

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



CITY OF WATSONVILLE,

Employer,

and

WATSONVILLE POLICE OFFICERS
ASSOCIATION and WATSONVILLE PUBLIC
SAFETY MID-MANAGEMENT UNIT,

Exclusive Representative.

Case No. SF-IM-176-M

Administrative Appeal

PERB Order No. Ad-445-M

June 27, 2017

Appearances: Rains Lucia Stern by Timothy K. Talbot and Peter A. Hoffmann, Attorneys, for Watsonville Police Officers Association and Watsonville Public Safety Mid-Management Unit; Renne Sloan Holtzman Sakai by Allyson S. Hauck and Erich W. Shiners, Attorneys, for City of Watsonville.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

GREGERSEN, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Watsonville Police Officers Association and the Watsonville Public Safety Mid-Management Unit (collectively, Unions) of the PERB Office of the General Counsel's administrative determination (attached) that the Unions' request for factfinding was untimely pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA)¹ and PERB Regulation 32802.²

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

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

We have reviewed the record in its entirety in light of the issues raised by the Unions' appeal. We find the administrative determination to be well reasoned and in accordance with applicable law. We deny the Unions' appeal and adopt the administrative determination as the decision of the Board itself, as supplemented below.

FACTUAL AND PROCEDURAL HISTORY

In 2015, the City of Watsonville (City) and the Unions were jointly meeting and conferring for successor memoranda of understanding (MOUs). On June 1, 2015, the Unions provided the City with a written declaration of impasse, and on June 9, 2015, a mediator was appointed. On August 5, 2015, the Unions filed a request for factfinding with PERB. On the factfinding request form, the Unions stated that the impasse was over the parties' successor MOUs. On August 12, 2015, the Unions subsequently withdrew their request for factfinding prior to PERB's consideration.

Following the Unions' June 1, 2015 declaration of impasse, the City did not vote to impose terms and conditions of employment, but instead maintained the status quo. Over the next several months, and into the following calendar year, the parties occasionally met and exchanged proposals without, however, resolving their dispute by reaching successor agreements. On November 13, 2015, the Unions made a proposal to the City, which the City rejected. On December 2, 2015, the Unions made what they claim was a significant concession by eliminating a proposal for a 2 percent wage increase. The Unions' members later voted down a City counterproposal of February 2016 and since that time the City has maintained its position as set forth in the rejected February 2016 counterproposal.

On June 29, 2016, the Unions again declared impasse and, on July 7, 2016, again requested factfinding with PERB. On the factfinding request form, the Unions again stated that the impasse was over the parties' successor MOUs. The City objected on July 13, 2016,

arguing, among other things, that because the negotiations concerned the same dispute, i.e. successor MOUs with the Unions, the Unions should not be permitted to request factfinding again, since they had already made and withdrawn their request for factfinding the previous year.

On July 14, 2016, the Office of the General Counsel denied the Unions' most recent request for factfinding and, on August 3, 2016, issued an administrative determination explaining the basis for this denial. The administrative determination stated that, in the absence of any authority indicating that the MMBA permits parties to declare impasse a second time and restart the MMBA factfinding process, the Unions' July 7, 2016 factfinding request was rejected as untimely because it was filed more than one year after both the first declaration of impasse on June 1, 2015, and appointment of a mediator on June 9, 2015. (Administrative Determination, pp. 4-5.) The Unions' appeal and the City's response thereto followed on August 18, and September 6, 2016. On appeal, the Unions dispute the Office of the General Counsel's determination that their request for factfinding was untimely, contending that the two impasse declarations occurred in different bargaining disputes.

DISCUSSION

This case presents an unusual set of facts and a very narrow question to be resolved: whether a union that has declared impasse but has failed to timely request factfinding, may revive the request for factfinding when the employer has not imposed its last best and final offer and negotiations have continued, resulting in the union declaring a second impasse. For reasons we explain, we conclude under the facts of this case, the Unions' second request for factfinding is untimely.

The factfinding timelines are provided for in both MMBA section 3505.4, subdivision (a) and PERB Regulation 32802, subdivision (a). To be timely, the employee organization's

request must occur “[n]ot sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to [an] agreement to mediate or a mediation process required by a public agency’s local rules.” (PERB Regulation 32802, subd. (a)(1).) Alternatively, “[i]f the dispute was not submitted to mediation,” an employee organization may request that the parties’ differences be submitted to a factfinding panel “not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.” (*Id.*, (a)(2).) By including definite time limits for the availability and initiation of the factfinding process, the Legislature clearly intended that factfinding would begin relatively soon after a dispute had reached impasse. (*City of Redondo Beach* (2014) PERB Order No. Ad-409-M, pp. 6-7.)

Here, the Unions provided the City with an initial written declaration of impasse in successor MOU negotiations on June 1, 2015, and on June 9, 2015, a mediator was appointed. Therefore, it was incumbent on the Unions to submit their request for factfinding between July 9 and July 24, 2015. They failed to do so. The Unions filed their first untimely request for factfinding on August 5, 2015, a request that was withdrawn before the Office of the General Counsel had an opportunity to rule on it.³ The fact that the Unions later filed a second written declaration of impasse in successor MOU negotiations on June 29, 2016, does not renew the time limits for the availability and initiation of the factfinding process and the Unions’ second request for factfinding on July 7, 2016 was likewise untimely. We affirm the Office of the General Counsel’s determination that the Unions’ July 7, 2016 factfinding request failed to satisfy the requirements of MMBA section 3505.4, subdivision (a), and PERB Regulation 32802 and was properly dismissed.

³ As the dissent acknowledges, it is likely this request would have been denied as untimely.

On appeal, the Unions first assert that the administrative determination failed to recognize that the parties' initial 2014-2015 negotiations for successor MOUs came to an end after the statutory impasse resolution procedures were exhausted and the City declined to implement its last, best and final offer. According to the Unions, a new round of successor MOU negotiations began in November 2015, which resulted in a new declaration of impasse in July 2016. Therefore, the most recent request for factfinding was "timely" within the language of section 3505.4, according to the Unions.

In general, bargaining is complete when the parties reach agreement or bargain to impasse and complete any applicable impasse procedures. (*County of Santa Clara* (2010) PERB Decision No. 2114-M, p.13.) In the latter case, the employer may implement terms of its final offer. (Gov. Code, § 3505.7; *County of Sonoma* (2010) PERB Decision No. 2100-M.) The employer is not, however, required to implement any terms of its final offer, and may choose to maintain the status quo instead. (*County of Tulare* (2015) PERB Decision No. 2461-M.) Under either scenario, impasse may be broken and the duty to bargain revived if one party proposes a concession from its earlier bargaining position which indicates that an agreement may be possible. (*Rowland Unified School District* (1994) PERB Decision No. 1053.) When impasse is broken, the employer may no longer unilaterally implement terms and conditions of employment. (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 899.)

The Office of the General Counsel determined that the 2015 negotiations did not result in agreement, the completion of impasse procedures, or the City's imposition of its last, best and final offer, and that the negotiations beginning in November 2015 were part of the same set of negotiations. We agree, and reject as factually unsupported the Unions' claim that November 2015 marked the beginning of a new round of negotiations. Rather, it appears that

the Unions made concessions aimed at breaking the previously declared impasse. Such concessions are part of the bargaining process and cannot be viewed as resulting in a new round of bargaining.

We also reject the Unions' alternative argument that a new round of bargaining commenced by operation of MMBA section 3505.7, which reads:

The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

According to the Unions, section 3505.7 should be read to allow for a new round of negotiations to begin as a matter of law *annually* prior to the adoption of the public agency's annual budget. Included with this renewal would be the right to declare impasse and proceed to factfinding.

We disagree with the Unions' interpretation of MMBA section 3505.7. As we have previously noted, the Legislature added the above-quoted language to clarify that an employer's post-impasse implementation of terms does not extinguish the union's right to meet and confer for a specific term. (*City of Santa Rosa* (2013) PERB Decision No. 2308-M.) Nothing in the Legislative history of this provision contemplates the automatic reset of the factfinding provisions. We decline to read into the statute what the Legislature has declined to say. (*California State University, Hayward* (1987) PERB Decision No. 607-H.) Therefore, we find that the right to exercise and exhaust impasse procedures does not automatically renew annually prior to the adoption of the public agency's annual budget.

Having concluded that the negotiations resulting in the June 29, 2016 declaration of impasse were part of the same negotiations that resulted in the June 1, 2015 declaration of

impasse, we must consider whether the Unions' request for factfinding following the second impasse declaration was timely. We have previously held that a bright line rule applies to determine the timeliness of those requests. (*Lassen County In-Home Supportive Services Public Authority* (2015) PERB Order No. Ad-426-M, p. 6; *City of Redondo Beach, supra*, PERB Order No. Ad-409-M, pp. 6-7.) Therefore, we conclude that in matters involving the same dispute, the timeliness of an employee organization's request for factfinding is properly based upon an initial written notice of a declaration of impasse. In situations where an employee organization has provided the employer with a written notice of a declaration of impasse, and it later believes that the parties are no longer at impasse, it is incumbent on the employee organization to withdraw its declaration of impasse. (*Santa Cruz Central Fire Protection District, supra*, PERB Order No. Ad-436-M.) In situations where it is the employer who has provided the employee organization with a written notice of a declaration of impasse, it is incumbent on the employee organization to keep track of the statutory window period and to file its request for factfinding within that period. (*Ibid.*; *Lassen County In-Home Supportive Services Public Authority, supra*, PERB Order No. Ad-426-M; *City of Redondo Beach, supra*, PERB Order No. Ad-409-M.)

Our dissenting colleague would interpret the MMBA's factfinding provisions to allow the employee organization to decide whether to invoke the factfinding process either following an initial impasse declaration or, if it disagrees that the parties are at impasse, following a subsequent impasse declaration in the same course of bargaining. We believe this interpretation would undermine the bright line rules established in the statute and our cases, and raises the prospect of attempts to manipulate the process to resuscitate untimely impasse requests. Regardless of whether those concerns are present under the circumstances of the present case, we believe such a result is contrary to the Legislature's intent in subjecting

factfinding requests to definite time limits. (*City of Redondo Beach, supra*, PERB Order No. Ad-409-M, pp. 6-7.) Instead, if an employee organization disagrees with the employer that negotiations are at impasse, PERB's unfair practice proceedings remain the legislatively preferred procedure for resolving whether a declaration of impasse is bona fide. (*City & County of San Francisco* (2014) PERB Order No. Ad-415-M, pp. 13-14; *County of Fresno* (2014) PERB Order No. Ad-414-M, pp. 6-8.)

In this case, the June 1, 2015 declaration of impasse remained in effect when the Unions requested factfinding on July 7, 2016. The Office of the General Counsel properly used the June 1, 2015 date as the start of the Unions' window period to request factfinding and properly found the July 7, 2016 request untimely. The Unions failed to make a timely request under MMBA 3505.4, subdivision (a), and PERB Regulation 32802 and as a result, the appeal is denied.

ORDER

Watsonville Police Officers Association's and Watsonville Public Safety Mid-Management Unit's appeal from the administrative determination in Case No. SF-IM-176-M is hereby DENIED.

Member Winslow joined in this Decision.

Member Banks' dissent begins on page 9.

BANKS, Member, dissenting: I disagree with the reasoning and result of the majority opinion, which is at odds with the language and purpose of the factfinding provisions of the Meyers-Milius-Brown Act (MMBA)¹ and PERB Regulations,² and with longstanding Public Employment Relations Board (PERB) and judicial precedent recognizing the temporary and potentially recurring nature of impasse in negotiations. The issues presented by this case are what, if any, limits PERB should place on an exclusive representative's ability to request MMBA factfinding *other than those expressly stated by the Legislature*, and, if so, by what authority the agency may do so. Rather than confront these difficult questions of statutory interpretation and the scope of PERB's authority, by adopting the administrative determination, the majority creates new restrictions on access to the factfinding process not contemplated by the Legislature and thereby subverts the statute's purpose of allowing the employee organization, and not the employer, to determine when and whether to request factfinding for a dispute.

FACTUAL AND PROCEDURAL BACKGROUND

The Watsonville Police Officers Association and the Watsonville Public Safety Mid-Management Unit (collectively, Unions) represent bargaining units of police personnel employed by the City of Watsonville (City). In 2015, the Unions were jointly meeting and conferring with the City for a successor Memoranda of Understanding (MOU). The Unions provided the City with a written declaration of impasse on June 2, 2015. A mediator was appointed on June 9,

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

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

2015. The Unions requested factfinding on August 5, 2015, but then withdrew that request on August 12, 2015 without PERB considering the request.³

Following the Unions' June 2, 2015 declaration of impasse, the City did not opt to impose terms and conditions of employment, but instead maintained the status quo. Over the next several months and into the following calendar year, the parties occasionally met and exchanged proposals without, however, resolving their dispute or concluding successor agreements. On November 13, 2015, the Unions made a proposal to the City, which the City rejected. The Unions' members then voted down a City counterproposal of February 2016, and thereafter the City has maintained its position as set forth in the rejected February counterproposal.

On June 29, 2016, the Unions again declared impasse and, on July 7, 2016, again requested factfinding. The City objected on July 13, 2016, arguing, among other things, that because the negotiations concerned the same dispute, i.e., successor MOUs with the Unions, the

³ The Unions' request for factfinding occurred 64 days after the declaration of impasse and 57 days after the mediator's appointment. Had the request not been withdrawn, it likely would have been denied as untimely under MMBA section 3505.4, which requires that a request for factfinding occur "not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules," or, if the dispute was not submitted to mediation, then "not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse." (§ 3505.4, subd. (a); PERB Reg. 32802, subd. (a)(1)-(2); *City of Redondo Beach* (2014) PERB Order No. Ad-409-M (*Redondo Beach*), pp. 6-7; *City of Redondo Beach* (2014) PERB Order No. Ad-413-M, adopting administrative determination at pp. 2-4; *Lassen County In-Home Supportive Services Public Authority* (2015) PERB Order No. Ad-426-M, p. 6.)

However, because the Unions' August 5, 2015 request for factfinding was withdrawn, PERB *made no determination* as to the appropriateness of factfinding for that dispute, including whether that request was timely. The majority's framing of the issue as whether a union may "revive" a request for factfinding studiously ignores this point by assuming what was never decided at the time. For PERB to determine *in 2016* that the Unions' factfinding request made *one year earlier* was untimely and can therefore not be "revived" requires the agency to make precisely the kinds of factual findings which the majority insists PERB cannot make.

Unions should not be permitted to request factfinding again, since they had already made and withdrawn their request for factfinding the previous year. On July 14, 2016, PERB's Office of the General Counsel denied the Unions' most recent request for factfinding and, on August 3, 2016, the Office of the General Counsel issued an administrative determination explaining the basis for this denial. The Unions' appeal and the City's response followed on August 18, and September 6, 2016.

THE ADMINISTRATIVE DETERMINATION

The administrative determination states that, in the absence of any authority indicating that the MMBA permits parties to declare impasse a second time and *restart* the MMBA factfinding process, the Unions' July 7, 2016 request must be rejected as untimely because it was filed more than one year after both the first declaration of impasse on June 2, 2015, and the appointment of a mediator on June 9, 2015. (Administrative Determination, pp. 4-5.) The Administrative Determination thus turns, in part, on the Office of the General Counsel's implicit finding that the Unions' two declarations of impasse, separated by approximately one year in time, nonetheless arise from the same dispute.

THE PARTIES' CONTENTIONS ON APPEAL

On appeal, the Unions argue, among other things, that their negotiations with the City for fiscal year 2016-2017 and their July 7, 2016 request for factfinding do not relate back to their negotiations the previous year which ostensibly ended with the Unions' June 2, 2015 declaration of impasse and the City's decision to maintain the status quo rather than impose terms and conditions of employment. According to the Unions, a new round of negotiations began when they presented proposals in November 2015, more than three months after they chose not to proceed with advisory factfinding for the 2015 negotiations.

For its part, the City argues that, by declaring impasse on June 2, 2015, but never withdrawing that declaration, the Unions exhausted their one opportunity for factfinding as to their dispute with the City in successor negotiations. According to the City, because the Unions allowed the statutory time limit for requesting factfinding to run without making a timely request, they should not be allowed to re-request factfinding a year later based on a second declaration of impasse for the same dispute.

DISCUSSION

This case presents two issues not previously considered in PERB's MMBA factfinding jurisprudence: (1) Whether an employee organization must request factfinding on the first instance when a particular dispute is declared to be at impasse or forfeit its right forever to invoke factfinding for that dispute, even if negotiations resume and then reach a subsequent impasse over the same dispute; and (2) Whether, by requesting factfinding and then withdrawing that request before PERB has made any determination as to the appropriateness of the request, including whether it was timely, does an employee organization preserve its right to invoke factfinding in the event of a subsequent declaration of impasse in the same dispute.

Based on the statutory language and long-standing PERB and private-sector decisional law regarding the temporary and potentially recurring nature of impasse in negotiations, I would answer the first question in the negative. That is, if an employee organization chooses not to invoke MMBA factfinding upon an initial declaration of impasse in a dispute, and the public agency chooses not to impose terms and conditions of employment from its last, best and final offer (LBFO), I see no reason why the employee organization should not be permitted to invoke the factfinding process later, in the event negotiations resume but then again result in an impasse. The majority opinion and our previous case law is undoubtedly correct that, by

including definite time limits for the availability of the factfinding process, the Legislature intended that factfinding, *if utilized*, would begin relatively soon after a dispute had reached impasse. (*Redondo Beach, supra*, PERB Order No. Ad-409-M, pp. 6-7.) Certainly, the Legislature did not intend to permit employee organizations to extend negotiations under the guise of advisory factfinding indefinitely and thereby deprive a public agency of its right, ultimately, to end the process and impose its LBFO. (MMBA, §§ 3505.7; *Charter Oak Unified School District* (1991) PERB Decision No. 873 (*Charter Oak*), p. 10.) However, the majority opinion fails to explain how this concern is applicable in the present circumstances, where the factfinding process was never utilized or even initiated and, equally important, where the public agency itself has chosen not to impose its LBFO but to allow the stalemate to continue.

As to the second issue presented, unlike the majority, I would hold that an employee organization may timely withdraw its request for factfinding before the process has been initiated, in order to preserve the right to proceed to factfinding in the event of a subsequent impasse in negotiations. Where, as here, an employee organization makes a request for factfinding but then withdraws its request before PERB makes any determination as to its appropriateness, including its timeliness, the employee organization should not thereby lose its right to invoke factfinding, in the event of a subsequent declaration of impasse in the same dispute.

For reasons that, in my view, are not adequately explained, the majority would instead require an employee organization that wishes to terminate the factfinding process to withdraw the declaration of impasse which triggered the right to proceed to factfinding rather than take the more straightforward approach of simply withdrawing the request for factfinding. Aside from being unnecessarily complicated, the majority's approach ignores the fact that an employer may also make a written declaration of impasse, which an employee organization has

no power to withdraw. Moreover, under the majority's *first-time only* rule, the employer's written declaration of impasse would trigger an employee organization's timeline to either invoke the factfinding process for a dispute which the union may not think is at impasse, or forfeit its right to factfinding altogether, since, according to the majority, the first declaration of impasse is *the only* appropriate opportunity to invoke the factfinding process.

As explained below, the majority's interpretation of the MMBA's factfinding provisions and of PERB's role as gatekeeper to that process is inconsistent with the temporary and "fragile" nature of impasse recognized by both PERB precedent and by other administrative and judicial authorities.

Consistent with Long-Standing PERB and Judicial Precedent, the Legislature Understood that a Dispute May Produce More than One Impasse, and, Consequently, Employee Organizations Should Not Forfeit their Right to Factfinding for a Subsequent Impasse, if they Never Previously Invoked or Utilized the Factfinding Process for the Same Dispute

The purpose of the MMBA is to establish a method of collective bargaining for the resolution of disputes between public agencies and the representatives of their employees. (MMBA, § 3500; *County of Contra Costa* (2014) PERB Order No. Ad-410-M, pp. 17-18.) To that end, in 2011, the Legislature enacted Assembly Bill No. 646 (Statutes 2011, ch. 680) (AB 646) to establish an advisory factfinding procedure for resolving post-impasse bargaining disputes under the MMBA. Similar in purpose to the other PERB-administered statutes, factfinding under the MMBA is designed to defer and, if possible, avoid the disruption of government services caused by work stoppages, and to provide a public agency at impasse in negotiations with additional information and recommendations before it decides whether to impose its LBFO. (§§ 3505.4, subds. (c) & (d), 3505.5, subd. (a), 3505.7, 3507, subd. (a)(5); *San Diego Teachers Assn. v. Superior Court of San Diego County* (1979) 24 Cal.3d 1, 15; *County of Riverside v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 20, 29, review

den. (July 13, 2016); *San Francisco Unified School District* (1979) PERB Order No. IR-10, p. 3.) Although advisory, if an employee organization opts to use MMBA factfinding, the process must be completed before a public agency may unilaterally implement its LBFO. (MMBA, §§ 3505.4, 3505.5, and 3505.7.)

Following federal precedent, PERB and California's courts have recognized that "impasse is a fragile state of affairs and may be broken by a change in circumstances" (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 898-899; *Los Angeles Unified School District* (2013) PERB Decision No. 2326, p. 13, fn. 13; *County of Trinity (United Public Employees of California, Local 792)* (2016) PERB Decision No. 2480-M, adopting dismissal letter at p. 4; see also *Charles D. Bonanno Linen Service, Inc. v. NLRB* (1982) 454 U.S. 404, 412.) If an impasse is broken by changed circumstances, the duty to bargain revives and the parties are legally obligated to resume meeting "until they reach agreement or again reach impasse." (*Fremont Unified School District* (1990) PERB Order No. IR-54 (*Fremont*), p. 5, emphasis added; *PERB v. Modesto City, supra*, at pp. 898-899.) Thus, inherent in the statutory scheme for collective bargaining, of which factfinding is a part, is the possibility that following a declaration of impasse the duty to bargain may revive, and that negotiations may resume and result in a *subsequent* impasse concerning the same dispute. (*Fremont, supra*, at p. 5; *El Dorado Superior Court* (2017) PERB Decision No. 2523-C (*El Dorado*), adopting proposed decision at p. 15.)

Here, the Unions declared impasse on June 29, 2016 and requested factfinding approximately one week later on July 7, 2016. Although well within the 30-day deadline set forth in the second sentence of section 3505.4, subdivision (a), the Office of the General Counsel refused to accept this declaration of impasse on its face and permit the dispute to proceed to

factfinding. Instead, the Office of the General Counsel rejected the Unions' assertion that they may "declare impasse again and invoke MMBA factfinding procedures once more" because the Unions had "fail[ed] to provide any authority indicating that the MMBA permits parties to declare impasse a second time and restart the MMBA factfinding timelines" for the same dispute. (p. 4.) The majority adopts this reasoning, with the additional explanation that it "decline[s] to read into the statute what the Legislature has declined to say."

However, the Legislature is presumed to know existing law, including applicable judicial and agency precedent, when it enacts a statute. (*Singh v. Superior Court* (2006) 140 Cal.App.4th 387, 400; *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609.) Although the Legislature may not have cited case law to the majority's satisfaction, I have no doubt that it fully intended for PERB to interpret and apply the MMBA factfinding provisions in accordance with existing judicial and administrative precedent, including the possibility that the same dispute or round of negotiations may result in more than one impasse.

For example, although the MMBA's factfinding provisions do not expressly say so, a reasonable interpretation, and one that is in accordance with long-standing precedent interpreting impasse procedures under the other PERB-administered statutes, is that "[w]hen the parties reach this second impasse after the statutory impasse procedures have been completed, PERB has no authority to recertify impasse or reinvoke the impasse procedures." (*Fremont, supra*, PERB Order No. IR-54, p. 6, citing *Modesto City Schools* (1983) PERB Decision No. 291, p. 38; *El Dorado, supra*, PERB Decision No. 2523-C, p. 11; see also *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2017-S, adopting partial dismissal letter at p. 4.) As noted above, by providing for advisory factfinding, the Legislature did not intend to eviscerate a public agency's right, ultimately, to end negotiations and determine terms

and conditions of employment by imposing its LBFO or, as here, by maintaining the status quo. However, where the statutory impasse procedures have never been completed or, as in the present case, *never began in the first place*, nothing in the statutory language or in existing case law would seem to prohibit the employee organization from utilizing the factfinding process for a subsequent declaration of impasse regarding the same dispute.

In my view, the majority does not adequately explain why the factfinding process should be categorically off limits for resolving a dispute simply because the same dispute had previously resulted in a written declaration of impasse by one or both parties, so long as the factfinding process itself had never been used. Certainly, by including time limits, the Legislature did not intend to permit employee organizations to extend negotiations indefinitely by repeatedly invoking and re-invoking the factfinding process for the same dispute. (See, e.g., *Charter Oak*, *supra*, PERB Decision No. 873, p. 10.) But such concerns are clearly absent in the present case, not only because the Unions withdrew their request for factfinding before PERB made any determination as to the appropriateness of that request, but also because the public agency chose not to impose its LBFO following the initial declaration of impasse. Indeed, a year later, the City had still not imposed its LBFO, thereby indicating its preference for allowing the stalemate to continue rather than ending it once and for all by imposing its LBFO. Any concerns that the Unions are using the factfinding process to delay or frustrate the City's right to impose its LBFO are therefore misplaced.

The First-Time Only Rule Announced by the Majority Reads into the Statute What the Legislature Declined to Say and Subverts the Statute's Purpose by Allowing Employers to Intrude into Determining When and Whether a Dispute May Proceed to Factfinding

Not content to confine its decision to the "unusual set of facts" and "very narrow question" it purports to consider, the majority goes beyond the reasoning of the administrative

determination (and the language of the statute) to announce the following bright line rule: *the only time* MMBA factfinding will be available is upon the first declaration of impasse in a dispute regardless of circumstances, *including which party declared impasse*. The sole justification offered by the majority for refusing to accept the Unions' August 12, 2015 withdrawal of their request for factfinding, and for ignoring their June 29, 2016 declaration of impasse altogether, is that the June 2, 2015 declaration occurred first in time and must therefore be the *only* event that will allow the Unions to proceed to factfinding. Citing *Redondo Beach, supra*, PERB Order No. Ad-409-M, the majority asserts that, "[b]y including definite time limits for the availability and initiation of the factfinding process, the Legislature clearly intended that factfinding would begin relatively soon after a dispute had reached impasse." I find this explanation unpersuasive.

In *Redondo Beach*, we observed that, by granting employee organizations, and not public agencies, the right to request factfinding, the Legislature presumably intended that the employee organization would have the sole responsibility for deciding when, and whether, to make such requests. (*Id.* at p. 7.) Neither the Board's decision in *Redondo Beach* nor the Legislature could have intended to eviscerate the right to factfinding altogether by mechanically requiring that an employee organization proceed to factfinding upon the first declaration of impasse that occurs, or forever lose its right to do so. However, that is one consequence of the majority's reasoning because, while only the employee organization may request factfinding, a declaration of impasse can be made unilaterally *by either party*. (*City & County of San Francisco* (2014) PERB Order No. Ad-415-M, p. 11; *Modesto City Schools, supra*, PERB Decision No. 291.) Thus, applying the majority's *first-time only* rule would allow an employer to declare impasse, regardless of actual circumstances, and thereby force the union either to invoke the factfinding process

immediately or forfeit its right to do so later when the union believes a genuine impasse exists and the process may be of more value.

Moreover, while a union can, as the majority points out, withdraw its own declaration of impasse, nothing in the statute or PERB's decisional law suggests that one party has the power to withdraw another party's declaration of impasse. To the contrary, unless a declaration of impasse is found to be invalid through PERB's separate unfair practice proceedings, a party must proceed to factfinding or other applicable impasse resolution procedures, even if it believes the dispute is not genuinely at impasse. (*Regents of the University of California* (1985) PERB Decision No. 520-H, pp. 23-24.) By permitting the employer to trigger the union's deadline to request factfinding or forfeit that right completely, the majority's *first-time only* rule effectively undermines the legislative intent of granting employee organizations the sole right to determine if and when to use the factfinding process.

The majority does not explain how a union can withdraw *an employer's* declaration of impasse, or why it should be required to do so in order to preserve its right to proceed to factfinding, particularly if the union disagrees with the employer that negotiations are at impasse. The more straightforward approach would be to permit the employee organization to withdraw its request for factfinding. Because it unnecessarily restricts an employee organization's right to submit a dispute to factfinding and undermines the legislative purpose of the MMBA's factfinding provisions, I dissent from the majority's view that an employee organization cannot withdraw its own request for factfinding and instead must withdraw a declaration of impasse, if it does not wish to proceed to factfinding.

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August 3, 2016

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Re: City of Watsonville
Case No. SF-IM-176-M
ADMINISTRATIVE DETERMINATION

Dear Interested Parties:

On July 7, 2016, the Watsonville Police Officers Association and the Watsonville Public Safety Mid-Management Unit (WPOA/WPMA or Associations) filed requests for factfinding¹ with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.3.² The Associations assert that they have been unable to effect a settlement in their negotiations for successor memoranda of understanding (MOU) with the City of Watsonville (City).

The 2015 Factfinding Request³

PERB records show that the WPOA filed a factfinding request on August 5, 2015 (Case No. SF-IM-159-M). On the factfinding request form, the WPOA stated that the impasse was over the parties' successor MOU, impasse had been declared on June 1, 2015, and a mediator had

¹ The requests are treated as the Associations' joint request.

² The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

³ The Board and its agents may take official notice of documents in PERB files and records. (*State of California (Department of Personnel Administration)* (1993) PERB Decision No. 995-S.)

been appointed on June 9, 2015. WPMA⁴ withdrew the factfinding request on August 12, 2015.

The Instant Factfinding Request

The instant factfinding request states that the Associations gave the City written notice of their joint declaration of impasse on June 29, 2016.

The City's Objection to the Instant Factfinding Request

On July 13, 2016 the City filed its objection to the Associations' factfinding request. According to the City, after the Associations withdrew their August 2015 factfinding request, the Associations made a proposal to the City on November 13, 2015. The parties met in December and on February 12, 2016, the City made a counterproposal that was subsequently rejected by the Associations' members. In March 2016, the City told the Associations that it was holding to its February proposal and over the next three months, the Associations asked if the City had changed its positions. The City responded that it had not changed its positions.

The City objects to the instant factfinding request on the grounds that the request is untimely as it was filed well over 45 days after the mediator was appointed in June 2015 to try to resolve the parties' successor MOU impasse, and that impasse resolution procedures are available only upon first impasse, not upon reaching a second impasse in negotiations.

The Associations' Reply

On July 14, 2016 the Associations replied to the City's opposition. The Associations assert that the instant factfinding request should be granted for the following reasons:

- The parties have recently engaged in good faith bargaining on a successor memorandum of understanding and "[t]he facts and issues that are currently outstanding between the parties differ substantially from those that were considered in the prior impasse/mediation efforts which occurred in 2015";
- "[T]he parties pursued mediation procedures in 2015 as required by local ordinance, and utilized the services of a mediator," but "that mediation did not involve in any way, a neutral appointed by PERB or proceedings conducted by way of authority identified in Government Code section 3505.4. [T]here was no exhaustion of the impasse procedures identified in section 3505.4."
- Impasse procedures were not exhausted because the parties made "an agreement⁵ to extend the 45 day timeline for the request for an appointment of a neutral by PERB"

⁴ It appears that the August 5, 2015 case was jointly filed by the WPOA/WPMA and that the WPOA/WPMA and the City understood it to be a joint request.

and the purpose of the “agreement/understanding” was that “such timelines would be extended while the parties continued to exhaust the City authorized mediation procedure and avoid waiver of the Association’s right to invoke section 3505.4”;

- “[T]here has never been any affirmative or knowing waiver of any right of the Associations to utilize the impasse procedures in section 3505.4”; and
- “The prior dispute which occurred between the parties relative to the untimely request in August 2015 to secure a neutral from PERB per section 3505.4 led the Associations to initiate a new round of negotiations relative to the previously declared impasse. Those negotiations commenced on November 13, 2015 and concluded by way of the recently tendered declaration of impasse and request to PERB to appoint a neutral pursuant to section 3505.4. The recent negotiations consisted of a substantial and material change in the position of the Associations relative to a very significant wage proposal. Specifically, the Associations commenced the new round of negotiations by immediately eliminating a cornerstone proposal of a 2% wage increase for all members. The reduced wage proposal was submitted on December 2, 2015. The elimination of this proposal represented a significant change in circumstances. Moreover, the City has, without objection, engaged in bargaining over the new proposed terms”.

Discussion

MMBA section 3505.4, subdivision (a), provides as follows:

The employee organization may request that the parties’ differences be submitted to a factfinding panel not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties’ agreement to mediate or a mediation process required by a public agency’s local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties’ differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

⁵ The Associations assert in their Reply that their representative is “willing to submit a sworn declaration that he had an understanding/agreement with the City negotiator in June of 2015 that such timelines would be extended while the parties continued to exhaust the City authorized mediation procedure.”

PERB Regulation 32802 provides as follows:

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

The factfinding timelines provided in the MMBA and PERB Regulations are clear and unambiguous. (*Santa Cruz Central Fire Protection District* (2016) PERB Order No. Ad-436-M, p. 5 (*Santa Cruz*).) Two events trigger the factfinding timelines: a written declaration of impasse from either party, or the appointment or selection of a mediator. (*Ibid.*) It is well settled that "[O]nce impasse is declared, the exclusive representative has not only a right, but a strict window period within which to request factfinding." (*City & County of San Francisco* (2014) PERB Order No. Ad-419-M, pp. 16-17, citing *Redondo Beach* (2014) PERB Order No. Ad-409-M, pp. 6-7.) "[I]t is up to the union to keep track of the statutory window period and to file its request for factfinding within that period." (*Santa Cruz, supra*, PERB Order No. Ad-436-M, pp. 5-6, citing *City of Redondo Beach* (2014) PERB Order No. Ad-409-M and *Lassen County In-Home Supportive Services Public Authority* (2015) PERB Order No. Ad-426-M.) In processing a factfinding request, the MMBA does not authorize PERB to independently determine the validity of a declaration of impasse. (*Santa Cruz, supra*, citing *City & County of San Francisco* (2014) PERB Order No. Ad-419-M.)

The Associations do not contest that the timelines provided in the statute must be adhered to. (*Santa Cruz, supra*, PERB Order No. Ad-436-M, pp. 5-6; *City & County of San Francisco, supra*, PERB Order No. Ad-419-M, pp. 16-17; *City of Redondo Beach, supra*, PERB Order No. Ad-409-M; *Lassen County In-Home Supportive Services Public Authority* (2015) PERB Order No. Ad-426-M.) Rather, the Associations assert a variety of reasons why they may declare impasse again and invoke MMBA factfinding procedures once more: the issues currently in dispute are different; bargaining positions have changed; MMBA factfinding procedures have not been exhausted; the parties only participated in mediation provided in local rules; and, there was no affirmative or knowing waiver of MMBA factfinding. But the Associations fail to provide any authority indicating that the MMBA permits parties to declare impasse a second time and restart the MMBA factfinding timelines.

Also of no assistance is the Associations' assertion that factfinding should be granted because the parties had an "agreement/understanding" to extend timelines. Just as the MMBA does not authorize PERB to independently determine the validity of a declaration of impasse, there is no

authority suggesting PERB is authorized to interpret or enforce the parties' agreement allegedly reached to preserve factfinding rights while mediation is pursued under local rules. (*Santa Cruz, supra*, citing *City & County of San Francisco* (2014) PERB Order No. Ad-419-M.)

It is undisputed that the Associations provided a written declaration of impasse in successor MOU negotiations on June 1, 2015. A mediator was appointed on June 9, 2015. The Associations then provided another written declaration of impasse on June 29, 2016. The July 7, 2016 request is untimely because it was not made within 30 days of notice of the written declaration of impasse on June 1, 2015. Nor was it timely under the provision concerning mediation because it was not made within 30 to 45 days following the selection or appointment of a mediator on June 9, 2015. Accordingly, the factfinding request does not satisfy the requirements of MMBA section 3505.4, subdivision (a), and PERB Regulation 32802, and is therefore dismissed.

Right to Appeal

Pursuant to PERB Regulations, an aggrieved party may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid.*)

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 PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

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 Attention: Appeals Assistant
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 Sacramento, CA 95811-4124
 Telephone: (916) 322-8231
 Facsimile: (916) 327-7960
 E-File: PERBe-file.Appeals@perb.ca.gov

If a party appeals this determination, the other party(ies) may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Service

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

Extension of Time

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

Sincerely,

 Mary Weiss
Senior Regional Attorney

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