



constituted a violation of MMBA sections 3505 and 3505.4, PERB Regulation 32603(c), (e) and (g)<sup>2</sup> and Local Rules section 17(a) and (b).

We have reviewed the entire record in this matter, including the original, first amended and second amended unfair practice charges, the Public Authority's response to the second amended charge and CUHW's reply to this response, the warning and dismissal letters, CUHW's appeal of the dismissal, and the Public Authority's response thereto. Based on this review, we reverse the Board agent's dismissal of the unfair practice charge for the reasons stated below.

### BACKGROUND

CUHW is the agent for the United Domestic Workers of America, the exclusive representative for In-Home Supportive Services (IHSS) providers in Kings County (County). The Public Authority is the employer of record for IHSS providers in the County. CUHW and the Public Authority are parties to a memorandum of understanding which provides that the parties agree to reopen negotiations no later than June 30, 2006, for the sole purpose of bargaining fiscal year 2006-2007 wages.<sup>3</sup> This case involves the conduct of the parties during those wage negotiations and the impasse procedures that followed.

#### Unfair Practice Charge

On October 23, CUHW filed an unfair practice charge which alleged that the Public Authority failed and refused to bargain with CUHW in violation of the MMBA by prematurely declaring impasse. CUHW supplemented the charge on October 30 alleging that the Public

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<sup>2</sup>PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

<sup>3</sup>Unless otherwise indicated, all date references made hereafter are to year 2006.

Authority violated the Local Rules by refusing to propose dates for an impasse meeting. A first amended charge was filed on November 6 which further alleged that on October 31 the Public Authority violated the MMBA by unilaterally imposing its own wage increase proposal.

CUHW did not allege any additional facts in its second amended charge in response to the Board agent's warning letter. In this unfair practice charge CUHW stated it was not alleging surface bargaining,<sup>4</sup> but rather that the Public Authority committed a "per se" violation of the duty to meet and confer when the Public Authority refused to schedule further negotiations and thereafter unilaterally implemented a wage increase without first scheduling an impasse meeting as required by the local impasse procedures.

#### Board Agent Dismissal

In his warning letter, the Board agent informed CUHW that its charge failed to state a prima facie case of bad faith or "surface" bargaining under the "totality of the conduct" test because the Public Authority's adamant position on the wage increase, without any evidence of delays or dilatory tactics, was merely hard bargaining as demonstrated by the undisputed facts. The Board agent also informed CUHW that it failed to allege sufficient facts to state a prima facie case that the Public Authority failed to schedule an impasse meeting pursuant to the Local Rules' impasse procedures because CUHW had rejected all four of the Public Authority's proposed dates for an impasse meeting and instead proposed to meet on a holiday over a month and a half after the declaration of impasse.

The Board agent dismissed the second amended charge determining it did not provide any further facts to show that the Public Authority failed to bargain in good faith or that it refused to schedule an impasse meeting. The Board agent again cited, as the basis for his

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<sup>4</sup>Based on this representation by CUHW, we do not analyze the charge as having alleged surface bargaining.

decision, the facts that the CUHW had rejected the four October dates offered by the Public Authority for an impasse meeting and instead proposed a holiday in late November.

The Board agent also found that CUHW had not stated a prima facie case that a per se unilateral change violation had occurred because CUHW failed to establish that the wage increase was implemented before notifying CUHW and affording it the opportunity to request negotiations.

#### CUHW's Appeal

In its appeal, CUHW argues that it has alleged facts sufficient to state a prima facie case of a per se violation of the duty to meet and confer in good faith by alleging the Public Authority's: (1) premature declaration of impasse; and (2) unilateral implementation of a wage increase without exhausting impasse procedures in good faith.

CUHW contends that the allegations that it did not believe the parties were at impasse and that it requested to continue negotiations are sufficient to state a prima facie case that the Public Authority failed to meet and confer in good faith by prematurely declaring impasse.

It is maintained by CUHW that alleging the Public Authority failed to comply with local impasse procedures is sufficient for a prima facie case because CUHW's second amended charge alleged no impasse meeting was scheduled and that CUHW was denied its right to pursue voluntary mediation as provided for in the Local Rules.

CUHW also excepts to the Board agent's dismissal on the basis that he exceeded his pre-hearing authority by making certain factual determinations. We do not address this exception given our de novo review of the second amended charge.

## Public Authorities Response to CUHW's Appeal

In response to CUHW's appeal, the Public Authority contends that it complied with the local impasse procedures and that CUHW waived its rights under them through its evasive and dilatory conduct.

The Public Authority also asserts that pursuant to PERB Regulation 32620(b)(5),<sup>5</sup> it is not sufficient for a charging party to merely state a prima facie case but that they must also show evidence of it. According to the Public Authority, CUHW failed to provide such evidence to establish that the Public Authority committed a prima facie violation of its duty to meet and confer with CUHW.

### DISCUSSION

The issues raised by CUHW's second amended charge are whether CUHW has alleged sufficient facts to establish a prima facie case that the Public Authority failed to bargain in good faith by: (1) prematurely declaring impasse on October 12, 2006; and (2) failing to participate in local impasse procedures in good faith because (a) no impasse meeting was scheduled prior to the Public Authority's unilateral imposition of a wage increase, and (b) CUHW was denied an opportunity to voluntarily mediate.

#### A. Undisputed Facts

We begin our analysis of these issues by determining the facts we may consider as the chronology of the negotiations between CUHW and the Public Authority. At the charge processing stage, the burden to provide specific allegations of fact, which demonstrate a prima

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<sup>5</sup>PERB Regulation 32620(b)(5) provides, in pertinent part, that the Board agent shall have the power to "Dismiss the charge or any part thereof as provided in Section 32630 if it is determined that the charge or the evidence is insufficient to establish a prima facie case; . . ."

facie case that an unfair practice has been committed, is on the charging party. (Sacramento Municipal Utility District (2006) PERB Decision No. 1838-M; PERB Reg. 32615.)<sup>6</sup>

The majority of the factual allegations in the chronology below were obtained from CUHW's charges and related documentation filed therewith. However, some of the facts result from information and documentation that was filed by the Public Authority, served on CUHW, and summarized in the Board agent's warning letter. These additional facts which expand the factual picture in this case were not contradicted by CUHW, therefore they may be considered by PERB in determining whether the charge should be dismissed. (Fontana Teachers Association, CTA/NEA (Alexander, et al.) (1984) PERB Decision No. 416 [failure of charging party to deny factual conclusions outlined in the warning letter is justification for dismissal of charge].)

Our factual chronology of the negotiations by CUHW and the Public Authority is as follows:

- Sometime prior to August 10, four<sup>7</sup> negotiation dates were scheduled for August 10, August 23, September 12 and October 12, 2006, respectively.

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<sup>6</sup>The Public Authority argues that CUHW also has the burden of producing evidence of a prima facie case at this stage based on PERB Regulation 32620(b)(5) and Eastside Union School District (1984) PERB Decision No. 466 (Eastside). We disagree. According to Eastside, the single question at the charging stage is whether the charge alleged facts which, if true, constitute evidence of a violation. (San Juan Unified School District (1982) PERB Decision No. 204.) In analyzing PERB Regulation 32640, the Board in Eastside stated that the regulations were designed to permit a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations.

<sup>7</sup>There is a factual dispute as to the number of negotiation sessions attended by the parties. The Public Authority contends that the parties also negotiated on July 25, 2006. When considering a motion to dismiss on the ground that a charge fails to allege a violation of the Act, we must assume that the essential facts alleged in the charge are true. (San Juan Unified School District (1977) EERB\* Decision No. 12.) Accordingly, we assume as true that the parties engaged in four days of negotiations. (\*Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.)

- On August 10, CUHW proposed to increase the \$7.50 hourly wage to \$10.50.
- On August 23, the Public Authority responded with a proposed increase in hourly wages to \$7.65.
- On September 12, CUHW proposed to increase hourly wages to \$9.50 effective immediately. The Public Authority responded by proposing to increase hourly wages to \$7.85. At that time, the Public Authority expressed its intent to present a final offer at the fourth and final negotiating session on October 12.
- On September 26, CUHW proposed to delay the implementation date of its \$9.50 hourly wage proposal to December.
- On October 10, CUHW sent the Public Authority a letter expressing CUHW's concern that the Public Authority was attempting to push the negotiations to impasse prematurely and stating that CUHW remained flexible, ready and willing to continue bargaining to negotiate an agreement.
- At the final negotiation session on October 12, CUHW lowered its hourly wage proposal to \$9.25. The Public Authority responded by presenting CUHW with a written declaration of impasse and its "last, best, and final offer" of \$8.00 per hour. In this session the Public Authority also submitted a written request pursuant to Local Rule section 17 that an impasse meeting be held on October 18, 19, 25 or 26. CUHW responded by requesting to schedule further negotiations in order to reply to the final offer. The Public Authority refused this request. CUHW's representatives did not take the impasse documentation provided by the Public Authority with them when they left the negotiations. Subsequently on the same day, the Public Authority again provided the impasse documents to CUHW by overnight mail.
- On October 24, the Public Authority notified CUHW by email that since CUHW had not accepted one of the dates offered for an impasse meeting or proposed an alternate date, the Public Authority would assume CUHW waived its right to an impasse meeting and would proceed to schedule the matter for determination at a meeting of the county board of supervisors on October 31. CUHW was given up to 5:00 p.m. on October 25, to respond to this email. By letter dated October 24, CUHW informed the Public Authority that CUHW did not consider the parties to be at impasse pursuant to the definition of "impasse" under the Local Rules. CUHW also expressed its dissatisfaction that the Public Authority would not schedule further negotiations to allow CUHW to respond to the final offer.
- On October 25, before the Public Authority's 24-hour deadline had expired, CUHW faxed a letter to the Public Authority which stated that although CUHW did not agree with the Public Authority's "unilateral declaration of impasse," CUHW would be available to meet with the Public Authority on November 24.

- On October 26, the Public Authority rejected CUHW’s request to meet on November 24, citing “a lack of good faith” on CUHW’s part because the Local Rules required the scheduling of a prompt impasse meeting, CUHW’s proposed date was “well over a month” after the declaration of impasse, and would fall “on a holiday.”
- On October 27, CUHW responded that it could look at another date that would be convenient for the Public Authority. CUHW also urged the Public Authority to continue the board meeting scheduled for October 31 in order to give the parties an opportunity to hold an impasse meeting.
- On October 31, the county board of supervisors adopted the final \$8.00 hourly wage offer.

B. The Public Authority Prematurely Declared Impasse

CUHW has alleged that no impasse existed on October 12 pursuant to the definition of impasse in the Local Rules<sup>8</sup> and for that reason the Public Authority failed to bargain in good faith by declaring an impasse at that time. We find that this allegation was improperly dismissed.

Local Rule section 17 provides, in pertinent part, that “Impasse procedures may be invoked [by either party] after all other attempts made by both parties to reach agreement through good faith negotiations have been unsuccessful.”

Under Local Rule section 3(i), “Impasse” means that the parties “have reached a point in their meeting and conferring in good faith on a dispute over matters within the scope of their

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<sup>8</sup>MMBA section 3507(a)(5) authorizes local agencies to adopt “reasonable rules and regulations” governing collective bargaining matters, including “[a]dditional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.” The reasonableness of the Public Authority’s Local Rules pertaining to the definition of “impasse” and the “impasse procedures” have not been challenged.

representation at which their differences in positions are so substantial or prolonged that future meetings would be futile.”<sup>9</sup>

Charges involving claims of bad faith bargaining which allege that a declaration of impasse was unfounded under local rules adopted pursuant to the MMBA, are determined by analyzing the totality of the bargaining circumstances that led up to the impasse declaration. (City & County of San Francisco (2007) PERB Decision No. 1890-M (San Francisco); City of Fresno (2006) PERB Decision No. 1841-M; County of Riverside (2004) PERB Decision No. 1715-M (Riverside).

Under this test, the Board weighs the facts to determine whether the conduct at issue as a whole “indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained.” (Oakland Unified School District (1982) PERB Decision No. 275 (Oakland).

In the instant case, the parties agreed to participate in four negotiation sessions to be held on August 10, August 23, September 12, and October 12, 2006, respectively. On August 10, CUHW proposed to increase the \$7.50 hourly wage to \$10.50. In response, on August 23, the Public Authority proposed to increase the hourly wage to \$7.65.

On September 12, CUHW proposed to increase hourly wages to \$9.50 effective immediately. The Public Authority responded by proposing to increase hourly wages to \$7.85.

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<sup>9</sup>The Local Rules contain the following definitions of “impasse”:

‘Impasse’ means that the representatives of the Public Authority and a Recognized Employee Organization have reached a point in their meeting and conferring in good faith on a dispute over matters within the scope of their representation at which their differences in positions are so substantial or prolonged that future meetings would be futile. [Local Rule, sec. 3(i).]

In addition, the Public Authority expressed its intent to present a final offer at the October 12 negotiation session. On September 26, CUHW proposed to delay the implementation date of its \$9.50 hourly wage proposal to December.

At the final negotiation session on October 12, CUHW lowered its hourly wage proposal to \$9.25. The Public Authority responded by presenting CUHW with a written declaration of impasse and its “last, best, and final offer” of \$8.00 per hour.

Based on the foregoing, it is clear that the parties participated in a series of productive bargaining sessions in which both parties made significant bargaining concessions at each of the scheduled sessions. Indeed, the Public Authority offered to increase the hourly rate to \$7.65 on August 23, to \$7.85 on September 12, and to \$8.00 on October 12, 2006. Likewise, CUHW also proposed significant concessions regarding the hourly rate at each of these sessions.

After a careful review of the record, we find the allegations do not support the premise that the differences in parties’ respective positions were so substantial or prolonged that future meetings would have been futile. To the contrary, each bargaining session was marked by significant concessions by both parties. At a minimum, it appears that an additional bargaining session would have been necessary for CUHW to consider and respond to the Public Authority’s final offer. No such session was scheduled. Instead, the Public Authority declared impasse and presented its “last, best, and final offer” to CUHW.

1. The Public Authority was not Adamantly Maintaining a Legitimate Position

The Board has held that while a party may not merely go through the motions of negotiations, it may lawfully maintain an adamant position on any issue. “Good faith” has been interpreted by the courts as “a genuine desire to reach agreement.” (Placentia Fire

Fighters v. City of Placentia (1976) 57 Cal.App.3<sup>rd</sup> 9 [129 Cal.Rptr. 126].) Although the parties need not reach agreement, “good faith” requires a “serious attempt to resolve differences and reach a common ground.” (Id.) Adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. (Id.; Oakland.) “The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained.” (NLRB v. Herman Sausage Co. (5<sup>th</sup> Cir. 1960) 275 F.2d 229 [45 LRRM 2829, 2830].)

Considering the fact that CUHW was never afforded an opportunity to respond to the Public Authority’s last offer, we find this case does not involve a situation in which the Public Authority adamantly maintained a legitimate position. Rather, the Public Authority inexplicably declared impasse without allowing CUHW to respond to the Public Authority’s counter-offer and refused to participate in further negotiations. As such, we find this conduct indicates an intent to subvert the negotiating process and generally demonstrates the lack of a genuine desire to reach agreement. Accordingly, under the totality of the conduct test, we hold that that CUHW stated a prima facie case that the Public Authority declared impasse prematurely and, therefore, failed its duty to meet and confer in good faith.

2. CUHW’s Willingness to Bargain is not Dispositive

Relying on National Labor Relations Board precedent, CUHW claims that two parties cannot be held to be at impasse where one of them requests to continue negotiating also fails to state a prima facie case that impasse was prematurely declared. This same argument, however, was raised and rejected in San Francisco where the parties’ local impasse rules also allowed either party to negotiations to declare impasse.

In San Francisco, the employee organization protested that it “had every intention on bargaining to obtain a contract rather than have a contract imposed by third parties,” and had

“room to move” after the employer declared impasse. PERB determined, in its analysis of the charge under the totality of the conduct test, that the sum total of the employee organization’s allegations, just one of which was that the parties were not at impasse because the employee organization expressed its willingness to keep negotiating, did not state a prima facie case that San Francisco failed to bargain in good faith.<sup>10</sup> The same is true in this case. A holding that impasse cannot exist as long as one party desires to continue bargaining to reach an agreement is fundamentally inconsistent with local rules which permit either party to the negotiations to declare impasse and request an impasse meeting. Such a holding would allow any party to negotiations to prevent impasse and would render the local impasse procedure rule that either party may declare an impasse meaningless.

C. Failure to Participate in Good Faith in Impasse Procedures

CUHW acknowledges that under the MMBA, a local public employer may impose its last, best and final offer after negotiating to impasse and participating in good faith in impasse procedures. (Department of Personnel Administration v. Superior Court (1992) 5 Cal.App.4<sup>th</sup> 155, 188-189 [6 Cal.Rptr.2d 714]; Los Angeles County Assn. of Environmental Health Specialists v. County of Los Angeles (2002) 102 Cal.App.4<sup>th</sup> 1112, 1114-1116 [126 Cal.Rptr.2d 300]; MMBA sec. 3505.4.)

CUHW contends on appeal that the allegations that the Public Authority: (1) refused to schedule an impasse meeting; and (2) denied CUHW its right to mediation, as provided in the Local Rules, are sufficient to establish a prima facie case that the Public Authority failed to participate in good faith in the local impasse procedures.

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<sup>10</sup>The employee organization also alleged as indicia of bad faith the city’s tardiness, dilatory tactics, that its negotiator lacked authority to bargain, and that its responses to information requests were inadequate.

The impasse procedures CUHW alleges the Public Authority failed to participate in are delineated in section 17 of the Local Rules which provides:

Impasse procedures may be invoked after all other attempts made by both parties to reach agreement through good faith negotiations have been unsuccessful.

(a) Any party involved in the negotiation of specific issues may invoke the impasse procedure by filing with the other affected party (or parties), a written request for an impasse meeting together with a statement of its position of the disputed issues. The parties involved shall then promptly schedule an impasse meeting. 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.

(b) If agreement is not concluded at the impasse meeting, the parties may mutually agree upon a method of resolving the dispute including, but not limited to, mediation.

(c) Unless the parties in writing mutually request them to do so, mediators shall make no public recommendations nor take any public position. All mediation sessions shall be conducted in private.

(d) The cost for the services of a mediator, if any, and other mutually incurred costs of mediation shall be borne equally by the Public Authority and the recognized employee organization.

1. The Impasse Meeting

CUHW alleges the following facts are sufficient to state a prima facie case that the Public Authority failed to schedule the impasse meeting pursuant to Local Rule section 17(a):

- On October 25, CUHW told the Public Authority that although it did not agree the parties were at impasse, it would participate in an impasse meeting and suggested an alternative date. The Public Authority refused to accept that date or suggest another one.
- On October 27, CUHW asked the Public Authority to suggest other dates for an impasse meeting but the Public Authority refused.

To determine whether a party has alleged sufficient facts to state a prima facie case that a party to negotiations failed to participate in impasse procedures in good faith, PERB examines alleged indicia of bad faith in the context of the totality of the parties' post-impasse conduct. (Newark Unified School District (2007) PERB Decision No. 1895; Riverside; City of Fresno v. People Ex Rel. Fresno Firefighters (1999) 71 Cal.App.4<sup>th</sup> 82, 100 [83 Cal.Rptr.2d 603]; PERB Reg. 32603(e).)

For the reasons stated below, we find that under the totality of the conduct test, CUHW has failed to allege sufficient facts to state a prima facie case that the Public Authority violated the Local Rules by failing to schedule an impasse meeting.

The impasse procedures call for a party that has declared impasse to file with the other a request for an impasse meeting and a statement of its position on the issues in dispute. The facts indicate that the Public Authority complied with that rule on October 12.

Thereafter, the impasse procedures provide that the parties shall promptly schedule an impasse meeting. It is alleged that the Public Authority's October 12 declaration of impasse proposed four dates within two weeks of the declaration for an impasse meeting.

The facts before us also indicate that CUHW's initial response to the Public Authority's request for impasse was to ignore it by leaving the documents behind when it left the final day of negotiations. The Public Authority responded by having the impasse documents sent to CUHW later that day by overnight mail. CUHW did not respond to the Public Authority's request for an impasse meeting, but instead requested that the Public Authority return to negotiations.

On October 24, the day before the last two of the four dates the Public Authority offered for an impasse meeting, the Public Authority contacted CUHW and threatened to

proceed with implementation of its final offer at the October 31 meeting of the board of supervisors unless CUHW contacted the Public Authority within 24 hours to schedule an impasse meeting. CUHW responded the next day that it would participate in an impasse meeting but suggested the meeting be held on November 24, a public holiday that was almost a month and a half after the request for an impasse meeting. By memo dated October 26, the Public Authority objected to CUHW's proposed meeting date as not being prompt and being a public holiday.

On October 27, a few days before the board of supervisors would consider implementing the Public Authority's final wage offer, CUHW responded to the Public Authority's objections by offering to look at another date but not proposing a specific date for an impasse meeting. Instead, it asked the Public Authority to suggest additional dates on which it would be available for an impasse meeting.

Although the parties never held an impasse meeting, we conclude under the totality of the conduct test that CUHW has failed to allege a prima facie case that the Public Authority failed to participate in good faith in the scheduling of an impasse meeting.

## 2. Denial of Right to Mediation

CUHW also alleges that the Public Authority's failure to hold an impasse meeting thereby "robbed" CUHW of its right to mediation pursuant to Local Rule section 17(b).

Under section 17(b) of the Local Rules, parties to impasse proceedings may participate in voluntary mediation as an available dispute resolution tool provided that both parties agree to use the non-binding procedure. CUHW has not alleged that it ever requested mediation during the impasse procedures or that the Public Authority refused such a request.

Accordingly, CUHW has failed to state a prima facie case that the Public Authority failed to participate in local impasse procedures in good faith based on there being no opportunity to mediate.

ORDER

The Board hereby REVERSES the Board agent's dismissal of the unfair practice charge in Case No. SA-CE-434-M and REMANDS the case to the Public Employment Relations Board General Counsel's office for the issuance of a complaint consistent with this Decision.

Members McKeag and Neuwald joined in this Decision.