At the June 29 meeting, the Council was not ready to adopt a final budget. Instead, the Council adopted a resolution allowing the City to continue to operate and expend funds until a final budget was approved. Heusser testified the resolution was adopted to allow time "[t]o finalize our budget and finalize any negotiations that might be underway."

On June 30, the City Clerk called Rivas informing him that Heusser was calling an emergency meeting with the Association the next day, July 1. Rivas suspected the meeting had something to do with the City Council's elimination of the fire chief position. Rivas did not bring Sharpe to the meeting.

[7] Sharpe did not testify.

On July 1, Rivas, Owens and Demers attended the meeting with Heusser and Steve Yribarren, the City's finance consultant. Heusser distributed a memo, which stated, in part:

> The Selma City Council has agreed to the following and has directed me to present this our last, best and final offer to the Selma Firefighters Union.
>
> 1. The City of Selma will place all members of the Union at 100% and thus eliminate the use of furloughs.
>
> 2. The members of the Union would pay 8% of the employee contribution side of the Calpers retirement program.

The memo requested a written response by July 7.[8]

There was no discussion or negotiation of the City's revised proposal, or any explanation for the change in the proposal. Rivas told Heusser he would discuss the proposal with Sharpe. Rivas noted the requested response date and commented there was not much time to provide a written response. Heusser stated the Association could have another day or two to respond.

On July 8, Sharpe sent the Association's counter-proposal to Heusser. The Association accepted the City's proposal to eliminate furloughs and pay 8 percent of the CalPERS cost. The Association also proposed: (1) if the City did not enter into a contract with CalFire prior to January 1, 2012, firefighter salaries would be increased 6 percent; and (2) the City would not enter into an agreement with any entity other than CalFire to provide fire protection and emergency medical response. Sharpe's letter stated, "Should the City not accept the package counter-proposal set out below, we remain willing to continue the meet and confer process with the goal of reaching agreement on an MOU for F/Y 2011-2012." The letter did not state the Association was waiting for a response to its June 23 information request, nor did it request any further information.

[8] Heusser delivered the same proposal to the police union that same day.

On July 12, Rivas emailed Heusser, inquiring if he had received the Association's counter-proposal and reiterating that if the City did not accept the Association's proposal, it remained willing to continue the meet and confer process. Heusser responded immediately, saying he had the Association's proposal and planned to take it to the City Council.

On July 13, Heusser mailed a letter to Sharpe informing him that the Council had rejected the Association's "package proposal." Heusser stated, "The City believes that the differences between it and the Fire Fighter's Association are so significant and this negotiation has been so prolonged that we have reached an impasse." Heusser told Sharpe the Council would consider adopting a budget at its July 18 meeting that incorporated the terms of the last, best and final offer (LBFO). Heusser concluded:

> The City is certainly willing to listen to any further proposals the Fire Fighters may wish to make. However, our current fiscal situation does not provide us with many options other than taking appropriate measures to decrease employee costs.

Rivas received a copy of Heusser's letter from Sharpe on Friday, July 15. Rivas tried to call Heusser, but City offices were closed that day due to furloughs. Rivas then tried to email Heusser, but the email did not go through.

On Monday, July 18, before 8:00 a.m., Rivas sent an email to Heusser stating that the Association wanted to continue the meet and confer process and was available to meet that day. Sharpe also called and left a voicemail message for Heusser that the Association wanted to meet. Heusser responded to both Rivas and Sharpe by email that he was busy preparing for the Council meeting and did not have time to meet that day.

Owens attended the July 18 City Council meeting and addressed the Council, but did not dispute the parties were at impasse. During the meeting, the City Council adopted a

resolution implementing the City's LBFO.[9]

ISSUE

1. Did the City fail or refuse to provide requested information that was necessary and relevant?

2. Did the City fail to bargain in good faith by prematurely declaring the parties were at impasse?

CONCLUSIONS OF LAW

Information Request

An exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (*Stockton Unified School District* (1980) PERB Decision No. 143). PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of the requested information. (*Trustees of the California State University* (1987) PERB Decision No. 613-H.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

An employer does not breach its duty to provide necessary and relevant information when the employer complies or partially complies with an information request and the union does not communicate its dissatisfaction, or reassert or clarify its request. (*City of Redding* (2011) PERB Decision No. 2190-M; *City of Fresno* (2006) PERB Decision No. 1841-M.)

The Association made several verbal requests for information, beginning on May 16, during the roundtable meetings attended by representatives of the City's bargaining units. The Association continued to verbally request information during the June 2 and 16 bargaining sessions, including information on increased retirement, insurance and miscellaneous costs, City expenses, and the fire fighters' "target" share of the budget deficit. Heusser provided

[9] In the same resolution, the City implemented the LBFO given to the police union.

some of this information during the bargaining sessions. Finally, Heusser asked the Association to put its information request in writing so he could provide the specific information requested.

After receiving the Association's written information request, Heusser typed the information into the electronic version of the Association's letter, and emailed his response to Sharpe on June 23, the day he received the information request.

The record establishes the City timely responded to the Association's information request. There is no evidence that the Association reiterated its request for information, made additional requests for information, or disputed that the information provided was insufficient. Rivas testified only that he did not recall seeing Heusser's response. This allegation is therefore dismissed.

Surface Bargaining

MMBA section 3505 requires public agencies and recognized employee organizations to meet and confer in good faith over wages, hours, and other terms and conditions of employment. The California Supreme Court has construed this section, stating:

> Thus a public agency must meet with employee representatives (1) promptly on request; (2) personally; (3) for a reasonable period of time; (4) to exchange information freely; and (5) to try to agree on matters within the scope of representation. Though the process is not binding, it requires that the parties seriously "attempt to resolve differences and reach a common ground." (*Citation.*) The public agency must fully consider union presentations; it is not at liberty to grant only a perfunctory review of written suggestions submitted by a union.

(*Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, 61-62.)

In evaluating claims that a party has prematurely declared impasse, the Board analyzes the totality of the bargaining conduct leading up to the impasse declaration. (*Placentia Fire*

Fighters, Local 2147 v. City of Placentia (1976) 57 Cal.App.3d 9; *Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M.) The Board has stated:

> Under this test, the Board weighs the facts to determine whether the conduct at issue as a whole "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.)

(*Kings In-Home Supportive Services Public Authority*, *supra*, p. 9.)

A party may not merely go through the motions of negotiations as "good faith" requires "a genuine desire to reach agreement." (*Kings In-Home Supportive Services Public Authority, supra,* PERB Decision No. 2009-M.) In *Modesto City Schools* (1983) PERB Decision No. 291, p. 35, the Board cited decisions of the National Labor Relations Board (NLRB), stating, "The NLRB encourages, through face-to-face bargaining, the exploration of new proposals which may provide avenues to resolve differences and arrive at a final agreement." The Board has also held, "The obligation to negotiate includes the obligation to express one's opposition in sufficient detail to permit the negotiating process to proceed on the basis of mutual understanding." (*Jefferson School District* (1980) PERB Decision No. 133, p. 11, footnote omitted.)

In *City & County of San Francisco* (2009) PERB Decision No. 2041-M, p. 40, the Board adopted the following definition of impasse:

> [I]mpasse exists where the parties have considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile. (*Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124, p. 5.) PERB's analysis has focused on a number of objective factors, including the number and length of negotiation sessions, the extent to which the parties have made and discussed counter-proposals to each other, the number of tentative agreements, and the number of unresolved issues. (*Citations omitted.*)

In *Regents of the University of California* (1985) PERB Decision No. 520-H, the Board affirmed the union's declaration of impasse. In this case, the parties met frequently, offered proposals, and submitted revisions to proposals. The parties had discussed the proposals and reviewed their outstanding differences during the final five bargaining sessions, yet made only minor movement. The Board concluded the parties remained far apart on economic issues and several important noneconomic issues. Thus, the Board found the impasse declaration reasonable based on the totality of the circumstances.

In *Kings In-Home Supportive Services Public Authority, supra,* PERB Decision No. 2009-M, the Board found the parties had held a series of productive bargaining sessions where both sides continued to make significant wage concessions. During the last bargaining session, the employer made another wage concession but then declared the parties were at impasse. The Board found the employer prematurely declared impasse because the parties were continuing to display movement, and the union was not given an opportunity to respond to the employer's final offer.

In the present case, the parties held only two bargaining sessions, on June 2 and 16, and exchanged and discussed only one written proposal on June 16. Thereafter, the City called the Association to an "emergency meeting" on July 1, to present its LBFO. The Association's chief negotiator was not present, and there was no discussion about the significant change in the City's proposal from a graduated increase in employee retirement contributions up to 8 percent and continued furloughs, to an immediate 8 percent employee retirement contribution and elimination of furloughs.

A few days later, the Association sent a counter-proposal to the City. The Association accepted the City's proposal and added terms related to the possible transition of the fire department to CalFire. Thereafter, the Association twice informed the City it wanted to

continue negotiations if its proposal was unacceptable. No further bargaining sessions were held, however, to discuss the differences between the parties' proposals.

After the City delivered its LBFO, all communication between the parties was in writing. The City rejected the Association's proposal in a letter mailed to Sharpe. In the letter, the City claimed the process had been prolonged, declared the parties were at impasse, and stated the City Council would consider the LBFO five days after the date of the letter. Although the City stated it was willing to consider further proposals from the Association, it provided no opportunity for further discussion despite two requests for meetings from the Association. The City Council had previously adopted a resolution giving the City more time to complete negotiations and finalize a budget, however, it appears the City was in a rush to conclude negotiations and adopt a budget. The adoption of the LBFOs for both the Association and police union in the same resolution bolsters this conclusion.

Ultimately, the parties differed on only one economic proposal. The Association accepted the City's retirement contribution and elimination of furlough proposals, and added a contingent wage increase if the City did not contract with CalFire. Although the Association was slow to provide a proposal, once it did there were no further face-to-face bargaining sessions. There was no opportunity to discuss or clarify positions, or determine if there was room for movement.

The City was certainly free to maintain an adamant position that proposals increasing costs were unacceptable. The absence of a further negotiating session, however, precluded the opportunity to explore the proposals, resolve differences, and possibly reach a final agreement.

Based on the totality of the bargaining conduct, the City breached its duty to bargain in good faith when it prematurely declared impasse.

REMEDY

MMBA section 3509(b) states, in part:

> The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board.

It has been found that the City failed to meet and confer in good faith in violation of MMBA sections 3505 and 3509(b), and PERB Regulation 32603(c), when it prematurely declared the parties were at impasse.

As a result of this violation, the City also interfered with the rights of employees to be represented by the Association in violation of MMBA section 3506 and PERB Regulation 32603(a), and denied the Association its right to represent employees in their employment relations with the City in violation of MMBA section 3503 and PERB Regulation 32603(b). It is appropriate to order the County to cease and desist from such unlawful conduct. (*Rio Hondo Community College District* (1983) PERB Decision No. 292.)

The appropriate remedy in bargaining cases is to order the restoration of the status quo and to resume negotiations upon request of the union. (*Desert Sands Unified School District* (2004) PERB Decision No. 1682; *Regents of the University of California* (1994) PERB Decision No. 1077-H.) Restoring the status quo typically requires rescission of the unlawful conduct and to make employees "whole" for losses resulting from the unlawful conduct. (*California State Employees' Assn. v. PERB* (1996) 51 Cal.App.4th 923, 946.)

Following the premature declaration of impasse, the City implemented its LBFO. Because the City did not satisfy its obligation to meet and confer in good faith, it was not privileged to implement the LBFO. Therefore, the City is ordered to rescind its adoption of the LBFO, restore the status quo, and make employees whole for any actual losses that resulted from implementation of the LBFO. It is noted that the status quo at the time of the unlawful

conduct included employee furloughs. Interest at the rate of 7 percent per annum will be added to any monetary loss. (*Ventura County Community College District* (2003) PERB Decision No. 1547; *The Regents of the University of California* (1997) PERB Decision No. 1188-H.)

As such remedy will potentially require calculations, offsets and tax consequences considering furlough pay and retirement deductions, an opportunity to discuss a negotiated solution may better serve the parties. This order shall be stayed for 45 days before submitting the matter to compliance, to allow the parties an opportunity to consider whether a negotiated remedy is appropriate. If the parties decline to negotiate or are unable to reach an agreement within 45 days, this order shall take effect. (*Ventura County Community College District*, *supra*, PERB Decision No. 1547.)

Finally, it is appropriate that the City be ordered to post a notice incorporating the terms of the order at locations where notices to public employees are customarily posted for employees represented by the Association. Posting such a notice, signed by an authorized agent of the City will provide employees with notice that the City has acted in an unlawful manner, it is required to cease and desist from such activity, and it will comply with the order. It effectuates the purposes of the MMBA that employees are informed of the resolution of this controversy and the City's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.)

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the City of Selma (City) violated the Meyers-Milias-Brown Act (MMBA or Act), Government Code sections 3503, 3505, 3506 and 3509(b), and Public Employment Relations Board (PERB or Board) Regulation 32603(a), (b) and (c) (Cal. Code Regs., tit. 8, sec. 31001 et seq.), by prematurely declaring the parties were at impasse without

satisfying its obligation to meet and confer in good faith with the Selma Firefighters Association, IAFF, Local 3716 (Association). All other allegations in the complaint are dismissed.

Pursuant to section 3509, subdivision (b) of the Government Code, it is hereby ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith by prematurely declaring the parties are at impasse.

2. Denying the Association its right to represent bargaining unit employees in their employment relations with the City.

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

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

1. Rescind the adoption of the LBFO and, upon request of the Association, resume negotiations with the Association.

2. Make all affected employees whole for any loss of wages or benefits due to the City's violation of the MMBA, including interest at 7 percent per annum.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the City are customarily posted, copies of the Notice attached hereto as an Appendix. 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 thirty (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.

4. This order shall be stayed for 45 days before submitting the matter to compliance, to allow the parties an opportunity to consider whether a negotiated remedy is appropriate. If the parties decline to bargain or are unable to reach an agreement within forty-five (45) days, this order shall take effect.

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The City shall provide reports in writing, as directed by the General Counsel or her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

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
(916) 322-8231
FAX: (916) 327-7960

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).)