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 Request for Reconsideration PERB Decision No. 2380-M PERB Decision No. 2380a-M October 17, 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 is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration by the City of Selma (City) of the Board's decision in *City of Selma* (2014) PERB Decision No. 2380-M (*City of Selma* or Decision). In that Decision, the Board affirmed the proposed decision by an administrative law judge (ALJ) and concluded that the City had violated the Meyers-Milias-Brown Act (MMBA)[1] by engaging in surface bargaining and by prematurely declaring impasse in negotiations with the Selma Firefighters Association, IAFF, Local 3716 (Association) before implementing its last, best and final offer (LBFO). The City filed a timely request for reconsideration, and the Association filed a timely response.

The Board has reviewed the City's request for reconsideration and supporting

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

documentation, and the Association's response thereto. Based on this review, the Board denies the City's request for reconsideration for the reasons discussed below.

DISCUSSION

Requests for reconsideration of a final Board decision are governed by PERB Regulation 32410(a),[2] which states in full:

> (a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. An original and five copies of the request for reconsideration shall be filed with the Board itself in the headquarters office and shall state with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. Service and proof of service of the request pursuant to Section 32140 are required. The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

Because reconsideration may only be granted under "extraordinary circumstances," the Board applies the regulation's criteria strictly in reviewing requests for reconsideration. (*Regents of the University of California* (2000) PERB Decision No. 1354a-H.) Reiterating the same facts and arguments made on appeal does not satisfy the requirements of PERB Regulation 32410(a). (*San Leandro Unified School District* (2007) PERB Decision No. 1924a;

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

Oakland Unified School District (2004) PERB Decision No. 1645a.) Purported errors of law are not grounds for reconsideration. (*California State Employees Association (Hard, et al.)* (2002) PERB Decision No. 1479a-S, p. 6 (*CSEA (Hard)*); *Apple Valley Unified School District* (1990) PERB Order No. Ad-209a.)

The City asserts three specific grounds for reconsideration based on PERB Regulation 32410(a): it urges the Board to reconsider its legal conclusion that the City engaged in surface bargaining prior to declaring impasse; it alleges several factual inaccuracies that it claims are prejudicial; and finally, it urges reconsideration of the remedy, because employees allegedly suffered no wage loss as a result of the City's imposition of its LBFO. In conjunction with its request to reconsider the remedy, the City submits a document that it claims was previously unavailable.

Conclusion That The City Engaged In Surface Bargaining Prior To Impasse Declaration

The City urges the Board to reconsider its determination that the City engaged in surface bargaining, claiming that it was premised on an erroneous conclusion by the ALJ that surface bargaining was encompassed within the allegations of failure to meet and confer in good faith.

This argument was raised by the City in its exceptions to the proposed decision and addressed in the Board's Decision wherein we explained that "surface bargaining is reasonably contemplated within allegations of bad faith bargaining." We also concluded based on the totality of the City's pre-impasse declaration bargaining conduct, that the impasse it declared on July 13, 2011 was not bona fide. (*City of Selma, supra,* PERB Decision No. 2380-M, p. 15.)

By this request for reconsideration, the City merely seeks to re-argue its legal contention. Disagreement with the Board's legal conclusions is not a legitimate ground for

reconsideration. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M.) The City's request for reconsideration on its first basis is therefore denied.

Alleged Prejudicial Factual Errors

As its second basis for reconsideration, the City asserts that the Decision contains several prejudicial factual errors. We address each as follows:

Date of Impasse Declaration

First, the City claims that the Board erroneously found that the City declared impasse on July 1, 2011, when the actual date, according to the City, was July 18, 2011.[3]

The facts determined by the Board indicate that the City's Chief Negotiator, D-B Heusser (Heusser), wrote to the Association's chief negotiator on July 13, 2011, informing him that the City council had rejected the Association's counter-proposal to the City's LBFO and that Heusser believed the parties were at impasse. (*City of Selma, supra*, PERB Decision No. 2380-M, p. 10.) Although the Decision mistakenly refers to a July 1, 2011, date as the date of the impasse declaration, a reading of the Decision as a whole indicates that the operative date the Board relied upon was July 13, 2011.

The City has failed to demonstrate that the mistaken date was a prejudicial error of fact within the meaning of PERB Regulation 32410(a). The Board considered the following events occurring on or after July 1, 2011, in its analysis of the totality of the circumstances leading to its conclusion that the declaration of impasse was premature and that the City engaged in bad-faith surface bargaining: (1) the City's LBFO issued on July 1, 2011, which inexplicably and substantially changed the City's proposal; (2) the Association's July 8, 2011 counter-proposal, and its repeated attempts thereafter to meet with the City regarding the proposal; (3) the City's refusal to meet with the Association after the July 8, 2011 counter-proposal; (4) the City's

[3] July 18, 2011, was the date on which the City council passed its resolution imposing the City's LBFO, not the date when impasse was declared.

July 13, 2011, rejection of the Association's counter-proposal, and its continued refusal to meet with the Association to clarify positions or determine that there was no room for further movement. In short, the Board's conclusion that the City had not bargained in good faith and prematurely declared impasse did not turn on the single fact of the date on which impasse was declared.

Although there was no prejudicial error of fact, in order to ensure clarity in the Decision, the Board hereby acknowledges that the date on which the City declared impasse was July 13, 2011.

Date of City's First Bargaining Proposal

Next, the City asserts that the Decision erroneously found that "no proposals were presented to the Association until the second meeting on June 16." The City fails to note that the Decision found that on June 2, 2011, at the first bargaining session between the parties, the City "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. Heusser also stated that the furloughs might have to continue." (*City of Selma, supra,* PERB Decision No. 2380-M, p. 6.)[4] The Decision notes that a written proposal was given to the Association on June 16, 2011. (*Ibid.*)

The City has not demonstrated factual error, let alone prejudicial factual error. The Decision analyzes the totality of circumstances surrounding the parties' negotiations with the understanding that face-to-face negotiations began on June 2, 2011, and that the City first

[4] The City also asserts in its brief in support of the request for reconsideration that the City made a proposal on March 16, and May 10, 2011. The City's assertions are not supported by the record evidence. The meeting on March 16, 2011, was a roundtable meeting to brief all employee organizations on the City's financial situation. The Association was not present at that meeting. The May 10, 2011, meeting was also a roundtable meeting with all employee organizations present. As the Board found, no proposals were presented by the City at the May 10, 2011 meeting. Negotiations between the City and the Association did not begin until June 2, 2011.

made its proposal regarding pension cost-sharing to the Association on that date. We therefore deny its request to reconsider this point. (*State Center Community College District* (2002) PERB Decision No. 1471a [reconsideration denied where underlying decision did not turn on alleged error].)

June 29, 2011 City Council Resolution

The City claims that our description of the City Council's June 29, 2011, resolution is erroneously incomplete because it allegedly fails to note that the resolution "was adopted to allow the City to continue operating." (Req. for Recon., p. 12) However, our Decision states that on June 29, 2011, the City Council "adopted a resolution allowing the City to continue to operate and expend funds until a final budget was approved." (*City of Selma, supra,* PERB Decision No. 2380-M, p. 8; emphasis added.) We therefore find no error of fact, let alone a prejudicial error of fact, and deny the City's request for reconsideration of this point.

Bad-Faith and Surface Bargaining

The City characterizes PERB's finding of bad faith bargaining and surface bargaining by the City as a prejudicial error of fact that denies it due process. However, this conclusion is one of law, not of fact, and therefore does not satisfy any ground for reconsideration. (*CSEA (Hard), supra*, PERB Decision No. 1479a-S; *Redwoods Community College District* (1994) PERB Decision No. 1047a.) To the extent that the Board found that the City bargained without requisite intent to reach an agreement, the City has pointed to no error or newly discovered evidence or other reason to justify reconsideration of this finding.

The City had a full opportunity to address the charge of "surface bargaining" during the administrative litigation of this case and on exceptions. It is now merely repeating legal arguments it already made at earlier procedural stages, which cannot serve as grounds for

reconsideration. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 14 (*City of Pasadena*).)

Other Miscellaneous Alleged Prejudicial Factual Errors

The City also disputes the Board's findings on several other matters that were considered as part of the totality of circumstances leading to the Board's conclusion that the City did not bargain in good faith before it imposed its LBFO. For example, the City takes issue with "determinations concerning the nature of the counterproposal . . . of July 8, 2011, as containing a wage proposal as opposed to a proposal that sought to coerce the City into transferring the functions of its Fire Department to Cal Fire." (Req. for Recon., p. 3.) It also asserts that PERB erred in determining that a request to continue to meet and confer, subsequent to the exchange of counterproposals, need not specify particular bargaining subjects to preclude the existence of an impasse. (Req. for Recon., p. 3.)

These alleged errors are merely re-argument of claims the City made at earlier procedural stages. It obviously disagrees with the Board's characterization of the facts and the legal conclusion it drew from those facts, but such disagreement is not a ground for reconsideration.

Request For Revision Of Remedy

As its third basis for reconsideration, the City asserts that the Board must revise its remedy in *City of Selma, supra*, PERB Decision No. 2380-M on two grounds. We address each as follows:

Request For Offset Of Remedy

The City urges reconsideration of the remedy ordered by the Board on the ground that the terms and conditions imposed on July 18, 2011, did not cause Association members to lose any money. Aside from being an improper basis for reconsideration because the City has

failed to show a prejudicial error of fact, this request misapprehends the purpose of the status quo ante remedy where the employer has unilaterally changed terms and conditions of employment. A status quo ante remedy seeks to restore the bargaining equilibrium between equal partners in negotiations, as well as to make whole individuals who have lost benefits as a result of any unilateral change. (*City of Pasadena, supra,* PERB Order Ad-406-M, p. 14; *Temple City Unified School District* (1990) PERB Decision No. 841; *Santa Clara Unified School District* (1979) PERB Decision No. 104.) The only way to restore the bargaining equilibrium is to assure that one party, in this case, the Association, is not bargaining from a deficit position.

Regarding the make-whole remedy order as it relates to the 8 percent CalPERS contribution, the City claims that the employees have not been harmed because they now earn 100 percent of their salary, which the City implies is a 10 percent "raise" from past years when they were in furlough status. This more than off-sets the 8 percent CalPERS contribution taken from their pay, according to the City.

We reject this argument. The City's position might have been valid had the City mistakenly paid employees for work they did not actually perform. However, in this case, it was the City's unilateral change that caused employees to work on days that would otherwise have been furlough days, and the City received the full benefit of the time worked by these employees, regardless of whether the days would otherwise have been furloughed under the status quo.

In this case, offsetting the make-whole remedy by compensation earned by employees would be to effectively garnish wages retroactively, with no opportunity for the affected employees to seek income from outside sources for the days in question (an opportunity they

would have had if they had actually been furloughed). The affected employees should not be penalized for the unfair practice committed by the City.

Any argument the City wishes to make concerning offsets is more appropriately made at the compliance stage of these proceedings. (*Fresno County Office of Education* (1996) PERB Decision No. 1171; *In re Controlled Energy Systems* (2000) 331 NLRB 251, 251, fn. 1 (*Controlled Energy Systems*).)

Claim Of Newly Discovered Evidence

The City submitted a declaration signed by its counsel with an exhibit attached of a resolution approved by the City Council on June 25, 2012 for fiscal year 2012-2013, in which the City Council declared impasse in negotiations with the Association and implemented terms and conditions of employment according to its LBFO for that round of bargaining, a full year after the events that form the basis of this Decision. The City claims that this evidence is newly-discovered and supports a revision in the remedy ordered by the Board.

We reject this proffer of alleged new evidence for two reasons. First, it does not satisfy PERB Regulation 32410(a). The resolution was previously available, and could have been discovered prior to the administrative hearing with reasonable diligence. Nor was the document submitted within a reasonable time of its discovery. The City Council approved the resolution three days before the commencement of the formal hearing in this case on June 28, 2012, and the City could have introduced the resolution into evidence at that hearing.

The declaration states that the City could not have introduced the 2012-2013 resolution at the hearing because "the resolution was still subject to challenge at the time of the hearing that occurred in this proceeding and therefore did not amount to a conclusive, final and unassailable determination by the City Council until six months after it was passed." The City provides no authority for this proposition, and the resolution itself gives no such indication of a

six-month challenge period. In its exceptions to the ALJ's proposed decision filed on February 4, 2013 (more than six months after the resolution was approved), the City made no mention of the resolution. Nor did it make any attempt to augment the record, despite the fact that the remedy ordered by the ALJ contained the same substantive provisions as the Board's ultimate remedy.

Regardless of when the 2012-2013 resolution took effect, this resolution could have been introduced into the record at the time of the hearing, and the legal effect of the resolution been left to argument and final determination by the ALJ and this Board. The City obviously knew of its existence, as its governing body had passed the resolution before the start of the hearing.

Second, even if we were to consider the resolution, it does not justify any amendment to the remedy ordered. (*Chula Vista Elementary Educators Association (Larkins)* (2004) PERB Decision No. 1575a [request for reconsideration must establish how proffered newly discovered evidence would alter previous decision].) The resolution appears to impose on this bargaining unit the same terms and conditions of employment for the 2012-2013 fiscal year that the City imposed in the previous year.

The City claims that this resolution demonstrates that the parties have negotiated, reached a new impasse and a new imposition in the ensuing year since the events underlying this Decision took place. This fact, however, is not a basis for reconsidering the ordered remedy. Subsequent negotiations do not absolve the employer of past unfair practices. If there are changed circumstances such that the remedy the Board ordered is no longer appropriate, the Association need not demand to bargain, and could waive the make whole portion of the remedy if it believes it is in the best interest of the bargaining unit to do so. Further, disputes over the continued applicability of the remedy are more appropriately considered in

compliance proceedings. (*Controlled Energy Systems, supra,* 331 NLRB 251; *Nevada Joint Union High School District* (1985) PERB Decision No. 557; *Norris School District* (1995) PERB Decision No. 1090.)

ORDER

The City of Selma's request for reconsideration of the Public Employment Relations Board's decision in *City of Selma* (2014) PERB Decision No. 2380-M is hereby DENIED.

Chair Martinez and Member Banks joined in this Decision.