STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY OF STOCKTON, Employer, and OPERATING ENGINEERS LOCAL UNION NO. 3, AFL-CIO, Exclusive Representative.	Case No. SA-IM-246-M PERB Order No. Ad-507-M December 21, 2023

Appearances: Sloan Sakai Yeung & Wong by Charles Sakai, Attorney, for City of Stockton; Gening Liao, Attorney, for Operating Engineers Local Union No. 3, AFL-CIO.

Before Banks, Chair; Krantz and Nazarian, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the City of Stockton from an administrative determination (AD) by PERB's Office of the General Counsel (OGC). In the AD, OGC granted a request by Operating Engineers Local Union No. 3, AFL-CIO (OE3) to submit the parties' bargaining differences to a factfinding panel pursuant to the Meyers-Milias-Brown Act (MMBA) and PERB Regulations.[1]

The City argues that OE3 did not timely request factfinding within a statutorily required window after appointment of the parties' mediator. OE3 responds, in part, by arguing that events occurring after that appointment amounted to constructive

[1] The MMBA is codified at Government Code section 3500 et seq. All further undesignated statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

reappointment. Having reviewed the matter de novo, we do not find that the mediator was constructively reappointed. We therefore dismiss OE3's request. Because the Board does not lightly infer a constructive reappointment date, a party must preserve timelines by filing a factfinding request in a known window and then deciding later whether to pursue the request, withdraw it, or seek a continuance. This is particularly important given that missing the window waives the right to factfinding.

FACTUAL AND PROCEDURAL BACKGROUND

I. The City's Local Rules

At all relevant times, the Stockton Municipal Code has included the City's local rules on resolving a collective bargaining impasse. Those local rules provide in relevant part:

> "2.74.030 Definitions.
>
> [¶] . . . [¶]
>
> "'Fact finding' means the identification of the issues in a particular dispute; reviewing the positions of the parties; the investigation and reporting of the facts by one or more impartial fact-finders; and, when requested by both parties, to make advisory recommendations for settlement of disputes.
>
> [¶] . . . [¶]
>
> "'Impasse' means a deadlock in negotiations between a recognized employee organization and the City concerning matters about which they are required to negotiate.
>
> [¶] . . . [¶]
>
> "'Mediation' means the efforts of an impartial third person, or persons, to assist in reconciling a dispute regarding wages, hours, and other terms and conditions of employment between representatives of the City and a recognized employee organization or organizations through interpretation, suggestion, and advice.
>
> [¶] . . . [¶]

> "2.74.180 Impasse procedures.
>
> "A. Notice. Impasse procedures may be invoked only after all other attempts made by both parties to reach agreement through good faith negotiation have been unsuccessful. If impasse is reached during negotiations concerning a memorandum of understanding, either party may declare an impasse. The party initiating impasse must send written notice containing:
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> "1. A list of all issues in dispute;
>
> "2. The party's position regarding each issue;
>
> "3. A written description containing the party's last, best, and final offer on each issue; and
>
> "4. A list of all issues on which there is a tentative agreement.
>
> "B. Impasse Meeting. After an impasse notice is sent, the parties shall convene at a mutually convenient time within five (5) days of receipt of the written notice, unless the parties involved mutually agree to an extension. The purpose of such impasse meeting is to permit review of the position of all parties in a final good faith effort to reach agreement on the disputed issues.
>
> "C. If agreement is not concluded at the impasse meeting, the parties together may mutually agree upon a method of resolving the dispute including, but not limited to, mediation or fact finding as defined in Section 2.74.030."

II. The Parties' Negotiations and OE3's Factfinding Request

OE3 is the exclusive representative of a bargaining unit comprising City employees who work in operations and maintenance. The parties started bargaining over a successor Memorandum of Understanding for this unit on March 13, 2023.[2]

In a July 7 e-mail, the City and OE3 jointly asked PERB's State Mediation and Conciliation Service (SMCS) to assign a mediator. The e-mail indicated that neither

[2] All further dates are in 2023.

party had declared an impasse and that further bargaining sessions were set for July 17 and July 24. On the same day as the parties' joint request—July 7—an SMCS mediator e-mailed the parties to notify them that SMCS had appointed her to mediate the bargaining dispute. The parties eventually scheduled an initial mediation session for August 4.

On July 24, the City made a proposal to OE3 that the City termed its last, best, and final offer. On July 31, the City sent OE3 a written declaration of impasse pursuant to Section 2.74.180(A) of the City's local rules. In its impasse declaration, the City suggested that the parties use their scheduled mediation date to satisfy the requirement of holding an impasse meeting pursuant to Section 2.74.180(B) of the local rules.

On September 14—exactly 45 days after the City's July 31 written declaration of impasse—OE3 initiated this case by filing a factfinding request. On September 19, the City opposed the request, claiming that OE3 failed to file it in a timely manner. On September 20, OGC issued its AD approving OE3's request. On October 2, the City appealed the AD and asked the Board to stay factfinding while it addressed the appeal. OE3 opposed the appeal but it notified the Board it had no opposition to the stay request, and the Board thereafter granted the stay request.

DISCUSSION

MMBA section 3505.4, subdivision (a) explains that there are two alternate deadlines for a union to request factfinding:

> "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."

PERB Regulation 32802, which implements MMBA section 3505.4, similarly provides:

> "(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."

PERB reviews a factfinding request only to determine whether the request was procedurally proper, meaning that (1) there was a written declaration of impasse from either party, or a mediator was appointed or selected to assist the parties in bridging their bargaining differences; and (2) the factfinding request was timely filed after one of these triggering events. (*City of Compton* (2023) PERB Order No. Ad-506-M, p. 4.)

We considered a constructive reappointment argument in *Lassen County In-Home Supportive Services Public Authority* (2015) PERB Order No. Ad-426-M (*Lassen*). There, after the parties scheduled an initial mediation session, the mediator informed the parties that he had a scheduling conflict and would seek a replacement mediator. (*Id*. at p. 2.) Two days later, the mediator reported that he could not find a

replacement, and the parties therefore rescheduled their initial session. (*Ibid*.) The union filed a factfinding request more than 45 days after the mediator's appointment, but argued that the mediator's scheduling conflict and search for a replacement "effectively rescinded his initial appointment" and that "the window for requesting factfinding should be re-set" as of the date when the mediator notified the parties that he could not find a replacement and the initial session would need to be rescheduled. (*Id.* at pp. 3-4.) We rejected this argument. (*Id*. at p. 5-6.) While the current facts differ, *Lassen* shows that we do not lightly infer constructive reappointment.

Here, OE3 does not claim to have filed its request within 30 days of a written impasse declaration. Rather, OE3 claims it timely filed its request between 30 and 45 days following appointment or selection of a mediator. OE3 acknowledges that SMCS appointed the parties' mediator on July 7, and that September 14, when OE3 filed its request, was more than 45 days after July 7. But OE3 argues that: (a) appointment of a pre-impasse mediator does not trigger a right to request factfinding; (b) the Board therefore must disregard the July 7 appointment date, which predated the parties' impasse; and (c) the Board should find that the mediator was constructively reappointed or reselected when the City declared impasse on July 31.

We agree that "appointment or selection of a mediator" in MMBA section 3505.4 and PERB Regulation 32802 means appointment or selection of a post-impasse mediator. The main reason is the statute's overall structure. A written impasse declaration triggers a 30-day window in which to request factfinding, except the statute delays the window if a mediator is appointed or selected. This reflects a clear legislative intent: slightly delaying the window will often afford parties an opportunity to begin mediation before having to file a factfinding request. That structure only makes

sense if “appointment or selection of a mediator” means appointment or selection of a post-impasse mediator. Moreover, a contrary interpretation would mean that any time parties agree to pre-impasse mediation, appointment of the pre-impasse mediator might become the only trigger for requesting factfinding, unless the parties later agree to select a post-impasse mediator. It is inconceivable that the Legislature intended for pre-impasse mediation to potentially be the *only* possible trigger for a union’s right to request factfinding, since that would discourage use of pre-impasse mediation. Accordingly, the mediator’s appointment on July 7 did not trigger a 30-to-45-day window in which to request factfinding.

OE3 filed its factfinding request on September 14, the 45th day following July 31. As noted above, OE3 argues that the July 31 written declaration of impasse, combined with the fact that the parties’ mediation occurred after July 31, was sufficient for July 31 to qualify as a date on which the parties’ mediator was constructively reappointed or reselected as a post-impasse mediator. If this argument accurately applied the law to the facts at hand, then the July 31 impasse declaration did not create a 30-day filing window that closed after August 30, but rather a window 30 to 45 days after July 31 (August 30 through September 14).

OE3’s argument would be correct in a case where an employer and a union agree to use a pre-impasse mediator to fulfill a post-impasse mediation process required pursuant to local rules or negotiation ground rules. In such a case, the mediator selected pre-impasse takes on a legally significant new role after impasse, which amounts to a constructive reappointment or reselection. In the present case, however, mediation was always purely voluntary under the City’s local rules; either pre-impasse or post-impasse, mediation between the City and OE3 can occur only if

both parties agree. It is therefore difficult, in the absence of any actual reappointment or reselection, to find that reappointment or reselection occurred as a matter of law merely because the mediator SMCS appointed on a pre-impasse basis did not end up meeting with the parties until after impasse. Finding July 31 to have been a constructive reappointment date would inject uncertainty into the rules, leading to confusion as to what circumstances might be sufficient to qualify as constructive reappointment.

City local rule 2.74.180(B) did require a post-impasse meeting, and the parties did agree to hold that meeting on a previously scheduled mediation date. But requiring an impasse meeting is different from requiring post-impasse mediation. Indeed, this conclusion is inescapable given that City local rule 2.74.180(C) provides that "[i]f agreement is not concluded at the impasse meeting, the parties together may mutually agree upon a method of resolving the dispute including, but not limited to, mediation. . ."

For the foregoing reasons, there is not a sufficient basis for finding that July 31 qualified as a constructive reappointment date. We reject this interpretation and instead adopt a more straightforward interpretation: the City's July 31 impasse declaration created a 30-day filing window lasting through August 30. Because OE3 did not file its factfinding request within that window, OE3 waived its right to do so.

ORDER

The administrative determination in Case No. SA-IM-246-M is REVERSED. The factfinding request in this case is DISMISSED.

Chair Banks and Member Nazarian joined in this Decision.