



## BACKGROUND

In or around 1989, the San Joaquin Local Health District (Health District) dissolved and the Health District's work and employees were absorbed by the County. The employees of the Health District were members of the California Public Employees Retirement System (CalPERS). When the Health District employees were absorbed by the County, they became members of the County's retirement system. The County's employees were not members of CalPERS, but belonged to a retirement plan created under the County Employees' Retirement Law of 1937. The issue here involves the transfer of funds from CalPERS to the County's retirement system for the Health District's former employees.

The issue of the transfer of these funds was apparently a topic of discussion during contract negotiations in 2001. In March 2001, the parties apparently reached agreement on a new collective bargaining agreement without resolving the issue of the retirement funds.

However, the parties signed a side-letter agreement stating, in part, that:

The parties agree to continue discussions on the PERS Benefit issues affecting former employees of the San Joaquin Local Health District as outlined in the attached letter of October 27, 2000. Discussions will include representatives from the Union, County, and PERS.

Following additional meetings, SEIU declared its belief that the parties were at impasse on May 29, 2003.

Because the charge is extremely vague, the exact nature of the dispute over which SEIU alleged impasse is unclear. Based on letters attached to the charge, it appears that the parties had been discussing two primary issues. First, SEIU had proposed enhancing the retirement benefits of former Health District employees who were currently employed by the County. Second, SEIU also proposed enhancing the retirement benefits of former Health District

employees who had already retired. From the letters, it appears that the County agreed to SEIU's proposal regarding current employees but rejected the proposal for retirees.

In any event, after declaring impasse SEIU requested mediation pursuant to the County's local rules. Section 12 of the County's local rules provides the following:

SECTION. 12. RESOLUTION OF IMPASSES

Impasse procedures may be invoked only after a deadlock in negotiations has been reached.

A. Limitations

- (1) Only San Joaquin County or a recognized employee organization shall have the right to invoke the impasse procedure as hereinafter described.
- (2) Mediation and fact-finding shall apply only to disputes arising out of and in the context of the annual salary and employee benefit meet and confer sessions and where mutually agreed to otherwise or as provided for in this Policy.

B. Impasse Initiation

Either the County or a recognized employee organization shall initiate the procedure by filing with the other party a written statement of impasse together with a statement of its position on the disputed issues. Such notice must be filed within fourteen (14) days after the last meet and confer session. Within five (5) days after receiving the written notice a joint meeting shall be scheduled and held. (Emphasis added.)

On June 11, 2002, the County informed SEIU of its position that the impasse procedures were not applicable, since the dispute over the retirement funds arose from a side-letter agreement after the completion of salary and benefit negotiations. Accordingly, the County refused to participate in the impasse procedures. The parties thereafter had several more meetings and had other exchanges of correspondence. On March 12, 2003, SEIU again

requested that the dispute be submitted to the impasse procedures under the County's local rules. On May 5, 2003, the County again declined the request. SEIU then filed this unfair practice charge on June 2, 2003, alleging that the County violated PERB Regulation 32603(e)<sup>2</sup> by refusing to participate in the impasse procedures provided by the County's local rules.

#### BOARD AGENT'S DISMISSAL

The Board agent first addressed the allegation that the County violated the MMBA by refusing to participate in impasse procedures provided by local rules. The Board agent concluded that Section 12 of the County's local rules is designed to limit impasse procedures to disputes "arising out of and in the context of the annual salary and employee benefit meet and confer sessions." Noting that the side-letter agreement stated that the parties would "continue discussions" and did not say that the parties would continue to "negotiate" or to "meet and confer," the Board agent concluded that the discussions contemplated by the side-letter did not qualify as a dispute under Section 12.

Even if the dispute was covered by Section 12, the Board agent held that SEIU's charge would have to be dismissed, because SEIU failed to request mediation within the required fourteen (14) days.

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<sup>2</sup>PERB Regulation 32603(e) states, in part:

It shall be an unfair practice for a public agency to do any of the following:

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2 or required by any local rule adopted pursuant to Government Code section 3507.

## SEIU'S APPEAL

In its appeal, SEIU challenges the Board agent's determination that the dispute over the retirement funds did not constitute a "dispute arising out of and in the context of the annual salary and employee benefit meet and confer sessions." SEIU asserts that there is no difference between "discussions" and "negotiations." SEIU also argues that simply because the discussions over the retirement funds were continued apart from the main table negotiations does not mean they did not "arise" out of salary negotiations.

As for the timeliness of its request, SEIU argues that its first request, made on May 29, 2002, was timely and that nothing thereafter broke the impasse. According to SEIU, when it requested to submit the dispute to impasse on March 12, 2003, it was just repeating its request made on May 29, 2002. Thus, SEIU argues that its request was timely.

## DISCUSSION

### Interpretation of County's Local Rules

The issue presented here is whether the County violated its own local rules in violation of PERB Regulation 32603(e). Under Section 12 of the County's local rules, either party may invoke impasse procedures involving a "dispute arising out of and in the context of the annual salary and employee benefit meet and confer sessions." SEIU argues that the dispute over the retirement funds meets this standard. The County counters that the dispute over the retirement funds is wholly separate from salary negotiations and thus not subject to the impasse procedures.

It is well-settled that a Board agent must accept the plain language of the contract or rule where it is clear and unambiguous. (Glendora Unified School District (1991) PERB Decision No. 876; Butte Community College District (1985) PERB Decision No. 555.)

However, where the contract language or rule is unclear or ambiguous, the Board has held that the parties should be given an opportunity to offer evidence to support their differing interpretations at an evidentiary hearing. (Long Beach Community College District (2000) PERB Decision No. 1378.) Here, SEIU argues that the side-letter agreement regarding the retirement funds “arises out of and in the context of” of annual salary and benefit negotiations within the meaning of the County’s local rules. In support, SEIU asserts that the issue of the retirement funds was first discussed during contract negotiations over employee salary and benefits.

As the charging party, SEIU’s factual allegations must be accepted as true at this stage of the proceedings. (Golden Plains Unified School District (2002) PERB Decision No. 1489; San Juan Unified School District (1977) EERB<sup>3</sup> Decision No. 12.) In light of SEIU’s factual allegations, the Board cannot find Section 12 of the County’s local rules to be clear and unambiguous. To the contrary, Section 12 appears to be reasonably susceptible to the interpretation offered by SEIU. As discussed above, where a local rule is reasonably susceptible to conflicting interpretations, the matter should be resolved at an evidentiary hearing. Accordingly, the Board finds that the dispute over the retirement funds “arises out of and in the context of the annual salary and employee benefit meet and confer sessions” for purposes of establishing SEIU’s prima facie case.

#### Timeliness

The Board also disagrees with the Board agent’s determination that SEIU’s March 12, 2003, request to submit the dispute to the impasse procedures of Section 12 was untimely.

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<sup>3</sup> Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

There is no evidence that the timelines under Section 12 are jurisdictional. Since the County did not assert untimeliness as a defense in its May 5, 2003, response there is a question of whether the County waived this defense. Indeed, the County itself is guilty of violating the timelines, since it took more than five (5) days to respond to both of SEIU's requests. From the facts, it appears that neither party has a history of strictly adhering to the timelines. In any event, SEIU's contention that timeliness must be measured from its first request is reasonable in light of its factual allegations and is sufficient to establish its prima facie case.

#### Scope of Representation

Based on the above discussion, the Board would normally order the issuance of a complaint. However, the Board is not satisfied that SEIU has established that the dispute over the retirement funds is a subject within the scope of representation. It is well-settled that a party may not insist to impasse on non-mandatory subjects of bargaining. (Poway Unified School District (1988) PERB Decision No. 680; Lake Elsinore School District (1986) PERB Decision No. 603.) The specific issue in dispute between the parties appears to involve enhanced retirement benefits for current employees and retirees. PERB has held that retirement benefits for current employees is a mandatory subject of bargaining. (Temple City Unified School District (1989) PERB Decision No. 782 (Temple); Jefferson School District (1980) PERB Decision No. 133.) In contrast, retirement benefits for retirees – those who are no longer employed by the employer – is only a permissive subject of bargaining. (Temple, citing Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co. (1971) 404 U.S. 157 [78 LRRM 2974].) As noted above, it appears that the only issue in dispute between the parties is SEIU's proposal to enhance retirement benefits for retirees. If this is true, then

SEIU's charge must be dismissed, since SEIU may not insist to impasse on a permissive subject of bargaining.

It is SEIU's burden to establish that the alleged impasse involves a subject within the scope of representation. SEIU's vague charge fails to meet this burden. SEIU should be provided an opportunity to correct this defect since it was not provided an opportunity to do so in the Board agent's warning letter. Accordingly, the Board remands this case to the General Counsel's office for further processing consistent with this decision.

ORDER

The Board REVERSES the Board agent's dismissal in Case No. SA-CE-148-M and REMANDS this case to the Office of the General Counsel for further processing.

Members Whitehead and Neima joined in this Decision.