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BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD
STATE OF CALIFORNIA

CITY OF LOMPOC, Employer, and LOMPOC POLICE OFFICERS' ASSOCIATION, Exclusive Representative.	Unfair Practice Case Nos.: LA-CO-100-M, LA-CE-555-M, LA-CE-564-M, LA-CE-585-M **LOMPOC POLICE OFFICERS' ASSOCIATION'S RESPONSE TO THE CITY OF LOMPOC'S STATEMENT OF CROSS-EXCEPTIONS AND BRIEF IN SUPPORT THEREOF** Proposed Decision: May 9, 2012

The LOMPOC POLICE OFFICERS' ASSOCIATION ("Association" or "LPOA") hereby submits its Response to the Statement of Cross-Exceptions filed by the CITY OF LOMPOC ("City"), pursuant to PERB Regulations sections 32310 and 32140. Subject to the Board's discretion, the Association also hereby submits its Reply to the City's Response to the Association's Statement of Exceptions. (*See,* Beverly Hills Unified School District (2008) PERB Decision No. 1969.)

I. INTRODUCTION

In its Statement of Cross-Exceptions, the City of Lompoc asks this Board to over-turn an ALJ's findings and allow the implementation of a unilaterally-imposed wage rate change not discussed, nor even mentioned, by either party throughout the course of a year-long MOU negotiation.

The City's imposition of the un-negotiated 10.769% wage reduction is a text-book example of an unlawful unilateral change prohibited by the MMBA. No matter anybody's interpretations of Government Code § 3505 or PERB Regulation 32603(c), those laws certainly do not stand for the proposition that an employer may blindside an employee organization by implementing a wage reduction never seen nor contemplated by anybody at the bargaining table. This is exactly what occurred here. The amount of the wage reduction was never discussed. The timing of the wage reduction was never negotiated. The representatives of the employee association were not aware of the methodology which produced that 10.769% number until it was explained by the City at the hearing before the ALJ. Indeed, that 10.769% rate was not even calculated by the City until *after* it had offered its initial Last, Best, and Final offer at mediation.

Quite simply, the City punished its employees for exercising their rights to bargain the terms and conditions of their employment. The City offered and negotiated an initial wage reduction, and when the employees did not accept that along with other demands in an acceptable amount of time, the City effectively doubled it by applying it retroactively, then implemented immediately. To allow such tactics by government employers would render meaningless the statutory right to bargain provided under the MMBA.

II. STATEMENT OF FACTS

A. Procedural Statement

This matter is before the Board because the Lompoc Police Officers' Association ("LPOA") filed a Statement of Exceptions to the ALJ's finding that PERB does not have jurisdiction to award "make whole" relief to peace officer members of the LPOA to remedy a unit-wide MMBA violation. Thereafter, the City of Lompoc ("City") filed its response to the LPOA's Statement of Exceptions, including with that Response a Statement of Cross-Exceptions. This Memorandum on behalf of the LPOA is a Response to the City's Statement of Cross-Exceptions.

The City asserts eight Cross Exceptions, seven of which contest the ALJ's finding that the City unlawfully imposed a unilateral change. The other Cross Exception asserts that the ALJ's proposed remedy for that violation is "ambiguous."

B. The Bargaining Process

The LPOA represents both the sworn and non-sworn rank and file employees of the Lompoc Police Department, and during all relevant times mentioned in the circumstances below, their level of pay and benefits was among the lowest in Santa Barbara County. (Vol. II, 22:7-9.) Just prior to the latest unilateral implementation at issue in this dispute, the City had imposed terms and conditions on the LPOA the year before. (Vol. I, 13:19-14:7.)

On October 18, 2008, the LPOA, through its labor representative, Ken George ("George"), contacted the City's labor representative, Bill Yanonis ("Yanonis") to meet and confer pursuant to Government Code Section 3505 over a memorandum of understanding ("MOU"). The parties first met on December 30, 2008. Yanonis was present for the City, as was the City's H.R. Director, Beth Flamm-Overby ("Flamm-Overby"), the City's Finance Director, Rene Vise ("Vise"), and a representative from the police department, Don Deming ("Deming"). (Vol. I, 17:18-25, 20:1-12.) For the LPOA, then-President Augustine Arias ("Arias"), as well as incoming President Bryan Dillard ("Dillard"), Rachel Delkener ("Delkener"), and George were present. (Vol. I, 20:15-17.)

At this first meeting, the LPOA provided the City with a comprehensive written proposal. (Vol. II, 11:17-25; Ex. C.) Yanonis simply glanced at the proposal and did not discuss it. (Vol. II, 43:14-23.) Although the LPOA was in position to address any questions or concerns the City had, Yanonis indicated that the City wasn't in a position to respond yet.. (Vol. II, 13:2-7.) Yanonis testified that at the time of this initial meeting, the City's financial condition wasn't clear and the City had to wait for the state to get information about their budget. (Vol. I, 21:15-21.) The Association was expecting to receive a counter proposal from the City, but that did not occur. (Vol. II, 44:7-13.)

Although the meeting was relatively short, the City did provide the LPOA with a partial proposal on one item, health insurance benefits. (Vol. II, 13:1, 14-23.) The proposal

contemplated no changes to the current MOU with respect to health and welfare benefits. Yanonis indicated that the City wanted to get this proposal on health insurance out of the way because the benefits had to go into effect in January. In response to the status quo offer, the LPOA accepted it and agreed to the City's proposal. (Vol. II, 14:1-14; Vol. III, 12:15-25.)

The parties then agreed to meet next on January 15, 2009. (Vol. II, 15:6-9.) The meeting on January 15, 2009 was short because the City again indicated that it wasn't in a position to negotiate at this time because the state's budget wasn't finalized yet. (Vol. II, 15:12-15.) The City was not in position to bargain due to the alleged uncertainty with the City's financial condition. (Vol. I, 25:17-22.) No discussions occurred regarding the LPOA's December 30, 2009 proposal, despite the LPOA's desire to do so. (Vol. I, 123:14-17; Vol. III, 15:28-16:5.)

The parties then agreed to meet next on February 5, 2009. (Vol. II, 16:23-25.) The February 5, 2009 meeting was again very short, lasting roughly 10-15 minutes. George became upset because Yanonis simply indicated that he again nothing to offer because nothing had changed and the City had nothing to discuss. Yanonis again indicated that the City was not in a position to negotiate. (Vol. II, 16:26-17:12, 46:8-17; Vol. III, 16:13-17:3.)

Due to Yanonis' vacation the entire month of March, the parties could not meet again until April 16, 2009. (Vol. II, 17:27-18:1; Vol. I, 27:23-27.) Despite six months having passed since the LPOA first requested to bargain, the prior terms and conditions having been expired at that point for over four months, and this being the fourth bargaining session, the City finally provided their very first comprehensive bargaining proposal. (Vol. I, 31:3-8.)

Incredibly, the second item on the City's comprehensive proposal included taking away the status quo proposal the City had made back on December 30, 2008. Although the City's initial status quo proposal stated that Article 6, health and welfare benefits, would remain the same with no changes, the City's April 16, 2009 proposal now indicated the City desired to freeze the City's current contributions levels. This meant that all future increases would be paid by the employee. In addition, the new proposal indicated that the City now wanted to eliminate the cost sharing formula and reduce the dental contribution to 50%. (Vol. II, 19:3-14)

In addition, the City did not respond to the LPOA's initial proposal. According to George it was if the proposal was "just disregarded." (Vol. II, 19:15-27.) Yanonis confirmed no discussion of the LPOA's proposal took place at this meeting. (Vol. I, 135:27-136:1.) The LPOA was upset with the City's decision to renege on its prior agreement regarding Article 6, but nonetheless, the LPOA agreed to at least discuss the remaining components of the City's proposal. (Vol. II, 20:4-12.)

On April 29, 2009, Yanonis and George exchanged emails in which George indicated to Yanonis that the parties still had not ever discussed the LPOA's initial proposal. George further indicated that Association membership had voted to reject the prior offer made by the City.

The next bargaining session occurred on May 1, 2009. (Vol. I, 42:7-9.) At that session, George submitted the LPOA's second proposal. (Vol. I, 42:9-18) The proposal was essentially the same as the LPOA's initial proposal, except it included a concession in the form of accepting the City's status quo health and welfare proposal offered by the City on December 30, 2009. (Ex. J; Vol. III, 20:17-28.) George submitted this offer after speaking with the City's Chief of Police, who recommended that they re-submit their offer since it had never been discussed. The City's Chief of Police also stated that "You know Bill [Yanonis] likes a fight." (Vol. II, 69:19-21.)

Only minutes into the meeting, and after receiving this proposal, the City personnel left the meeting and returned with a letter declaring impasse. (Vol. I, 42:19-22.) At that point, the City had spent <u>no</u> time discussing the substantive portions of the LPOA's proposals up to that point. (Vol. II, 20:25-21:9; Vol. III, 22:1-12, 79:13-20.) The impasse letter submitted by the City is the very first instance in which the City outlined its response, one way or another, on each of the proposals made by the LPOA.

After a caucus, the LPOA came back with a pared-down offer. (Vol. I, 46:4-10; Vol. II, 21:25-22:3.) The LPOA's offer responded point by point to the offer made by the City on April 16, 2009. Thereafter, the parties met on May 14, 2009 and the City provided proposed MOU language, which they previously indicated would be in accordance with its May 1, 2009 proposal. (Vol. I, 53:14-17.)

The City's proposed MOU language was nothing like its prior May 1, 2009 proposal, and again, evidenced a clear attempt to renege on its prior proposal. The City's new proposal now unilaterally switched the manner in which the City was going to obtain its 5% savings. Up to that point, every proposal from the City contemplated eliminating holidays and implementing one furlough day, but now for the first time, stated that every employee would be assigned "thirteen (13) unpaid vacation days and/or unpaid holidays." (Vol. I, 155:6-11, 155:16-19; Vol. III, 23:7-21, 27:5-13.) The City had never mentioned working unpaid vacation in the past. (Vol. II, 28:11-14.) Worse, the City's proposal, for the very first time, contemplated a two year contract with essentially a loss in pay in both years. A two year contract with a salary reduction in each year had never previously been discussed. (Vol. II, 26:20-23; Vol. I, 151:27-152:9, 152:19-153:19.)

The LPOA had concerns about the legitimacy and legality of the City's decision to now force the employee to work an unpaid vacation day. H.R. Director Flamm-Overby even admitted that they later discovered it was illegal to offer unpaid vacation days. (Vol. II, 137:3-19.)

At this point, the negotiation session ended and the LPOA's negotiation team determined that it needed to retain legal counsel to determine how to handle and respond to the City's tactics. George provided Yanonis with the name of the law firm the LPOA had retained and the contact person, attorney Michael McGill ("McGill").

Despite the fact that Yanonis sent McGill two letters on June 16, 2009 and June 23, 2009, that McGill responded on June 24, 2009, and Yanonis provided over 800 pages of documents on July 8, 2009 pursuant to McGill's request for such documents, the City filed an unfair labor charge on August 6, 2009. Yanonis filed this charge despite the fact that he made no further attempts to contact McGill or the LPOA; the City hadn't demanded an immediate meeting, or even offered a date for a meeting that McGill or the LPOA refused to attend. In reality, the LPOA was not avoiding meeting with the City. It was simply not made clear that the City was insisting that a bargaining date be set immediately. During this time the LPOA was reviewing the 800-plus pages of documents submitted by the City. (Vol. III, 34:20-22, 35:6-25.) It was

imperative that the LPOA verify all of the financial documentation and the City's financial condition since the City had never previously demanded that the LPOA to give back 104 hours of unpaid leave. (Vol. III, 35:25-36:7.) The City was asking for a major concession that it had never before sought. (Vol. III, 35:25-36:7.)

Immediately after the unfair was filed, McGill contacted Yanonis and scheduled a date to meet. (Vol. I, 70:16-23.) Yanonis testified that McGill stated he was surprised they had filed the unfair, because at no time had Yanonis called him or emailed him to schedule a negotiation date. (Vol. I, 173:2-18.)

The parties then held another bargaining session on August 27, 2009. (Vol. I, 71:14-16.) McGill insisted that the City respond to the LPOA's prior proposals that had never been discussed. (Vol. I, 71:17-72.) Despite the fact that the LPOA had not yet responded, but was preparing to respond to the City's May 15, 2009 proposal, the City then provided the LPOA with an entirely new bargaining proposal. (Vol. I, 74:15-21.)

Despite the fact that it was the LPOA's turn to respond to the City's May 14, 2009 proposal, the City's new proposal now requested 13 unpaid vacation days and now made no mention of unpaid holidays. It also now sought, alternatively, a straight 5% wage offset. (Vol. I, 175:23-176:12.) Additionally, the date as to when the wage deductions started were unilaterally changed in the new proposal from the May 14, 2009 proposal. (Vol. I, 176:13-25.) Furthermore, the proposal now contained a requirement that the employee must use all 104 unpaid vacation hours prior to taking paid vacation. (Vol. I, 176:26-177:9.)

The parties then met the very next day, August 28, 2009, and the LPOA provided its comprehensive proposal. (Vol. I, 81:10-16.) Although Yanonis testified on direct that he was concerned that this new proposal had four or five new items, this was the first time the LPOA had indicated that it would be agreeable, in general, to accepting furloughs. (Vol. I, 82:2-3; 179:6-9.) He viewed this major concession as a step forward. (Vol. 179:16-17.) Rene Vise indicated that the LPOA's proposal represented a significant change and thus forward movement on negotiations. (Vol. II, 105:10-15.)

McGill and Yanonis then exchanged emails between September 3, 2009 and September 8, 2009 discussing the proposal. Notably, in the email exchange, McGill asks Yanonis about how furloughs in the amount of 104 hours would be implemented if it is now September 2009 and the contract would potentially expire in December 2010. Yanonis specifically stated that the Teamster's MOU allows the members to use the furlough hours through July 2011, despite the expiration of the contract in December 2010. Thus, it was made abundantly clear that the salary reduction could be spread out over a long period of time.

The parties then met again on September 10, 2009, although no one seems to recall what occurred at this meeting. (Vol. I, 89:22-23, 91:5-14, 182:23-28.)

The parties then met next on September 29, 2009. However, the LPOA had just previously voted to reject the City's prior proposal and indicated that to the City at the meeting. As a result, the City issued its last, best and final offer. (Vol. I, 92:21-28; Vol. III, 38:14-39:1.) The City's last, best and final offer was exactly the same as an email proposal of September 3, 2009. (Vol. I, 185:2-5.)

However, at the conclusion of the September 29, 2009 meeting Yanonis threatened the Association stating that the longer this negotiation process takes, "the more damaging this is going to be" to the Association members. (Vol. III, 39:16-40:26.) Yanonis admits that he threatened the LPOA, as he has done to other unions, stating "the longer this went on, the window of opportunity to get these savings is shrinking." (Vol. I, 186:15-23.)

Notwithstanding the threats, the LPOA members eventually met and voted to reject the City's last, best and final offer. (Vol. III, 42:3-8.) The process of obtaining a membership vote took about a week to notify the membership and then another week to gather the ballots. (Vol. III, 71:3-28.)

The parties were then scheduled to meet again on October 30, 2009. Bryan Dillard, LPOA President, attended the October 30, 2009 and advised Yanonis both verbally and by handing him a written letter that the LPOA had voted to reject the City's last, best and final offer. (Vol. I, 94:16-94, 188:22-27; Vol. III, 42:12-26.) Dillard indicated that he was there to receive from the City the impasse procedure and any other documents they needed to provide. (Vol. III,

42:12-26.) At the meeting, Yanonis talked about the impasse procedure and asked that the LPOA waive the "impasse meeting," required by the City's rules; however, the LPOA refused to do so. (Vol. III, 43:12-19.) At the meeting, Yanonis handed Dillard a letter stating that it had declared impasse, was initiating the impasse procedure, and attached a copy of the City's last, best and final offer indicating "the City's position on all disputed issue." Again, the last, best and final offer was the exact same last, best and final offer that had been given to the Association on September 3, 2009 and September 29, 2009.

The parties later agreed to forego the impasse meeting, and formal mediation was set according to the City's impasse procedure. The parties attended formal mediation on December 18, 2009. (Vol. I, 101:26-27.) However, the parties did not reach agreement. (Vol. I, 103:24-25.) At the conclusion of the meeting, after it was apparent that no agreement had been reached, the City then submitted to the LPOA for the first time a document entitled *Revised* Last, Best and Final Offer. (Vol. I, 193:15-17; Vol. III, 45:8-11.)

Among the differences between the City's last, best and final offer ("LBFO") and their newly issued *revised* last, best and final offer ("RLBFO") were as follows:

1. The LBFO covered a 2.5 year period, from 12/19/08 – 6/17/11; whereas the RLBFO now covered 6/20/09 – 6/20/10.
2. The RLBFO now proposed a 10.769% salary reduction for 12 consecutive pay periods, rather than the choice of a 5% salary reduction or 104 furlough hours.

However, neither of these components in the RLBFO had ever been discussed at the bargaining table. Specifically, the 10.769% had never been provided or discussed with the LPOA. (Vol. III, 45:24-27.) Based on all of the discussions that occurred at the table, the LPOA had no reason to expect that in January 2010, the City would begin deducting 10.769% from their salary. (Vol. III, 47:26-48:2.) In fact, before it was explained by Vise at the PERB hearing, Dillard had no idea how the City even calculated the 10.769%. (Vol. III, 41:3-6.)

On January 5, 2010, the City Council for the City of Lompoc voted to implement the RLBFO, and since that time, those terms were actually imposed on the LPOA and its members. (Vol. I, 193:18-24.) As a result of the nearly 11% unexpected salary reduction, LPOA members

were devastated, some nearly losing their home as single income families. (Vol. III, 49:5-15.) Moreover, subsequent to this implementation, the LPOA renegotiated a new MOU. However, the LPOA was quick to accept a new lesser deal and did not fully negotiate to the extent they could have because they were fearful that, based on these negotiations and the manner in which the City imposed on them, they would run the risk of having another substantial monetary hit.

The LPOA leadership had learned the lesson sought imposed by Yanonis, and was fearful that if it took time to negotiate an MOU, the time spent negotiating would be held against them and the City would impose the terms and conditions retroactively again, thus creating another substantial monetary hit. (Vol. III, 49:16-51:2.)

C. Additional Facts Regarding the Unlawful Unilateral Change

At the hearing before the ALJ, three witnesses testified for the City; Yanonis, Flamm-Overby, and Vise. At no time did the City ever specifically indicate that it would have to obtain its 5% salary reduction by the end of the fiscal year. Yanonis indicated at the bargaining table only that the City needed a 5% reduction in pay. (Vol. I, 33:2-5.) Yanonis conceded at hearing that he only stated the window is shrinking, and he never said that the entire 5% had to come out <u>by the end of that fiscal year</u>. (Vol. 186:28-187:4, 187:15-17.) Yanonis simply said "the shorter the time period, the bigger the impact is going to be" but didn't indicate what the time period would be. (Vol. I, 88:14-15.)

Flamm-Overby also stated that no one ever mentioned the 10.769% salary reduction at the bargaining table. (Vol. II, 151:16-19.) Vise also stated that Yanonis never said that the 5% would become 10% if the Association waited longer. (Vol. II, 97:19-28.) And he also never said anything more specific other than the longer you wait, the higher it's going to get. (Vol. II, 98:9-19.)

In fact, Vise, the finance director, didn't even perform the calculation as to what the Association would receive in salary reductions until December 18, 2009—after the City had already submitted their last, best and final offer. (Vol. II, 113:5-23.) Vise concedes that the process by which the City arrived at the 10.769% was never explained to the LPOA, and the

LPOA never learned how the City arrived at that number until the actual PERB hearing! (Vol. II, 114:15-24.)

The LPOA's witnesses testified similarly. George testified that the City never indicated that it intended to recoup the savings it was looking for in the remaining one year of the potential contract. (Vol. II, 30:13-17.) "I know there were discussions regarding that five percent, but a timeframe was never discussed." (Vol. II, 59:14-16.)

Dillard testified that Yanonis indicated the longer the negotiations takes, the narrower the window became for the City to recover its cost savings. However, Yanonis did not specify how it would be more damaging, other than to say it would be more costly. He left it so "your mind [can] run riot over what's going to happen next." He did not give a specified time limit and never mentioned a percentage increase over time. (Vol. III, 40:5-26.) In fact, prior to the PERB hearing, Dillard had no idea how the City even calculated the 10.769%. (Vol. III, 41:3-6.)

Dillard indicated Yanonis never gave a timeframe as to when those savings would be recovered. (Vol. III, 68:5-6.) Dillard never expected them to take the savings out by the end of that fiscal year; the parties had been discussing between a two and four year contract, and Dillard didn't expect the City to be so vindictive as to take it out in six months. (Vol. III, 68:25-69:13.)

Finally, Arias testified that the City never indicated that it intended on recouping the savings it was looking for in the remaining fiscal year and that the City never mentioned the 10.769% savings. (Vol. III, 95:95:25.)

III. ARGUMENT

The City's unilateral implementation of the 10.769% wage reduction included within its *Revised* LBFO was unlawful because it was neither reasonably comprehended by any prior proposal, nor was the LPOA given any meaningful opportunity to bargain the reduction. Moreover, the remedy proposed by the ALJ unambiguously requires the City to return all LPOA members back to the status quo, in other words, the situation they would have been in but for the City's unlawful actions.

A. The City's Unilateral 10.769% Salary Reduction Was Not Reasonably Comprehended by Any Prior Proposal.

Seven of the City's cross-exceptions rely, essentially, upon two bases: the unilateral implementation of a 10.769% pay reduction was "reasonably comprehended" within the bargaining of prior proposals, and the LPOA received notice of the imposed reduction, yet failed, on their part, to engage in bargaining on that term. These bases have no support in either the record or PERB precedential decisions. Every person who testified before the ALJ, whether witnesses testifying on behalf of the LPOA or the City, stated that the City never revealed that the 5% savings must be implemented by the end of the fiscal year, and that the final 10.769% figure was never discussed in negotiations. Furthermore, the City's cited decisions provide no support for their positions. Lastly, this Board has expressly rejected the exact tactics, reasoning, and arguments employed and argued by the City here. Because of this, the ALJ's finding that the City engaged in an unlawful unilateral change must be upheld.

1. Every witness before the ALJ testified that neither the timing, amount, nor methodology was discussed by the parties prior to implementation.

The evidence produced at hearing before the ALJ demonstrates the parties never negotiated the timing of the wage reduction ultimately unilaterally implemented by the City. Testimony by the City's own witnesses acknowledges as such. The City's lead negotiator, Bill Yanonis, testified at hearing that he never revealed to the LPOA during negotiations that the entire 5% reduction sought had to come out by the end of the fiscal year. (Vol. I, 186:28-187:4, 187:15-17.) He never said anything more specific than the general admonitions repeated by the City in their Statement of Cross-Exceptions; various statements to the effect of "the shorter the time period, the bigger the impact is going to be." (Vol. I, 88:14-15.) The City's Finance Director, Rene Vise, confirmed this by admitting Yanonis never said the 5% reduction discussed would become the eventual 10.769% if the LPOA waited longer. (Vol. II, 97:19-28.)

The LPOA negotiation team testified to the same. The LPOA's initial representative, Ken George, correctly recalls that discussions on point only included the City's sought 5% wage

reduction, but did not include any discussion of a proposed timeframe. (Vol. II, 59:14-16.) LPOA President Bryan Dillard stated that Yanonis never elaborated upon his threat, and never gave a specified time limit nor percentage increases as time passed. (Vol. III., 40:5-26.)

More directly, even when specifically asked about an intended time frame for the proposed wage reductions, Yanonis indicated implementation well beyond the then-current fiscal year. In an email exchange between Yanonis and LPOA representatives on the subject, he simply responded that the reductions could be taken into the next fiscal year, similar to a prior negotiation he had been involved in. Quite simply, the City's arguments that the timing of the reduction was "reasonably comprehended" by the negotiations is without merit.

In addition to the timing, the actual amount of wage reduction, 10.769%, or even the methodology in how that amount was decided upon, was never contemplated nor discussed by the parties. Vise conceded that the methodology by which the City arrived at the 10.769% was never explained to the LPOA during negotiations. (Vol. II, 114:15-24.) The City's H.R. Director, Beth Flamm-Overby, stated that the 10.769% amount was never mentioned. (Vol. II, 151:16-19.) Again, Dillard stated that a percentage increase over time was never offered or discussed, and prior to the City's testimony at hearing, he had no idea how the City calculated the implemented 10.769% number. (Vol. III, 40:5-26 and 41:3-6.) Then-LPOA President Augustine Arias testified that the City never indicated its intention on retroactively recouping its stated savings goals within that fiscal year, and never mentioned the 10.769% amount. (Vol. III, 95:95:25.)

Neither the time-frame, methodology, nor final percentage was ever discussed, at all, between the parties during negations.

2. The City's cited PERB Decisions provide no support for their position.

The City cites *Charter Oak Unified School District,* (1991) PERB Decision No. 873, for the rule stating that a party has notice of an implemented change where, "all of the provisions for which changes were implemented had been subject to negotiation by the parties..." (City of Lompoc's Brief in Support of Cross-Exceptions, p. 24.) Yet, the City does not provide evidence

showing that the 10.769% number, the methodology of arriving at that amount, nor the retroactive nature of that figure was ever discussed.

The City also quotes *Charter Oak* for the argument that this Board should not "dissect the package to separately compare each provision of the package to prior proposals...," and therefore should find that the never-mentioned 10.769% reduction was not a "significant departure." (City's Brief in Support of Cross-Exceptions, p. 25.) Is the City suggesting that, because the Revised LBFO was apparently a "package proposal," that the wage reduction in dispute is immaterial? Do the wage provisions within proposals presented as a "package" avoid the strictures of MMBA section 3505 and PERB Regulation 32603(c)? If the City's arguments prevail here, the rules against unlawful unilateral implementations would be read out of the statutes.

3. This Board has already concluded that the exact tactics, reasoning, and arguments put forth by the City here are unacceptable.

In *Laguna Salada Education Association,* (1995) PERB Decision No. 1103, the very same arguments advanced by the City here were rejected by the Board. In that case, the school district unilaterally implemented a 17.6% wage reduction, calculated from a 1.76% reduction as outlined in its final pre-impasse proposal to the Association. (*Laguna Salada,* p. 7, 11.) The district argued that the 17.6% reduction was "reasonably inferred" from its final proposal, because the implementation made in June of 1993 was consistent with the stipulation between it and the Association stating that the salary reduction was to become effective July 1, 1992. (*Id.* 7-8.) Specifically, the district asserted that:

> "...since unilateral implementation did not occur until the final month of the year, June 1993, it was reasonably comprehended within the proposal that the methodology to be used in implementing the salary reduction would be to reduce June paychecks by the entire annual amount, 17.6 percent." (*Id.* 14.)

Thus, because the parties' written stipulation provided that the reduction referred to the previous fiscal year (effective 1992), the District asserted that the retroactive reduction was reasonably comprehended. (*Id.* 8.)

The Board determined that even though the amount of the reduction had been expressly agreed to between the parties, and that the agreement *actually included the date to which the district referred in calculating the retroactive reduction*, the unilateral implementation of the 17.6% wage reduction was not "reasonably comprehended" by the prior negotiations or proposals. (*Id.* 14-15.)[1] The "mere statement...of the July 1, 1992, effective date of the salary reduction does not reasonably comprehend that the entire annual amount must be deducted...before the end of the 1992-93 year." (*Id.* 15.) This was because, "the proposal described in the joint stipulation simply does not indicate that with each passing month larger amounts would be deducted from paychecks remaining in 1992-93 to achieve the total annual reduction no later than June 1993.) (*Id.*)

This is exactly what occurred here. As indicated above in section III A 1., there was no discussion of the date, retroactive character, methodology, or even percentage implemented by the City. Thus, vaguely referring to "the shrinking time frame for the City to obtain the needed savings," is not sufficient. This is the case even had the City's actions here not gone beyond the district in *Laguna Salada*, being that here there was no wage reduction stipulated to between the City and LPOA.

The Board's basic difficulty with the district's actions and argument in *Laguna Salada* also applies with equal force here. The problem with the City's actions, and what makes the implementation an "apparent" unlawful unilateral change, is that:

> "...it is unclear from the proposal what action the [City] would have taken had implementation occurred in any month prior or subsequent to...," the date of implementation. (*Id.*)

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[1] The foundation of the Board's Decision was premised on the notion that, "[t]he methodology used by an employer to adjust the wages of employees is a subject clearly related to wages," and "the methodology used to make adjustments in employee wages is a negotiable subject, just as is the level to which wages are to be adjusted." (*Id.* 13.)

As hinted by this Board in *Laguna Salada*, taking the City's arguments here to their logical conclusion leads to absurd results. Indeed, had the City chosen to unilaterally implement the Revised LBFO during the final month of fiscal year 2009, would the LPOA members' wages been cut by an amount necessary to recoup the $249,365, approximately 60%? It is quite a stretch to assert that such a percentage is "reasonably comprehended" by a negotiated 5% wage cut proposal.

As such, the City's methodology and implementation was both "not addressed, and clearly not reasonably comprehended," within the bargained proposals. (*Id.* 16.)

B. The City Did Not Afford Adequate Notice to the Association Prior to the Unilateral Change, Therefore Denying Any Meaningful Opportunity to Bargain.

The City asserts the Revised LBFO was subject to negotiation because it was presented to the LPOA while the parties were still participating in mediation. This claim stretches the bounds of both common sense and any reasonable reading of the facts.

The Revised LBFO was provided to the LPOA on December 18, 2009, at the conclusion of mediation on its prior proposed LBFO. (Vol. I, 193:15-17; Vol. III, 45:8-11, and Proposed Decision, p. 13.) This mediation was a culmination of over a year's worth of negotiating over, among other things, a 5% wage reduction. "That was the proposal that was negotiated to impasse and went through mediation." (Proposed Decision, p. 13, emphasis added.)

The City suddenly, and without warning or discussion, produced a *Revised* LBFO with a more than doubled wage reduction at the end of the mediation session. As indicated above, nobody had brought up, discussed, or even hinted that such a hike in the wage reduction percentage was on the bargaining table. It cannot be credibly contended that, because the Revised LBFO was dropped upon the LPOA at the moment the parties were leaving the building, the "proposal" was subject to bargaining.

The City's cited authority does not support their position either. In *County of Sonoma,* (2010) PERB Decision No. 2100-M, not only was much of the unilateral change carried over from the previously implemented agreement, but the County provided the employees with those

changes no less than three times before implementation, and some six months prior to the County's vote to unilaterally implement. (*County of Sonoma,* p. 13-15.) Moreover, all of the changes were "reasonably comprehendible," from the prior proposals, not surprising since the employees' representatives admitted that the proposals did not differ materially from the prior ones. (*Id.* 14.) Here, the City provided a clearly materially different change, that was not "reasonably comprehendible," in the final minutes of impasse procedures. These extreme factual differences between the two situations simply render the reasoning and result of *County of Sonoma* inapplicable.

Similarly, the district in *Metropolitan Water District of Southern California,* (2009) PERB Decision No. 2055-M, gave the employees its written notice of intent to adopt its proposed policy five months before implementation. (*Metropolitan Water,* p. 5.)

The City has cited no authority indicating that providing a materially different change, in the form of a *Revised* LBFO, as the parties were leaving a mediation that had not produced an agreement, is an acceptable offer of an opportunity to bargain. The LPOA has not found any such authority either.

C. The ALJ's Proposed Remedy Unambiguously Requires the City to Reimburse the Entirety of the Unlawfully and Unilaterally Imposed Wage Reduction.

The ALJ's proposed remedy is not ambiguous. The ALJ ordered "make whole" relief to remedy the City's unlawful unilateral change. "Make whole" relief for unlawful unilateral changes calls for a restoration of the "status quo", that is, what the employees would have earned but for the employer's unlawful acts. (*Lost Hills Union Elementary School District,* (2004) PERB Decision No. 1652.)

Here, the City chose to disregard the bargaining process and unlawfully implement a unilateral change. This requires them to restore the "status quo"; what LPOA members would have received but for the unlawful unilateral change. Had the City not made this choice, the LPOA members would not have been unlawfully deprived of the 10.769% reduction. As such, the City is obligated to restore this amount in full.

Indeed, this result makes sense. Otherwise, what would prevent an employer from *always* implementing unlawful unilateral changes, if the only remedy would be returning back to what the parties had expected in the first place? Why not at least try, "roll the dice," and see if the employees don't challenge? Such a remedy proposed by the City provides no incentive to comply with the MMBA and PERB regulations.

IV. CONCLUSION

For all the reasons stated above, the Association respectfully requests that the Board reject the City's Cross-Exceptions and uphold the proposed decision of the ALJ finding that the City unlawfully implemented a unilateral change in violation of Cal. Gov. Code § 3505 and PERB Regulation 32603(c).

Date: July 16, 2012

By: LACKIE, DAMMEIER, & McGILL APC

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Michael A. Morguess, Esq.
Attorneys for
LOMPOC POLICE OFFICERS' ASSOCIATION
Appellant

Proof of Service

I declare that I am a resident of or employed in the County of San Bernardino, California. I am over the age of 18 years and not a party to the within entitled cause. The name and Address to my residence or business is Lackie, Dammeier & McGill, APC, 367 North Second Avenue, Upland California 91786.

On July 16, 2012, I served the **LOMPOC POLICE OFFICERS' ASSOCIATION'S RESPONSE TO THE CITY OF LOMPOC'S STATEMENT OF CROSS-EXCEPTIONS AND BRIEF IN SUPPORT THEREOF** on the parties listed below by:

(X) placing a true copy thereof in a sealed envelope for collection and delivery by the United States Postal Services or private delivery service following ordinary business practices with postage or other costs prepaid.

( ) personal delivery

(X) facsimile transmission in accordance with the requirements of PERM Regulations 32090 and 32135(d).

Adriana Guzman
LIEBERT CASSIDY WHITMORE
6033 W. Century Blvd., Ste. 500
Los Angeles, CA 90045
Certified Mail: 7012 0470 0001 9772 1022

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 16, 2012, at Upland, California.

Patricia Gonzales