STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TURLOCK EMERGENCY MEDICAL SERVICES ASSOCIATION, Charging Party, v. WEST SIDE HEALTHCARE DISTRICT, Respondent.	Case No. SA-CE-624-M PERB Decision No. 2144-M November 30, 2010

Appearance: Weinberg, Roger & Rosenfeld by Bruce A. Harland, Attorney, for Turlock Emergency Medical Services Association.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Turlock Emergency Medical Services Association (TEMSA) of a Board agent's dismissal (attached) of its unfair practice charge. As amended, the charge alleged that the West Side Healthcare District (District) violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing policies without providing notice and an opportunity to bargain, and by engaging in surface bargaining. The Board agent dismissed the charge for failure to state a prima facie case.

The Board has reviewed the dismissal and the record in light of TEMSA's appeal and the relevant law. Based on this review, the Board finds the Board agent's warning and dismissal letters to be a correct statement of the law and well-reasoned, and therefore adopts them as the decision of the Board itself, as supplemented by the discussion below.

[1] The MMBA is codified at Government Code section 3500 et seq.

DISCUSSION

The District provides ambulance service for residents in portions of Merced and Stanislaus Counties, and employs EMTs and paramedics. TEMSA and the District are engaged in negotiations for their first contract. TEMSA alleges that during the course of negotiations the District unilaterally changed health benefits, disciplinary procedures and the merit pay policy. In addition, the charge alleges the District engaged in surface bargaining by reneging on tentative agreements, refusing to consider TEMSA's package proposals, refusing to discuss any wage proposal, and rejecting proposals without explanation.

TEMSA appeals only the dismissal of the unilateral change allegations. Regarding the disciplinary policy allegation, the charge alleges that in September 2009, the District created a "point" system where employees would be given a point for absences, late calls or tardiness. The charge does not include copies of the original or the revised disciplinary policy. The Board agent held that although the creation of a "point" system suggests a change to the disciplinary policy, there were insufficient facts to state a prima facie case.

PERB Regulation 32615(a)(5)[2] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

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

Unilateral changes are considered "per se" violations of the duty to bargain in good faith if certain criteria are met. Those criteria are: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

The charge alleges only that employees now receive a point for absences, late calls or tardiness. It is impossible to determine from this statement if there has been an effective change in the disciplinary policy. Presumably employees are currently disciplined for excessive absences, late calls and tardiness. The mere allegation that employees now receive a "point" for this conduct does not establish that the District changed the level of discipline imposed or the procedure for when discipline is imposed. Without more information on the current and revised policy, TEMSA does not satisfy its burden to allege sufficient facts to demonstrate how being given points changes the disciplinary policy covering absences, late calls or tardiness.

TEMSA also alleges that the District unilaterally changed the health benefits by "reducing the level of benefits that employees would receive." The Board agent found that the failure to describe the original policy precluded a determination that an unlawful unilateral change had occurred.

On appeal, TEMSA states:

> What the original policy constituted is not material. The relevant fact is that the employer changed the policy without bargaining with TEMSA. The employer is not free to reduce the level of benefits, even if its policy said it was free to do so, otherwise there would be no reason for the employer to meet and confer with the Union over a matter within the scope of representation.

As stated above, a charging party bears the burden of alleging sufficient facts to demonstrate a prima facie case. (*State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1071-S.) The Board agent noted that TEMSA failed to set forth the existing policy. Without these essential facts, the Board cannot determine whether there has been an actual change in policy. In fact, the appeal seems to suggest the policy allowed the District to make changes to the level of benefits. Accordingly, the dismissal for failure to state a prima facie case is affirmed.

ORDER

The unfair practice charge in Case No. SA-CE-624-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8384
Fax: (916) 327-6377

August 5, 2010

Bruce Harland, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

Re: *Turlock Emergency Medical Services Association v. West Side Healthcare District*
Unfair Practice Charge No. SA-CE-624-M
DISMISSAL LETTER

Dear Mr. Harland:

The Turlock Emergency Medical Services Association (Union) filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB) on October 1, 2009. The original charge allege that the West Side Healthcare District (District)[1] violated its obligation to bargain under the Meyers-Milias-Brown Act (MMBA or Act).[2] Specifically, the original charge alleged the District committed "per se" violations of the duty to bargain by unilaterally changing three policies. The charge also alleged the District engaged in "surface bargaining" in order to avoid reaching a collective bargaining agreement with the Union. PERB sent the Union a Warning Letter dated May 26, 2010 (Warning Letter), a copy of which is enclosed. The Union filed an amended charge on June 16, 2010.

1. Health Insurance

In the Warning Letter, PERB stated that it is the charging party's responsibility to allege a "clear and concise statement of the *facts* and conduct alleged to constitute an unfair practice." (Cal. Code Regs., tit. 8, § 32615(a)(5) (emphasis added).) That means the charge must allege the "who, what, when, where and how" of an unfair practice. (*United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The original charge alleged that prior to July 2009, the District provided the employees with "health insurance benefits." On an unspecified date in "July 2009," the District "mailed" a

[1] The District is a public agency as defined in Government Code section 3501(c).

[2] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

letter "to all employees." The letter "attempted" to "change" the employees' health insurance benefits.

In the Warning Letter, PERB advised the Union that, even if PERB ignored the allegation about "attempted" change, the Union needed to allege "what" the original policy was, "how" the new policy differs from the original policy, and "when" and "how" the District changed the original policy. (See *Ragsdale*, *supra*, PERB Decision No. 944 (who did what and when did they do it).) In response, the amended charge alleges the following:

> In July 2009, the employer unilaterally change[d] health insurance benefits and mailed out to all employees that the change was being made reducing the level of benefits that employees would receive.

This allegation fails to describe "what" the original policy was. Without knowing what that policy was, it is impossible to know whether the policy prohibited the employer from reducing the level of benefits under the circumstances. Accordingly, the amended charge fails to correct the deficiency discussed in the Warning Letter.

(2) Disciplinary Procedures

The original charge alleged that prior to September 2009, the District had a policy regarding "disciplinary procedures" and that on some unspecified date in September 2009, the District "made unilateral changes" to the disciplinary procedures and "refused to discuss these changes with the Union."

In the Warning Letter, PERB advised the Union that the original charge failed to allege *facts* to show "what" the original "disciplinary procedures" were, "how" the new procedures differ from the original procedures, or "when" the District changed the procedures. (See *Ragsdale*, *supra*, PERB Decision No. 944 (who did what and when did they do it).) In response, the amended charge repeats the unspecified date "[i]n September 2009," and adds the following allegations:

> The changes included a point system by which employees would be given a point for late calls, absences or tardiness. Prior to the change, there existed no "point" system.

These new allegations arguably describe "what" the preexisting policy was, i.e., the preexisting policy did not include a point system. They also arguably describe "how" the policy has changed, i.e., the new policy includes a "point" system. However, the new allegations do not describe "who" at the District announced the change or "when" he or she did so. Accordingly, the amended charge fails to correct the deficiency discussed in the Warning Letter.

(3) Merit Pay

The original charge alleged that in December 2008, the District had a "merit pay" policy and that on January 28, 2009, the District "notified" the Union that it would not grant any more merit pay raises. It also alleged that the District had denied merit raises to "three individuals." Among other things, the Warning Letter advised the Union that—to the extent the Union was attempting to allege a unilateral change in policy—the allegation appeared to be barred by the six-moth statute of limitations. (*Coachella Valley Mosquito and Vector Control District* v. *Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1077.)

The amended charge drops the reference to "January 28, 2009," and re-alleges the merit pay dispute as follows:

> There are three individuals that were entitled to their merit raises back in December 2008, they received their raises around July 2009. On September 12, 2009, these employees were notified that they would not be receiving their merit increases. See September 12, 2009 letter attached to this charge.

The attached letter is from the District to the employees. The letter states that the District's research showed that on April 12, 2009, the District's accountant had "erroneously" granted the three employees a pay increase and that the District was going to immediately correct that error.

In order to establish an unlawful unilateral change in policy, the charging party needs to show that the respondent changed a policy concerning a matter within the scope of representation without giving the charging party notice and an opportunity to bargain. (*State of California (Departments of Veterans Affairs & Personnel Administration)* (2008) PERB Decision No. 1997-S, p. 8 (*Veterans Affairs*); *Grant Joint Union High School District* (1982) PERB Decision No. 196, pp. 8-9.) To constitute a "change in policy," a party's action must have a "generalized effect or continuing impact upon the terms and conditions of employment." (*Veterans Affairs*, *supra*, PERB Decision No. 1997-S, pp. 9, 14; *Grant*, *supra*, PERB Decision No. 196, p. 9.) The action must be more than an isolated breach. Rather, it must be generally applicable to all future situations. (*Veterans Affairs*, *supra*, PERB Decision No. 1997-S, p. 18.)

In this case, the amended charge alleges that the three employees were "entitled" to merit raises under the existing policy. Even though the amended charge does not include any factual allegations to support the *conclusion* that the employees were "entitled" to merit raises, it is assumed for the sake of discussion that they were. That assumption does not, however, establish an across-the-board change in policy. Rather, it shows only an isolated, one-time breach with no generalized or continuing effect. (*Veterans Affairs*, *supra*, PERB Decision No. 1997-S, p. 18.). Accordingly, this part of the amended charge fails to allege a unilateral change in policy.

4 Surface Bargaining

The amended charge fails to allege any new facts that would alter the surface bargaining analysis contained in the Warning Letter.

CONCLUSION

The amended charge fails to a allege a prima facie case of bad faith bargaining. Accordingly, PERB hereby dismisses the amended charge and the original charge based on the facts and reasons discussed above and in the Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[3] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Service

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

Extension of Time

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

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Harry J. Gibbons
Senior Regional Attorney

Attachment

cc: Art Tharpe

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8384
Fax: (916) 327-6377

May 26, 2010

Bruce Harland, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

Re: *Turlock Emergency Medical Services Association v. West Side Healthcare District*
Unfair Practice Charge No. SA-CE-624-M
WARNING LETTER

Dear Mr. Harland:

The Turlock Emergency Medical Services Association (Union) filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB) on October 1, 2009. The charge alleges the West Side Healthcare District (District)[1] violated its obligation to bargain under the Meyers-Milias-Brown Act (MMBA or Act).[2] Specifically, the charge alleges the District committed "per se" violations of the duty to bargain by unilaterally changing three policies. The charge also alleges the District engaged in "surface bargaining" in order to avoid reaching a collective bargaining agreement with the Union.

BACKGROUND

The Union represents a bargaining unit of District employees. The Union's lead negotiator is Robert Easter. The charge mentions, but does not name, the District's "lead negotiator." In October 2008, the Union began attempting to bargain its "first contract" with the District. The parties met approximately six times between November 7, 2008 and March 20, 2009.[3] The charge shows that the parties met an additional 12 times between April 27, 2009 and August 28, 2009.

[1] The District is a public agency as defined in Government Code section 3501(c).

[2] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

[3] The facts in this sentence are taken from the District's response to the charge. Because the Union is alleging surface bargaining, it does not appear that the Union disputes the fact that the parties met six time between November 2008 and March 2009. (See *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M (Board agent may rely on undisputed information not in the charge).)

A. The Unilateral Change Allegations

(1) Health Insurance

Prior to July 2009, the District provided the employees with "health insurance benefits." On an unspecified date in "July 2009," the District "mailed" a letter "to all employees." The letter "attempted" to "change" the employees' health insurance benefits. No other facts are alleged in the charge regarding this incident.

(2) Disciplinary Procedures

Prior to September 2009, the District had a policy regarding "disciplinary procedures." On some unspecified date in September 2009, the District "made unilateral changes" to the disciplinary procedures and "refused to discuss these changes with the Union." No other facts are alleged in the charge regarding this incident.

(3) Merit Pay

Prior to December 2008, the District had a "merit pay" policy. The charge does not describe or include a copy of the policy. There "were three individuals" who were "entitled" to merit pay raises in December 2008. The District gave those three individuals merit pay raises, although they did not receive the raises until "around July 2009." On January 28, 2009, the District "notified" the Union that it would not grant any other employees "merit" pay raises until the Union "signed" a "contract" with the District.

B. The Surface Bargaining Allegations

(1) The Package Proposals

On June 15, 2009, the Union gave the District a "package proposal." The District "rejected" the package and "insisted the parties go item by item."

On July 21, 2009, Easter told the District's lead negotiator that the Union wanted to present a second package proposal. The District's lead negotiator told Easter to present the package "as soon as possible." It is unclear whether Easter presented a second package proposal. However, it is clear that on August 8, 2009, the District's lead negotiator said the District would not "accept" a packages proposal, "but will only bargain item by item."

(2) Tentative Agreements

On some unspecified dates, the parities reached tentative agreements on "various provisions," including, but apparently not limited to, the following three "provisions": (1) "the recognition of bargaining unit," (2) "Union membership," and (3) "hold over pay (sic)." According to the charge, the District has since "withdrawn from those [tentative] agreements." It is not clear from the charge whether the District has "withdrawn" from *all* of the "various" tentative

agreements, or just "those [three tentative] agreements" particularized in the charge. Also, the charge does not say "when" the District withdrew from the tentative agreements or "what," if anything, the District said when it withdrew from the tentative agreements.

(3) End-of-Session Proposal

One paragraph in the charge reads in its entirety—and without alteration—as follows:

> The Union presented the employer with proposals at the end of a session and the employer shows up at the next session meeting without looking at the proposal. The employer has also rejected proposals on the basis that they haven't had time to really look at the proposals. The employer has rejected such proposals that incorporate or are there current practices and/or policies.

(4) Wages

As of August 28, 2009, the District "has refused to discuss any wage proposal."

(5) The "Current Practices" Proposal

On some unspecified date, the Union proposed that the parties incorporate into the contract the District's "current practices," such as the District's current "pay day." On some unspecified date, the District rejected the "current practices" proposal "without explanation."

DISCUSSION

A. Unilateral Changes

Unilateral changes are considered "per se" violations of the duty to bargain when the following conditions are met: (1) the employer changes a policy concerning a matter within the scope of representation, and (2) the employer changes the policy before it notifies the union and gives it an opportunity to request negotiations. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823 (*Vernon Fire Fighters*); *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813, 818; *Grant Joint Unified High School District* (1982) PERB Decision No. 196, p. 9.)

(1) Health Insurance

The charge alleges that the District "attempted" to change health insurance benefits. An "attempted" change is insufficient to establish a "per se" violation of the duty to bargain. Rather, the employer must actually *change* an exiting policy. (See *Vernon Fire Fighters*, *supra*, 107 Cal.App.3d at 823.) Accordingly, this part of the charge fails to allege a "per se" violation of the duty to bargain under the MMBA.

Additionally, even if PERB ignores the charge's use of the word "attempted," this part of the charge nevertheless fails to allege some basic facts. It is a charging party's responsibility to allege a "clear and concise statement of the *facts* and conduct alleged to constitute an unfair practice." (Cal. Code Regs., tit. 8, § 32615(a)(5) (emphasis added).) That means the charge must allege the "who, what, when, where and how" of an unfair practice. (*United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

Thus, in a unilateral change case, the charge should state "what" the original policy was, "how" the new policy differs from the original policy, and "when" and "how" the employer changed the original policy. The charge in this case does not allege *facts* sufficient to show "what" the original health insurance benefits were, "how" the new benefits differ from the original benefits, or "when" the District changed the benefits. (See *Ragsdale*, *supra*, PERB Decision No. 944.) Accordingly, this part of the charge fails to allege an unlawful unilateral change in health insurance benefits under the MMBA.

(2) Disciplinary Procedures

As with the health insurance benefits, the charge fails to allege *facts* to show "what" the original "disciplinary procedures" were, "how" the new procedures differ from the original procedures, or "when" the District changed the procedures. (See *Ragsdale*, *supra*, PERB Decision No. 944 (who did what and when did they do it).) Accordingly, this part of the charge fails to allege an unlawful unilateral change in disciplinary procedures under the MMBA.

(3) Merit Pay

In this case, the District had a "merit pay" policy. The charge does not describe or include a copy of that policy. It is therefore unclear whether the policy required—or permitted—the District to grant merit raises. Without knowing "what" the District was required to do under the original policy, it is impossible to tell whether the District implemented a new merit pay policy or simply exercised rights granted by the original policy. Accordingly, this part of the charge fails to show "what" changes the District made to the merit pay policy. (See *Ragsdale*, *supra*, PERB Decision No. 944.)

Also, if the Union corrects the deficiencies decided above by amending the charge, the Union should consider the six-month statute of limitations. Specifically, PERB is prohibited from issuing a complaint based on conduct that occurred more than six months before the charge was filed. (*Coachella Valley Mosquito and Vector Control District* v. *Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1077.) The limitations period begins to run once the charging party knows, or should have known, of the underlying conduct. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District*

(1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

In this case, the Union filed the charge on October 1, 2009. Thus, PERB cannot issue a complaint based on a unilateral change that occurred before April 1, 2009. If the District changed the merit pay policy on or about January 28, 2009, then—to the extent the Union is attempting to allege the change as a separate, "per se" violation of the duty to bargain—the District's alleged action falls outside the six-month statute of limitations.

B. Surface Bargaining

Despite the absence of a "per se" violation, a party may nevertheless violate the Act by engaging in "surface" bargaining. It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 13.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "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, p. 15.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude indicates bad faith because it suggests the respondent is merely going through the motions of negotiations. (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in scheduling can suggest an attempt to delay a timely agreement. (*Oakland Unified School District* (1983) PERB Decision No. 326, p. 34 (*Oakland*).) Dilatory and evasive tactics, including canceling meetings or failing to prepare for meetings, can also be evidence of bad faith. (*Ibid.*) Conditioning agreement on economic matters upon prior agreement on non-economic subjects can suggest an unwillingness to engage in the genuine give-and-take of bargaining. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S (*DPA*).)

Other factors that indicate surface bargaining include: a negotiator's lack of authority that delays and thwarts the bargaining process (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 25 (*Stockton*)); insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134, pp. 13-14 (*San Ysidro*)); and reneging on tentative agreements (*Charter Oak Unified School District* (1991) PERB Decision No. 873, p. 14 (*Charter Oak*); *Stockton, supra*, PERB Decision No. 143, pp.24-26; *Placerville Union School District* (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. (*Oakland Unified School District, supra*, PERB Decision No. 275.) The obligation of a party to bargain in good faith "does not require the

yielding of positions fairly maintained." (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229, 232.)

The specified indicia of surface bargaining are lacking in this case. For instance, the charge does not allege that the District adopted a "take it or leave it" attitude. (*General Electric Co.*, *supra*, 150 NLRB 192, 194, enf. 418 F.2d 736.) Indeed, the charge shows the District took the exact opposite approach by negotiating "item by item." Nor does the charge allege that the District was recalcitrant in scheduling meetings (*Oakland*, *supra*, PERB Decision No. 326, p. 34), that it cancelled scheduled meetings (*ibid.*), that its negotiator lacked authority (*Stockton*, *supra*, PERB Decision No. 143, p. 25), that it insisted on ground rules before addressing substantive questions (*San Ysidro*, *supra*, PERB Decision No. 134, pp. 13-14), or that it conditioned economic progress on non-economic agreements (*DPA*, *supra*, PERB Decision No. 1249-S).

As to possible indicia of surface bargaining mentioned in the charge, the alleged facts are neither clear nor concise. (See Cal. Code Regs., tit. 8, § 32615(a)(5).) For instance, the charge alleges that the District has "withdrawn" from "various" tentative agreements. (See *Charter Oak*, *supra*, PERB Decision No. 873, p. 14.) But the charge is unclear as to how many tentative agreements existed, which of those agreements the District repudiated, when the District repudiated the agreements, and "who" from the District said "what" when the District withdrew.

Similarly, the charge alleges that on at least one occasion, and possibly more, the Union gave the District a proposal at the end of bargaining session and the District appeared at "the next session meeting (sic) without looking at the proposal." The charge does not say "when" this occurred or how often it occurred. Nor does the charge say "who" from the District said "what"—if anything—to indicate that the District had not "look[ed] at the proposal" between meetings.

Likewise, the charge alleges that as of August 28, 2009, the District "has refused to discuss any wage proposal." The charge, however, fails to allege that the Union made a wage proposal, "when" the Union made the wage proposal, or "what"—if anything—the District said in response to the wage proposal.

Finally, the charge alleges that on some unspecified date, the District rejected "without explanation" the Union's "current practices" proposal. As with the other parts of the charge, this allegations lacks a clear and concise factual context. Nevertheless, even if it is assumed that the District acted in a matter indicative of bad faith when it rejected the proposal "without explanation," then the charge contains but one indicia of bad faith. As a general rule, one indicia of bad faith is insufficient to establish surface bargaining. (*Fresno County Office of Education* (1993) PERB Decision No. 975, pp. 9-10; *DPA*, *supra*, PERB Decision No. 1249-S, p. 2 (adopting Board Agent's Warning Letter, p. 4).)

CONCLUSION

For these reasons discussed above, the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before June 10, 2010,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Harry J. Gibbons
Senior Regional Attorney

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[4] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "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. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[5] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)