

FACTUAL SUMMARY³

In April 2009, the City and DCEA began negotiations for a successor agreement to their memorandum of understanding (MOU) that was scheduled to expire on June 30, 2009. On December 4, 2009, the City declared that the parties had reached impasse and provided its LBFO to DCEA. The LBFO included a provision for 12 furlough days to be taken before June 30, 2010 and a one-year term agreement. On December 17, 2009, the DCEA membership voted to reject the LBFO.

The City's local employer-employee relations resolution (EERR) sets forth detailed procedures for the resolution of an impasse in bargaining. Unless the parties agree to submit the dispute directly to the City Council for determination, they are required to submit the dispute to mediation and, if unsuccessful, to fact-finding. The fact-finder is to apply specified standards in making written findings of fact and recommendations to the parties and, if the dispute is still not resolved, to the City Council.

After the DCEA membership rejected the LBFO, the parties met with a mediator obtained from the State Mediation and Conciliation Service (SMCS), but failed to reach an agreement. At the City's request, the DCEA membership voted again on the LBFO, this time with a three-year term, but the membership again rejected the LBFO.

On February 16, 2010, the City suggested that the parties bypass the fact-finding process set forth in the EERR and submit the matter directly to the City Council, but DCEA declined this request in favor of pursuing fact-finding.

themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*City of Modesto* (2008) PERB Decision No. 1994-M.) Based on our review of the record, all of these criteria have been satisfied. Accordingly, we concur that the City's request for oral argument is hereby denied.

³ A complete statement of the facts is set forth in the attached ALJ's proposed decision adopted by the Board.

Sometime between February 18 and 23, 2010, DCEA provided the City with the names of five arbitrators acceptable to DCEA. However, on March 17, 2010, without notifying DCEA, the City contacted SMCS to obtain a different list of arbitrators. On March 18, 2010, the City requested DCEA to provide it with contact information for the arbitrators provided by DCEA. On March 24, 2010, the City notified DCEA that Joe Henderson (Henderson), one of the arbitrators on the SMCS list, was available for three days in late April 2010, and inquired whether those dates were acceptable to DCEA. Although DCEA was not previously aware of the City's communications with the SMCS arbitrators, DCEA agreed to use Henderson but objected to the proposed dates. Through the ensuing correspondence, DCEA expressed the desire to first obtain the arbitrator's availability before committing to dates, while the City wanted to obtain the first available dates from the arbitrator. In addition, DCEA believed that the process would take more time and entail more formality than the City believed appropriate or required under the EERR.

On May 10, 2010, the City informed DCEA that the arbitrator had five dates in June and July 2010 available, and that those dates were available for the City as well. The City further informed DCEA that it believed one day was sufficient, but that it would be willing to schedule two dates. On May 13, 2010, DCEA responded that the dates of July 19 and 20, 2010, would be acceptable, but that DCEA believed additional days of fact-finding would be required. In addition, DCEA stated that it believed a court reporter would be necessary to the process.

On May 14, 2010, the City objected to the level of formality desired by DCEA, accused DCEA of delaying the process and asserted that DCEA had "effectively rejected fact-finding arbitration." The City further informed DCEA that it intended to "go to the alternative step and promptly submit the matter to the City Council for final resolution." On May 25, 2010,

the City Council adopted a resolution imposing the LBFO. The City Council modified the proposed resolution to provide that the 12 furlough days would have to be taken before November 1, 2010, rather than June 30, 2010.

The ALJ determined that the City's act of cancelling the fact-finding dates and its implementation of the LBFO on May 25, 2010, before exhausting impasse procedures, violated the MMBA, PERB regulations and the City's EERR. The ALJ further determined that the City Council's modification of the terms of the furlough plan specified in the LBFO was reasonably contemplated within the December 4, 2009 LBFO and therefore did not violate the MMBA.⁴

THE CITY'S EXCEPTIONS AND DCEA'S RESPONSE

The City excepts to the ALJ's factual findings regarding DCEA's cooperativeness in trying to schedule fact-finding, as well as to the ALJ's ultimate conclusion that the City failed to meet and confer in good faith when it cancelled the fact-finding and implemented its LBFO. DCEA asserts that any lack of cooperation on its part is irrelevant because the City refused to proceed to fact-finding after DCEA agreed to dates proposed by the City, and that the ALJ's factual findings are supported by the record. DCEA further asserts that it acted diligently but that the City caused delay by acting unilaterally and withholding information.

DISCUSSION

The ALJ's Factual Findings

The City excepts to the following factual findings of the ALJ:

1. "On March 24, 2010, [Shirley] Stinnett emailed Henderson's resume to [Kenneth] Akins, specified that Henderson was available April 27, 28, and 29, 2010, and inquired whether those dates were acceptable with DCEA. Akins responded that Henderson

⁴ Neither party has excepted to this determination. Therefore, the ALJ's determination on this issue is final. (PERB Reg. 32300, subd. (c) ["An exception not specifically urged shall be waived."]). PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.)

was acceptable, but the dates were not acceptable as he couldn't put the case together that quickly and it was too close to his International Brotherhood of Electrical Workers (IBEW) interest arbitration against the City of Vallejo.”

2. “DCEA was also timely and cooperative in providing a list of fact-finding arbitrators as well as the contact information of such arbitrators.”

3. “Akins additionally encouraged [Melissa] Chaney that they select an arbitrator as soon as possible.”

In support of these exceptions, the City argues that the record indicates that DCEA's negotiator, Kenneth Akins, “conceded” that he did not know when he provided the list of arbitrators to the City, other than that it was prior to March 18, 2010, and that the City had not received such a list prior to March 17, 2010, when it requested names from SMCS. The City further argues that DCEA was dilatory in failing to propose additional available dates in a timely manner and that its initial encouragement to select an arbitrator as soon as possible was merely “lip service.” We find the ALJ's findings to be amply supported by record. We note that the City requested contact information about DCEA's list of arbitrators on March 18, 2010, thereby indicating that it had received DCEA's list by that date. In addition, the record establishes that the parties had differing views on how the selection of arbitrators should proceed, with DCEA preferring to contact arbitrators first before selecting dates. Finally, even if DCEA had engaged in some delay, it would not excuse the City's unilateral conduct in requesting arbitrators from SMCS and contacting arbitrators without notifying DCEA and cancelling the fact-finding process altogether after the parties had reached an agreement on both the arbitrator and two dates of hearing.

Unilateral Cancellation of Fact-Finding and Implementation of LBFO

The City excepts to the ALJ's findings that, once the City and DCEA agreed to dates for fact-finding, the City could not then cancel the hearing and that it had other alternatives available to it rather than engage in self-help. The City asserts that the totality of the circumstances establishes that it acted in good faith in attempting to implement the impasse resolution process, while DCEA failed to exercise the same level of diligence, citing *City & County of San Francisco* (2007) PERB Decision No. 1890-M (*San Francisco*) and *Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M (*Kings In-Home Supportive Services*).

We find neither of these decisions support the City's position in this case. In *San Francisco*, PERB held that the City and County of San Francisco did not engage in surface bargaining when the parties engaged in substantive discussions, exchanged proposals, and noted that the city "attempted to follow the impasse resolution procedures" set forth in its local rules. The case before us is not about the City's conduct during bargaining, but about its conduct in unilaterally cancelling the impasse resolution procedures and implementing its LBFO. Under these circumstances, we do not find that the City's conduct was a good faith attempt to follow the impasse resolution procedures' set forth in the EERR.

In *Kings In-Home Supportive Services*, the Board found that an unfair practice charge established a prima facie case of surface bargaining sufficient to warrant issuance of a complaint. The Board further held, however, that the facts alleged in the charge were insufficient to establish a prima facie failure to participate in good faith in the scheduling of an impasse meeting, where the labor organization failed to respond to the employer's proposed dates other than by proposing to meet on a public holiday. In the case before us, the record evidence established that DCEA responded to the communications it received regarding the

scheduling of fact-finding. More importantly, the parties actually agreed to hearing dates which the City later unilaterally cancelled. *Kings In-Home Supportive Services* has no application to these facts.

The City also appears to argue that, because MMBA section 3505 requires it to meet and confer “prior to adoption of the agency’s final budget for the ensuing year” (underlining omitted), it was unreasonable to require it to move forward with fact-finding after the June 30, 2010 deadline for the City to adopt a budget “regardless of whether DCEA would participate for the two days available.”⁵ Nothing in the record before us indicates that DCEA would not have participated in the two days it agreed to, even though it had expressed its belief that additional days and more formal procedures were necessary. As noted by the ALJ, the City had the option of either submitting to the arbitrator’s authority as to how the fact-finding was to be conducted or insisting that the hearing be conducted in an informal manner in a two-day

⁵ MMBA section 3505 provides, in relevant part:

‘Meet and confer in good faith’ means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

fact-finding.⁶ At that point, if DCEA did not appear or participate, the City would arguably have exhausted the impasse resolution procedures. By cancelling the fact-finding altogether, however, the City failed to meet its obligation to participate in good faith in the impasse resolution procedures.

ORDER

Based on the foregoing and the entire record in the case, it is found that the City of Davis (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3506, and 3509(b) and Public Employment Relations Board (PERB or Board) Regulation 32603(a), (b), (c), and (g) (Cal. Code Regs., tit. 8, sec. 31001 et seq.), by implementing its last, best and final offer upon the Davis City Employees Association (DCEA) without exhausting fact-finding as required by the local rules. All other allegations are hereby DISMISSED.

Pursuant to section 3509, subdivision (b) of the Government Code, it is hereby ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to proceed with the fact-finding process in its local rules.
2. Denying DCEA its right to represent bargaining unit members in their employment relations with the City.
3. Interfering with the right of bargaining unit members to be represented by their chosen representative.

⁶ We express no opinion on whether such insistence would have been lawful under all the circumstances. As noted by the ALJ, such an action could be subject to challenge under the EERR, but at least DCEA would have had the opportunity to participate in some manner of fact-finding.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Rescind City of Davis City Council Resolution 10-070, dated May 25, 2010 and restore terms and conditions of employment prior to the passing of the May 25, 2010 resolution.
2. Unless otherwise agreed to by the City and DCEA, contact DCEA to schedule a fact-finding and complete the fact-finding process in compliance with the City's local rules, allowing for adequate time to complete the fact-finding process.
3. Make all affected employees whole for any loss of wages or benefits due to the City's violation of the MMBA, including interest at 7 percent per annum.
4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the City are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.
5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the PERB, or the General Counsel's designee. The City shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on DCEA.

Chair Martinez and Member Huguenin joined in this Decision.



**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**

After a hearing in Unfair Practice Case No. SA-CE-672-M, *Davis City Employees Association v. City of Davis*, in which all parties had the right to participate, it has been found that the City of Davis (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3506, and 3509(b), and Public Employment Relations Board Regulation 32603(a), (b), (c), and (g) (Cal. Code Regs., tit. 8, sec. 31001 et seq.), by implementing its last, best and final offer (LBFO) upon the Davis City Employees Association (DCEA) without exhausting fact-finding as required by the local rules.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to proceed with the fact-finding process in its local rules.
2. Denying DCEA its right to represent bargaining unit members in their employment relations with the City.
3. Interfering with the right of bargaining unit members to be represented by their chosen representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Rescind City of Davis City Council Resolution 10-070, dated May 25, 2010 and restore terms and conditions of employment prior to the passing of the May 25, 2010 resolution.
2. Unless otherwise agreed to by the City and DCEA, contact DCEA to schedule a fact-finding and complete the fact-finding process in compliance with the City's local rules, allowing for adequate time to complete the fact-finding process.
3. Make all affected employees whole for any loss of wages or benefits due to the City's violation of the MMBA, including interest at 7 percent per annum.

Dated: _____

CITY OF DAVIS

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



DAVIS CITY EMPLOYEES ASSOCIATION,

Charging Party,

v.

CITY OF DAVIS,

Respondent.

UNFAIR PRACTICE
CASE NO. SA-CE-672-M

PROPOSED DECISION
(October 31, 2011)

Appearances: Beeson, Tayer & Bodine, by John Provost, Attorney, for the Davis City Employees Association; Best, Best & Krieger, LLP, by Stacey N. Sheston, Attorney, for the City of Davis.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges a public employer's implementation of its last, best, and final offer (LBFO) without exhausting fact-finding as required by the local rules. The employer denies violating its local rules, PERB Regulations¹ or the Meyers-Milias-Brown Act² (MMBA).

On June 2, 2010, the Davis City Employees Association (DCEA) filed an unfair practice charge (charge) against the City of Davis (City). On December 24, 2010, DCEA filed an amended charge. On January 20, 2011, the Office of the General Counsel of the Public Employment Relations Board (PERB) filed a Notice of Partial Withdrawal of the allegations that the City failed to participate in impasse procedures by unilaterally selecting an arbitrator, scheduling dates, and setting the rules for fact-finding. On January 20, 2011, the PERB Office

¹ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

² Unless otherwise indicated, all statutory references are to the Government Code. MMBA is codified at section 3500 et seq.

of the General Counsel issued a complaint alleging that the City violated MMBA sections 3503, 3505, 3506, and 3509(b) and PERB Regulation 32603(a), (b), (c), and (g) by implementing terms of the LBFO without exhausting the impasse procedures set forth in the local employer-employee relations resolution (EERR).

On February 9, 2011, the City filed its answer denying any violation of the EERR, PERB Regulations, or the MMBA and asserted defenses of business necessity and that DCEA was non-responsive and dilatory in its obligation to proceed toward fact-finding.

Formal hearing was held on August 9 and 10, 2011. At the close of DCEA's case-in-chief on August 10, 2011, it moved to amend the complaint to include an allegation that on May 25, 2010, when the City implemented its terms and conditions of employment, it unilaterally changed the terms set forth in the December 4, 2009 LBFO regarding the furlough plan so that the furloughs were to be taken by November 1, 2010 instead of June 30, 2010, and therefore violated MMBA sections 3505 and 3509(b). Respondent did not object to the amendment as it was prepared to respond to it.

When the transcripts of the proceeding were received, DCEA noticed that the portion of the video-tape recording of the June 9, 2009 Davis City Council meeting played at the August 9, 2011 hearing was not transcribed in the August 9, 2011 transcript. The Chief Administrative Law Judge thereby admitted a compact disc (CD) of the audio recording of the hearing as part of the evidentiary hearing so that City Councilmember Sue Greenwald's (Councilmember Greenwald or Greenwald) comments were preserved.³ The matter was submitted for proposed decision after receiving post-hearing briefs on September 23, 2011.

³ A copy of the CD was also provided to the parties.

FINDINGS OF FACT

Jurisdiction

The City is a public agency under MMBA section 3501(c) and PERB Regulation 32016(a). Under PERB Regulation 32016(b), DCEA is the exclusive employee organization of an appropriate unit of employees within the City.

Background

Bill Emlen (Emlen) is the City Manager and Paul Navazio (Navazio) is the Assistant City Manager and Finance Director. Melissa Chaney (Chaney) is the City's Human Resource Director and Employee Relations Officer. Dave Owen (Owen) is the DCEA President and Kenneth Akins (Akins) provides labor representation services to the DCEA.

EERR Impasse Procedures

The City's EERR provides in pertinent part:

ARTICLE III - DEFINITIONS

9. "Impasse" means a deadlock in discussions between a recognized employee organization and the Employee Relations Officer over any matters concerning which they are required to meet and confer in good faith, or over the scope of such subject matter.

ARTICLE XVII – IMPASSE PROCEDURES

1. Initiation of Impasse Procedures – Impasse procedures may be invoked only after the possibility of settlement by direct discussion has been exhausted. Any party may initiate the impasse procedures by filing with the other party or parties a written request for an impasse meeting, together with a statement of its position on all disputed issues. An impasse meeting shall then be scheduled by the Employee Relations Officer forthwith after the date of filing of the written request for such a meeting, with written notice to all parties affected. . . .

2. Impasse Procedures – Impasse procedures are as follows:

(a) If the parties so agree, the dispute shall be submitted directly to the City Council for determination.

(b) If they do not so agree within a reasonable period of time, the dispute shall be submitted to mediation. All mediation proceedings shall be private. The mediator shall make no public recommendation, nor take any public position at any time concerning the issues. If the parties are unable to agree on a mediator after a reasonable period of time, they shall select the mediator from a list of three (3) names to be provided by the State [Mediation and] Conciliation Service, or if that body for any reason shall fail to provide such a list, by the American Arbitration Association. The recognized employee organization or organizations shall first strike one name, the Employee Relations Officer shall then strike one name, and the name remaining shall be the mediator.

(c) If the parties have failed to resolve all their disputes through mediation within fifteen (15) days after the mediator commenced meeting with the parties, the parties may agree to submit the unresolved issues on which they have not expressly reached unconditional final agreement directly to the City Council. In that event the City Council shall finally determine the issues after conducting a public hearing thereon and after such further investigation of the relevant facts as it may deem appropriate.

(d) If the parties fail to agree to submit the dispute directly to the City Council, the said unresolved issues shall be submitted to fact-finding.

The parties may agree on the appointment of one or more fact-finders. If they fail to so agree, a fact-finding panel of three (3) shall be appointed in the following manner: One member of the panel shall be appointed by the Employee Relations Officer, one member shall be appointed by the recognized employee organization, and those two shall name a third who shall be the chairman. If they are unable to agree upon a third, they shall select the third member from a list of five names to be provided by the American Arbitration Association, the one to serve to be determined by the alternate striking of names with the party who is to strike the first name to be determined by chance method.

The following constitute the jurisdictional and procedural requirements for fact-finding;

- (1) Fact-finders shall not have served as mediator in the same impasse under subparagraph (b), and shall not be employees or officers of the City or members of one of the City's employee organizations.
- (2) Fact-finding is authorized hereunder in connection with all unresolved issues; i.e., issues on which they have not expressly reached unconditional final agreement, that are within the scope of representation.
- (3) The fact-finder(s) shall, to the extent, they are applicable, determine and apply the following standards to the unresolved issues in making recommendations:
 - (i) City job classifications shall be compared to comparable job classifications in private employment in the Davis labor market, and in public employment in the jurisdictions listed in . . .
 - (ii) In determining job comparability, the following factors will be considered: The nature and complexity of the duties involved; the degree of supervision received and exercised; the educational, experience and physical qualifications, and the special skills required; the physical working conditions; and the hazards inherent in the job.
 - (iii) Comparisons shall be in terms of total compensation and benefits of employment, and, to the extent feasible, shall be measured in monetary terms.
 - (iv) The comparison data as hereinabove provided for shall, to the extent feasible, be adjusted as appropriate for the benefit of job stability and continuity of employment; difficulty of recruiting qualified applicants; and equitable employment benefit relationships between job classifications in City employment.
 - (v) The financial resources and the expenditures of City government shall be considered.
- (4) The fact-finder(s) shall make written findings of fact and recommendations for the resolution of the unresolved issues, which shall be presented in terms of the standards in (3) above. The fact-finder or chairman of the fact-finding panel shall serve such findings and

recommendations on the Employee Relations Officer and the designated representative of the recognized employee organization. If these parties have not resolved the impasse within ten (10) days after service of the findings and recommendations upon them, and in no event later than ten (10) days prior to the final date set by law for fixing of the tax rate, the fact-finder or the chairman of the fact-finding panel shall make them public by submitting them to the City Clerk for consideration by the City Council in connection with the Council's legislative determination of the issues.

(Emphasis added.)

Bargaining over a Successor MOU

Approaching the 2009/2010 fiscal year, the City desired to take actions to provide short-term budgetary savings to cover a projected shortfall. Additionally, the City was interested in instituting long-term structural changes to manage its overall personnel costs. The City wanted to bargain these short and long-term changes with all of its bargaining units. Specifically, the City sought to reduce its personnel costs by five percent or approximately \$1.2 million in savings to its general fund and \$3 million in savings from all City funds, which included financial concessions from DCEA totaling approximately \$500,000 in savings. The City understood that the longer the bargaining process continued past July 1, 2009 without an agreement, it became more difficult to realize these savings during the 2009/2010 fiscal year.

The MOU between DCEA and the City expired on June 30, 2009. The negotiations for a successor MOU began April 22, 2009. Emlen, Navazio, and Chaney represented the City with Navazio as its chief spokesperson. Akins, Owen, and other DCEA officers were present on behalf of DCEA with Akins as its chief spokesperson.

Article VI of the MOU provided, in part, for a compensation study:

CITY agrees to initiate a total compensation study to be completed by March 31, 2009 for the purpose of discussing market adjustments for total compensation for benchmark

positions with the comparison agencies as agreed to below. CITY and ASSOCIATION agree to meet and confer on the components used for total compensation.

One of Chaney's subordinates was assigned to gather the data for the total compensation study. Unfortunately, she left City employment in March 2009 as her position was to be cut in July 2009. Chaney then took the data and compiled the information in May/June 2009. The information was provided to DCEA, but was never used, and was discounted by the City.

During the first three months of bargaining, the City forwarded proposals which sought concessions from DCEA including, but not limited to, furloughs, a five percent across the board reduction in pay, and a reduction/limitation to the cafeteria benefit cash-out provision.

On June 9, 2009, the City Council held a meeting which included a budget workshop to discuss the plans for the upcoming 2009/2010 proposed budget. During that workshop Councilmember Greenwald commented on the City's labor costs.⁴

⁴ Specifically, Greenwald isolated specific employee benefits which were excessive when compared to other public sector entities. She believed the City could realize significant budgetary savings from concessions in these areas and that the City could exercise control over the negotiations process by what they "offered." Greenwald pointed out that the City was not subject to interest arbitration, but did have mediation which could take up to one to one and one-half years and, if there was no agreement, the City could adopt its LBFO. Greenwald commented that going through this extended process should not deter the City as it had reserves and controlled the number of employees it employed.

DCEA argued that Greenwald's comments demonstrated the City Council's "state of mind" that it was aware that its impasse procedures could take an extended period of time to exhaust. However, Greenwald's comments do not show such awareness. She believed the mediation process took an extended period of time, but the EERR specifically states to the contrary, in that if the mediator does not resolve the matter within 15 days, it shall proceed either to the City Council or fact-finding. Greenwald's comments were primarily focused on areas of savings that could be achieved and not whether she was specifically aware of the details of the impasse procedures. Her comments are therefore deemed irrelevant and inadmissible hearsay.

During a June 2009 bargaining session, City representatives discussed the process of proceeding to impasse and implementing its proposals and that the City Council was aware of this process. Akins responded that DCEA could take actions to extend or postpone the process, such as requesting documents.

The parties met 11 times between April 22 and the end of July 2009. The City Council took its traditional break from August to September 2009 and no formal bargaining sessions were held. The parties then met five times between October 27 and November 30, 2009. On November 16, 2009, Emlen sent DCEA a letter stating that it appeared the City and DCEA were approaching impasse.

Impasse and the City's LBFO

On December 4, 2009, Emlen sent Akins a letter stating that the negotiations had reached impasse and the City requested to meet on December 8, 2009, so they could review each other's positions in an effort to reach an agreement, and if no agreement could be reached, to discuss further impasse procedures. The City included with the letter its LBFO which provided the following proposals for a one-year term agreement:

Furloughs

12 furlough days [in fiscal year] 2009/2010; all furlough days to be taken before June 30, 2010

Cafeteria Health Benefits

City to contribute to cafeteria health plan at calendar year 2010 rate for the Kaiser plan available through CalPERS for Employee +2 plan.

Cafeteria Cash-out Provision

Current Employees: Cap at CURRENT (2009) Cafeteria Benefit.

New Employees: Hired after January 1, 2010 – Cap cafeteria cash-out at \$500/month.

CalPERS Retirement []

RETAIN language from prior MOU re: employees agree to pay up to 3% increase in CalPERS employer contribution rate. (Employees pick up .453% FY 2009/2010)

Overtime

City to implement modifications to overtime provisions in current MOU to be more consistent with a 40 [hour] work week. Paid time off (sick, vacation, comp time) will not be considered time worked.

Tool Allowance

Increase tool allowance for Equipment Mechanic series from \$325.00 per year to \$500.00 per year.

Unit Determination

Upon Council approval move Lab Analyst Series to DCEA from [another bargaining unit].

CalPERS Retirement

Set election to amend CalPERS Contract effective January 1, 2011 to reflect Highest Three-Year Average PERSable compensation as [a] basis for calculating retirement benefit (instead of highest one year). Election to be held by June 30, 2009.

Retiree Medical Benefit

Implement vesting period for CURRENT employees with CalPERS vesting at [the] State contribution level.

On December 8, 2009, DCEA and the City met to discuss the impasse between them. DCEA decided to have its membership vote on the LBFO with a one-year term agreement. On December 17, 2009, DCEA unanimously rejected the City's LBFO and reported the vote to the City. Chaney then directed her subordinate, Shirley Stinnett (Stinnett), to contact the State Medication and Conciliation Service (SMCS) to schedule a mediation session on the first available date. Stinnett did so and DCEA was available on that day.

On February 2, 2010, the City and DCEA met with the State mediator. After a concession proposal by DCEA, which was rejected by the City, the mediation soon ended. The

City requested that the DCEA membership vote on the LBFO with a three-year term agreement. DCEA agreed to do so.

On February 12, 2010, the DCEA membership rejected the three-year term agreement of the LBFO and Akins notified Chaney of the results the next day in a letter, which stated in part:

This is and remains a bilateral process[,] but[] when one party announces early in the process that they will negotiate to impasse so that they can implement, the integrity of that party is called [into] question and that party has also clearly demonstrated that they never intended to bargain in good faith. I hope that the [C]ity takes the opportunity to resolve this in a harmonious manner as opposed to going down a path with twists and unknowns that may have everlasting repercussions.

(Underlining added for emphasis.)

Scheduling for Fact-finding

On February 16, 2010, Chaney suggested that both DCEA and the City bypass the fact-finding process and submit the matter to the City Council for determination. DCEA elected fact-finding.

On February 18, 2010, Akins contacted labor attorney Alan Davis in order to discuss whether he would represent DCEA at the fact-finding. Akins then spoke to Stinnett who asked him to provide her with the names of five arbitrators who were acceptable to DCEA. Akins promptly provided Stinnett with the names John Kagel (Kagel), Charles Askin (Askin), Catherine Harris, Matthew Goldberg and Bonnie Bogue. On February 23, 2010, Akins emailed Chaney suggesting that they should agree upon an arbitrator as soon as possible.

On February 28, 2010, Akins wrote Chaney that DCEA wanted to proceed to fact-finding. Akins urged Chaney to contact him at her earliest convenience so they could select an arbitrator. The City had never had a labor dispute go to arbitration before.

During the week of March 9, 2009, Owen spoke with Akins about the fact-finding process. On March 26, 2010, Owen spoke with Tim Reilly (Reilly), a financial expert from the firm of Bachecki, Crom & Co. (Bachecki & Crom) in order that he may evaluate the financial health of the City, which could be later used at the fact-finding. However, because of the quoted fee, DCEA was not able to arrive at an acceptable retainer fee for Bachecki & Crom until May 3, 2010.⁵

On March 17, 2010, Chaney instructed Stinnett to contact SMCS to get a list of arbitrators for the fact-finding. That same day, Stinnett requested a list for “expedited availability” arbitrators from SMCS. Stinnett wrote that “both sides” had agreed to meet with an arbitrator from the list. Stinnett was mailed a list of arbitrators that day, which included: Joe Henderson (Henderson), Morris Davis (Arbitrator Davis), Harold Kennedy, Philip Tamoush, Daniel Altemus, Judy Gust and James Margolin. SMCS’s letter listed Akins as an addressee, but Akins stated he never received the list.

Chaney instructed Stinnett to obtain dates from Akins’ list of arbitrators first and then determine whether the City had any objections with these arbitrators. Stinnett was directed to offer Akins the first available dates of the arbitrators acceptable to the City.

On March 18, 2010, Stinnett emailed Akins to provide him with the contact information of the five arbitrators he provided. Akins did so by the next day.

On March 19, 2010, Stinnett sent emails to Arbitrators Askin and Kagel inquiring as to their availability. Askin was not available in May, had a few dates available in June, but was

⁵ Although DCEA had finally agreed upon a fee with Bachecki & Crom, they never had the agreement approved by the DCEA membership as the City implemented its LBFO on May 25, 2010. Akins stated that Reilly would not begin preparing for the fact-finding until Reilly knew the fact-finding date(s). Reilly never sent a request for financial records to the City.

available in July and August. Kagel asked Stinnett and Akins how many days of fact-finding were needed. Stinnett estimated two days and Akins estimated four to five days. Akins added that DCEA had not yet spoken with legal counsel as to the amount of days needed and DCEA retained Bachecki & Crom as experts to conduct an examination of the financial health of the City.

Because the arbitrators on Akins' list were not available until later, Chaney wanted Stinnett to inquire as to the availability of the SMCS list of arbitrators to determine if they had an earlier availability.

On March 24, 2010, Stinnett emailed Arbitrator Davis, as to his availability for a three-day fact-finding over the next 30 to 45 days. Arbitrator Davis did not have any availability during that time period.

On March 24, 2010, Stinnett emailed Henderson as to his availability for a three-day fact-finding within the next 30 to 45 days. Henderson responded that he was available April 27, 28 and 29; May 11, 12 and 13; and May 25, 26 and 27, 2010. On March 24, 2010, Stinnett emailed Henderson's résumé to Akins, specified that Henderson was available April 27, 28 and 29, 2010, and inquired whether those dates were acceptable with DCEA. Akins responded that Henderson was acceptable, but the dates were not acceptable as he couldn't put the case together that quickly and it was too close to his International Brotherhood of Electrical Workers (IBEW) interest arbitration against the City of Vallejo. He did not provide any alternative dates.⁶

⁶ Although Akins did not provide any dates, it was uncontradicted that both Akins and Alan Davis were involved in interest arbitration proceedings representing International Association of Firefighters (IAFF) Local 1186 against the City of Vallejo in January and February 2010 and representing IBEW against the City of Vallejo in May and June 2010.

On April 1, 2010, Stinnett requested Henderson to reserve his next available dates, May 11, 12 and 13, 2010, without consulting DCEA as to its availability, and requested that Henderson forward a contract for her review. Henderson responded with a number of questions as to the type of proceeding he was to conduct and inquired as to some of the details of the dispute. On April 7, 2010, Henderson confirmed that he had reserved May 11, 12 and 13, 2010 for the fact-finding.

On April 9, 2010, Stinnett emailed Henderson explaining the type of proceeding and dispute he was to preside over. Stinnett admitted:

The City has not had to exercise this section of the Resolution within the memory of anyone still here, so we'll all have to muddle through it together.

On April 12, 2010, Chaney wrote Akins that the City retained Henderson to conduct the fact-finding and he was available on May 11, 12 and 13, 2010. Chaney stated that further dates could be added, if necessary, and they could discuss this with Henderson on these dates. Attached to the letter was an "Agreement for Fact-Finders Services" which included the following provisions:

2-Fact-Finding

The Fact-Finding shall be conducted in accordance with Resolution 1303, Article XVII, (d) provisions.

The Disputing Parties agree to submit a list of "unresolved issues" on the opening of first day of the Fact-Finding. The parties agree that the Fact-Finding shall be held on May 11, 12 & 13, 2010 and continuing on mutually agreed dates until the parties have submitted their positions, data and arguments to the Fact-Finder. If the Disputing Parties cannot agree upon continuation dates HENDERSON shall have the authority to set meeting or Hearing dates with 3 working days notice.

4-Terms of Joe H. Henderson Services:

A. Joe H. Henderson[']s authority to conduct these Fact-Finding proceeding[s] shall be exclusive and complete.

B. Standards [o]f Fact[-]Finding Report [a]nd Fact-Finders Decisions. In deciding any issue, Henderson shall apply the same standards of decision that a judge would apply if the same case were to have arisen in a court of competent jurisdiction.

(Underlining added for emphasis.)

Akins left a voice-mail with Chaney informing her that the proposed dates were not acceptable as they conflicted with the actual days he was involved in an interest arbitration with the City of Vallejo. He did not mention any other dates that he was available.

On April 20, 2010, Akins responded to Chaney's letter scheduling Henderson for fact-finding dates and that the dates were not acceptable. Akins did not object to Henderson as an arbitrator, but objected to the City unilaterally scheduling the fact-finding without input from DCEA or giving them the opportunity to check the schedules of its attorney and expert. Akins asked Chaney to contact him at her earliest convenience so that they could discuss scheduling in an orderly manner.

On April 22, 2010, Stinnett notified Henderson that the City would not be able to hold the fact-finding on May 11, 12 and 13, 2011, and asked if he was available in June.⁷ Henderson responded that he was available June 9, 10 and 11; June 21, 22, 23 and 24; July 19 and 20; and July 26 and 27, 2010.

On April 23, 2010, Chaney responded to Akins explaining that she scheduled the May 11 through 13, 2010 dates as it gave ample time for DCEA to prepare. Chaney implied that DCEA was stalling. Chaney asked Akins to provide all dates which DCEA was available

⁷ The City paid Henderson's cancellation fee.

to conduct the fact-finding within the next 30 to 40 days. After receiving DCEA's dates, Chaney would contact Henderson to schedule the fact-finding. Akins did not provide the dates as he wanted to know the dates the arbitrator was available first. Akins blamed Chaney for not contacting him so they could jointly call the arbitrator with all the schedules of the representatives/witnesses needed and agreeing upon fact-finding dates.

On April 23, 2010, Owen and Akins had lunch with attorney Alan Davis. Owen decided to retain Alan Davis to represent DCEA for the fact-finding. The DCEA Executive Board ratified the hiring of Alan Davis within a few days of this meeting.

On April 28, 2010, Akins sent a response to Chaney protesting how the City was proceeding unilaterally on the selection and scheduling of the fact-finding since Chaney requested a SMCS list of arbitrators, picked one of the arbitrators off the list, and then proceeded to get available dates from the arbitrator. While Akins again stated that Henderson was an acceptable arbitrator, he suggested that the City and DCEA should jointly contact the arbitrator with their calendars ready and select dates which were mutually available. Akins notified Chaney that DCEA retained Alan Davis to represent them and that all future contacts should be made through him.

Chaney stated that the City had never scheduled an arbitration before and was following the same procedure it followed when the City wanted to schedule a hearing with Akins before the Davis Personnel Board (DPB). Stinnett knew the dates when the DPB met and would call Akins and offer him the soonest dates they had available and Akins would cooperate by informing her as to his availability or lack of availability until they finally agreed upon a hearing date.

On April 29, 2010, Stacey Sheston (Sheston), Esq. of McDonough, Holland & Allen wrote Alan Davis and asked DCEA for available dates within the next 30 to 45 days.

On May 3, 2010, Alan Davis wrote Chaney asking that they jointly contact Henderson regarding dates which they were mutually available. Alan Davis asked that Chaney and Sheston be available to discuss the number of issues which needed to be addressed so they could discuss the number of days of fact-finding needed. On May 4, 2010, Alan Davis wrote Sheston, asking that she call him so that they can discuss the number of issues involved, the length of testimony, location of the fact-finding, and arrangements for a court reporter.

On May 10, 2010, Sheston wrote Alan Davis stating in part:

The impasse rules are pretty sparse regarding procedures for this non-binding “fact-finding” arbitration. I don’t foresee this being a formal, witness Q&A type of arbitration, but rather an informal presentation made directly by the parties to the arbitrator. The City’s presentation should take about a half a day. The “number of issues,” as you described it, is pretty small—here are the City’s financial situation and fiscal policy directions from the City Council, and here are the parties’ respective bargaining positions as of impasse. Ken Akin[s] told City staff he estimated two days would be needed. I think one day would do it, but am willing to schedule two. The days need not be consecutive. My understanding is that, as of a couple weeks ago, the arbitrator had June 22, 23, 24 and July 19 and 20 available. These are all agreeable for me as well. . . . We do not anticipate using a court reporter.

(Underlining added for emphasis.)

On May 11, 2010, Alan Davis’ assistant, Grania Sherr (Sherr), emailed Sheston in response to the May 10, 2010 letter. She relayed that Alan Davis was in another arbitration hearing for the next 10 days, that Alan Davis was unavailable for the June dates and she had put a “hold” on the July dates until she confirmed Alan Davis’ availability.

On May 13, 2010, Akins responded to Sheston. Akins stated that both Alan Davis and he were previously scheduled for an interest arbitration case regarding the City of Vallejo on May 10, 11, 12, 13, 14, 17, 18, and 19, and June 17, 18, 28, 29, and 30, 2010. Akins contended that a formal hearing process was consistent with his experience based upon the 25

to 30 fact-findings and interest arbitrations that he was involved in.⁸ Akins concluded the letter by stating:

The June dates suggested in your correspondence don't work with us, as there are conflicts with respect to other issues. However, the July dates do work. Nevertheless, as mentioned above, we believe that those dates are insufficient, and that we need to develop additional dates with respect to the arbitrator. This should be done jointly. You also indicated that you did not anticipate using a court reporter. Again, we believe that [a] court reporter is necessary, especially in the event of written post hearing briefs. Additionally, we believe a certified copy of testimony is an important and valuable component of this process.

If you disagree with our position, with respect to the hearing process, I suggest that you contact Mr. Davis after the 19th of May, so that you and he may have a joint conversation with the arbitrator in order to resolve any [prehearing] disputes or differences.

(Underlining added for emphasis.)

On May 14, 2010, Sheston responded by stating:

We are nowhere close to agreement even to concept regarding the City's fact-finding arbitration process. None of the formalities you described, while they may be typical in other fact-finding contexts under other labor laws or contracts, are required under the Meyers-Milias-Brown Act or the City of Davis process. It is apparent from the way events have unfolded that DCEA's entire purpose has been to delay and avoid any changes to their current contract, now by attempting to make the impasse resolution process unnecessarily complicated, expensive, and time-consuming. It cannot continue.

The City's position is that DCEA has, by its conduct, failed to participate in good faith toward impasse resolution and

⁸ Akins has been involved in numerous interest arbitration and fact-finding hearings over the last 17 years. The shortest hearing was three days and many went over 20 days. His experience with the fact-finding process was similar to the process of a formal administrative hearing, which involved examination of witnesses, a court reporter, and post-hearing briefs. When scheduling an arbitrator for these hearings, it usually took at least two to three months to get hearing dates and many times much longer.

effectively rejected fact-finding arbitration. For that reason, staff intends to go to the alternative step and promptly submit the matter to the City Council for final resolution. Staff is targeting the Council meeting of May 25, at which we expect the City Council will consider imposition of the City's last, best and final offer.

(Underlining added for emphasis.)

On May 21, 2010, Alan Davis replied to Sheston's letter by stating that the City's imposition of its LBFO would violate the City's EERR and the City must exhaust impasse procedures before implementation. Alan Davis faulted the City for taking control of the fact-finding scheduling process by unilaterally requesting a SMCS list of arbitrators, selecting an arbitrator from that list, scheduling dates with that arbitrator without consulting DCEA, and setting the procedure for the fact-finding rather than the parties presenting their respective views as to the manner of presentation before the arbitrator for decision. Alan Davis expressed DCEA's commitment to proceeding with the fact-finding pursuant to the City's EERR.

Emlen, Navazio, and Chaney prepared a "Staff Report," dated May 25, 2010 to the City Council recommending the City impose its LBFO on DCEA. The Staff Report stated in pertinent part:

Fiscal Impact

The provisions of the City's "last, best, final" contract proposal would yield budgetary all-funds savings of \$507,000 and General Fund savings of \$203,000 in the current fiscal year. This represents a savings of 4.52% compared to the FY2009/2010 cost of the existing DCEA Memorandum of Understanding, and a savings of 3.34% in comparison to the prior year cost for this contract.

Actual savings realized in the current fiscal year may be reduced, based upon the effective date of implementing the terms of employment, and the City's ability to recover costs already incurred. However, the City expects to achieve full savings, whether entirely in the current fiscal year, or over a period extending into FY2010/2011.

Background and Analysis

Since the mediation in February, City staff has been trying to schedule a fact-finding arbitration as per the City's Employer/Employee Relations Ordinance 1303. Despite repeated open-ended inquiries, as well as proposal of specific dates from the City, DCEA refused until May 13, 2010 to even give the City any dates.^[9] There remains major disagreement between the two sides about what the fact-finding should entail. Given that it is not binding, the City proposed a streamlined, relatively informal process whereby direct presentations could be made to the arbitrator (rather than by hearing-style witness testimony) over the course of two days. DCEA recently insisted the process will take at least four to five days of formal arbitration proceedings, complete with expensive litigation accoutrements like a court reporter.

The City has made three months of good faith efforts to comply with the final step of impasse resolution procedures in the Employee/Employer Relations Ordinance 1303 without success, and staff believes the prerequisites to unilateral implementation set forth in section 3505.4 have been met.

On May 25, 2010, the City Council convened to consider proposed Resolution No. 10-070: the City's imposition of its LBFO on DCEA. According to the official minutes of the May 25, 2010 City Council Meeting, City Attorney Harriet Steiner (Steiner) stated:

The [C]ity has a set of rules on the process to follow after impasse. The [C]ity and DCEA bargaining group have met with a mediator without success. The next step is to come to City Council or go to fact[-]finding arbitration; Council may impose a last, best final offer on [a] unilateral basis if it believes that further process is unavailing. Staff recommendation is to impose a last, best final offer as rules to apply to DCEA. . . .

⁹ The Staff Report failed to mention to the City Council that the City and DCEA had agreed to the fact-finding dates of July 19 and 20, 2011 and that on April 12, 2010, City representatives had offered DCEA three fact-finding dates and that further fact-finding dates could be added after discussion with Henderson. Indeed, the proposed agreement with Henderson stated the fact-finding would be three days "and continuing on mutually agreed dates until the parties have submitted their positions." The proposed agreement also gave the arbitrator the authority to schedule the dates after the first three days of fact-finding." These critical facts were omitted from the Staff Report to the City Council.

City Attorney Steiner stated the [C]ity feels strongly that it conducted good faith negotiations throughout the entire process and now is the time to start implementation of the last, best final offer.

(Underlining added for emphasis.)

Akins also addressed the Council that the City had an obligation to follow the MMBA and their own local rules by completing fact-finding before imposition of its LBFO.

The proposed resolution stated that all furlough days were to be taken before June 30, 2010. The City Council modified the proposed resolution that the furlough days be taken before November 1, 2010. The City Council unanimously passed and adopted the modified proposed resolution.

The City was not able to realize its projected \$500,000 in savings for fiscal year 2009/2010, but spent funds beyond which it had budgeted. The City has a 15% reserve in its budget, which was approximately \$5.2 million in 2009/2010. The City did not declare a fiscal emergency during this year.

ISSUES

1) Was the City's May 25, 2010 resolution implementing terms of its LBFO without exhausting fact-finding in violation of the MMBA, PERB Regulations and the City's local rules?

2) Was the May 25, 2010 resolution implementing terms of its furlough plan reasonably contemplated within its December 4, 2009 LBFO?

CONCLUSIONS OF LAW

MMBA section 3505, 3505.4, 3507 and 3509(b) provide in pertinent part:

3505. The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and

other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

“Meet and confer in good faith” means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

3505.4. If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

3507. (a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter. The rules and regulations may include provisions for all of the following:

(5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.

3509. (b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to

Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. . . . The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

PERB Regulation 32603(a), (b), (c), and (g) provide:

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

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

(Underlining added for emphasis.)

Failure or Refusal to Exhaust Fact-Finding

The EERR is silent as to the period of time in which the fact-finding must be held and to the manner of presentation (formal or informal) in which the fact-finding is to be conducted. The only description provided by the MMBA is that “adequate time” must be provided for the resolution of impasses. (MMBA section 3505.4.) The EERR is also silent about the City’s ability to unilaterally cancel a fact-finding and implement its LBFO.

DCEA was cooperative with the City in timely attending an impasse meeting and scheduled mediation. Indeed, DCEA attended the first available mediation date scheduled by the City. DCEA was also timely and cooperative in providing a list of fact-finding arbitrators as well as the contact information of such arbitrators. Akins additionally encouraged Chaney that they select an arbitrator as soon as possible.

While Akins thought the parties would agree upon an arbitrator first and then schedule the fact-finding date when it was acceptable to all representatives and witnesses, Chaney sought to find an acceptable arbitrator with the earliest availability. Unfortunately, this became more problematic than expeditious as Chaney or Stinnett would offer only the soonest of the possible dates to Akins and he would refuse based either upon the hearing being scheduled too quickly as on April 27, 28 and 29, 2010, or that there was an actual conflict as on May 11, 12 and 13, 2010, when both Akins and Alan Davis were previously scheduled for interest arbitration proceedings with the City of Vallejo on May 10, 11, 12, 13, 14, 17, 18 and 19, and June 17, 18, 28, 29 and 30, 2010. While Akins did not provide any alternative dates, he did so because he wanted to know Henderson's availability first.

Not until May 10, 2010, when Sheston became involved representing the City, did the City offer a number of dates in both June and July, including July 19 and 20, 2010, which Sheston represented as acceptable to the City. DCEA agreed to the scheduling of a fact-finding on July 19 and 20, 2010.¹⁰ The only real disagreement left was the manner in which

¹⁰ While the City contends that DCEA was dilatory in pursuing the scheduling of the fact-finding before the parties agreed to the July 19 and 20, 2010 dates, once the City agreed to the dates, it could not then cancel the hearing after-the-fact for dilatoriness when it had alternatives available to it (as will be discussed later in the proposed decision). Additionally, it should be noted that before the parties had agreed to July 19 and 20, 2010 dates, the City offered three fact-finding dates with the option of discussing further dates with Henderson, and the proposed agreement with the arbitrator provided him with exclusive and complete authority over conducting the proceeding and scheduling further hearing dates.

the evidence was to be presented to Henderson: in a formal hearing process or an informal hearing process.¹¹ While the parties disagreed as to the manner of presentation to the arbitrator, the City had available two less severe options than canceling the fact-finding. The City could have submitted the matter to the arbitrator as it was within the arbitrator's authority as to how the fact-finding was to be conducted (*John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964); *Elkouri & Elkouri, How Arbitration Works*, 293-294, Alan Miles Ruben ed., (6th ed. 2003)), or the City could have dictated that the hearing be conducted in an informal manner in a two-day fact-finding. Regarding this second option, if DCEA did not want to appear on July 19 and 20 dates for an informal fact-finding, then the fact-finding procedure would be arguably exhausted by their non-appearance.¹² Rather than exercising either of these two options, the City engaged in the harsh "self-help" remedy of canceling the July 19 and 20, 2011 fact-finding dates as DCEA did not "agree" with it as to the manner in which the hearing was to be conducted. Nothing in the EERR authorized the City to cancel the fact-finding at that point. The City therefore denied DCEA's right per the EERR to participate in any fact-finding proceedings and the post-fact-finding opportunities to resolve their outstanding negotiation issues with the City.

Although not addressed in the City's post-hearing brief, the City asserted in its answer that it had a business necessity for passing its resolution implementing its LBFO, especially in light of its projected shortfall. (*Calexico Unified School District* (1983) PERB Decision

¹¹ While DCEA had estimated four to five days of hearing, the dispute about the length of the hearing primarily concerned whether the fact-finding would be conducted in a formal evidentiary manner or an informal manner.

¹² It is understood that if the City exercised this second option, DCEA still could have challenged the City as violating its EERR, but at least DCEA would have had the opportunity to participate in some manner of a fact-finding.

No. 357 (*Calexico*.) To qualify for this defense, the City's unilateral action must be taken as the "unavoidable result of some sudden change of circumstances" and the "emergency" must be "actual" which "leaves no real alternative to the action taken and allows no time for meaningful negotiations." (*Id.* at pp. 20 and 22.) Such a defense is not often accepted without a specific and actual showing of an emergency, as demonstrated in *San Francisco Community College District* (1979) PERB Decision No. 105, when the employer was faced with tax revenue changes caused by Proposition 13. The Board stated:

Even when a District is in fact confronted by an economic reversal of unknown proportions, it may not take unilateral actions on matters within the scope of representation, but must bring its concerns about these matters to the negotiating table.

(*San Francisco Community College*, pp. 10 and 11.)

In this case, the City did not declare a fiscal emergency and the City had reserves sufficient to face its projected shortfall with DCEA. These facts do not rise to the level of an actual emergency, especially in light of PERB decisions.¹³ Moreover, as already discussed above, the City had readily available alternatives to the unilateral action at the point the parties disagreed as to the manner of presentation to the arbitrator. This defense must be rejected.

¹³ No business/operational necessity found: employer unilaterally imposed a freeze of step and salary increases as the employer wanted to present a balanced budget to its governing board when the employer had been aware of the serious financial condition well before that date (*Calexico, supra*, PERB Decision No. 357); unilateral reduction in health benefit plan contributions due to serious financial shortfalls which the employer had known previously and did not show that the budget required it to implement the reduction to balance the shortfall (*Compton Community College District* (1989) PERB Decision No. 720); unilaterally replacing health insurance plan due to its high expense when several other options were available to the employer, even if the options were not desirable (*Oakland Unified School District* (1994) PERB Decision No. 1045, adoption of ALJ's decision); and unilaterally hiring cardiovascular technicians to perform bargaining unit work of nurses in hospital not shown to be justified by the unanticipated earthquake destruction to the other hospitals because the cardiovascular technicians continued to be used after the impact of the earthquake had subsided (*The Regents of the University of California* (1998) PERB Decision No. 1255-H).

The City's canceling of the fact-finding dates and implementing of its LBFO on May 25, 2010 therefore constituted an unlawful implementation of its LBFO before exhausting impasse procedures in violation of MMBA section 3503, 3505, 3506 and 3509(b), PERB Regulations 32603(a), (b), (c), and (g), and EERR Article XVII.

Changes Reasonably Comprehended within LBFO

In *County of Sonoma* (2010) PERB Decision No. 2100-M (*Sonoma*), the Board summarized its precedent regarding implementing changes after impasse resolution procedures have been exhausted when it stated:

Once impasse has been reached and the parties have completed statutory impasse resolution procedures, the employer may thereafter implement changes reasonably contemplated within its last, best and final offer. (*Rowland [Unified School District]* (1994) PERB Decision No. 1053]; *Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*); *Charter Oak Unified School District* (1991) PERB Decision No. 873 (*Charter Oak*)). “The employer need not implement changes *absolutely identical* with its last offer on a given issue. However, the unilateral adoptions must be reasonably comprehended within the preimpasse proposals.” (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900 [citations omitted; emphasis in original].) Thus, PERB has stated, “matters reasonably comprehended within pre-impasse negotiations include neither proposals better than the last best offer nor proposals less than the status quo which were not previously discussed at the table.” (*Modesto*.) PERB will not, however, dissect a package proposal to “separately compare each provision of the package to prior proposals concerning that provision.” (*Charter Oak*.)

(Emphasis included in quotation.)

The remaining question is whether the City's implementation of the furlough plan was “reasonably comprehended” within its pre-impasse proposals. The December 4, 2009 LBFO included a furlough plan which called for the employees to take 12 furlough days in fiscal year 2009/2010 and that all furlough days were to be completed by June 30, 2010. The furlough plan passed by City Council resolution on May 25, 2010 also called for employees to take

12 furlough days, but instead by November 1, 2010. Both plans called for 12 furlough days. The difference between the plans was the span of time in which the furloughs were to be completed: the LBFO gave almost seven months and the resolution provided slightly over five months. The span of time in the resolution is not a “significant departure” from the span of time in the LBFO. (*Sonoma, supra*, PERB Decision No. 2100-M, p. 14.) Accordingly, DCEA failed to establish a violation of MMBA or PERB Regulation as to the change in proposals.

REMEDY

Government Code section 3541.5(c), incorporated within MMBA sections 3509(a) and (b),¹⁴ authorizes PERB:

to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It has been found that the City violated MMBA sections 3503, 3505, 3506, and 3509(b) and PERB Regulation 32603(a), (b), (c), and (g) when it passed Resolution 10-070 on May 25, 2010, before exhausting the fact-finding process set forth in its local rules. It is therefore appropriate to order the City to cease and desist from such activities in the future. Additionally, if the City wants to proceed through its impasse procedures, it must provide adequate time to complete the fact-finding process as set forth in its local rules.

In cases of unlawful unilateral action, PERB generally orders employers to rescind its unilateral action and restore the status quo ante as it existed prior to the violation. (*County of*

¹⁴ Section 3509(a) provides that the powers and duties of PERB described in Government Code section 3541.3 shall also apply to the MMBA. Section 3509(b) describes the unfair practice jurisdiction of PERB. Government Code section 3541.3(i) empowers PERB to investigate unfair practice charges, and to take any action and make determinations as PERB deems necessary to effectuate the policies of this chapter.

Sacramento (2008) PERB Decision No. 1943-M and *Santa Clara Unified School District* (1979) PERB Decision No. 104.) It is therefore appropriate to order the City to rescind Resolution 10-070 and reinstate the terms and conditions of employment prior to the passing of the May 25, 2010 resolution. (*Desert Sands Unified School District* (2004) PERB Decision No. 1682.) It is also appropriate, that the City be ordered to make bargaining unit employees whole for any losses they may have suffered due to the City's unlawful unilateral action, along with interest at the rate of 7 percent per annum until such time as they are restored to their former position prior to May 25, 2010. (*Mount San Antonio Community College District* (1988) PERB Decision No. 691.)

As a result of the above-described violation, the City has also interfered with the rights of employees to be represented by DCEA in violation of MMBA section 3506, and PERB Regulation 32603(a), and denied DCEA its right to represent employees in their employment relations with a public agency in violation of MMBA section 3503 and PERB Regulation 32603(b). It is appropriate to order the City to cease and desist from such unlawful conduct. (*Rio Hondo Community College District* (1983) PERB Decision No. 292.)

It is also appropriate that the City be ordered to post a notice incorporating the terms of the order at all locations in the City where notices to public employees are customarily posted for employees represented by DCEA. Posting such a notice, signed by the authorized agent of the City, will provide employees with notice that the City has acted in an unlawful manner, is being required to cease and desist from such activity, and will comply with the order. It effectuates the purposes of the MMBA that employees be informed of the resolution of this controversy and the City's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the City of Davis (City) violated the Meyers-Milias-Brown Act (MMBA or Act), Government Code sections 3503, 3505, 3506, and 3509(b) and Public Employment Relations Board (PERB) Regulation 32603(a), (b), (c), and (g) (Cal. Code Regs., tit. 8, sec. 31001 et seq.), by implementing its last, best and final offer (LBFO) upon the Davis City Employees Association (DCEA) without exhausting fact-finding as required by the local rules. All other allegations are dismissed.

Pursuant to section 3509, subdivision (b) of the Government Code, it is hereby ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to proceed with the fact-finding process in its local rules.
2. Denying DCEA its right to represent bargaining unit members in their employment relations with the City.
3. Interfering with the right of bargaining unit members to be represented by their chosen representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Rescind City of Davis City Council Resolution 10-070, dated May 25, 2010 and restore terms and conditions of employment prior to the passing of the May 25, 2010 resolution.
2. Unless otherwise agreed to by the City and DCEA, contact DCEA to schedule a fact-finding and complete the fact-finding process in compliance with the City's

local rules, allowing for adequate time to complete the fact-finding process.

3. Make all affected employees whole for any loss of wages or benefits due to the City's violation of the MMBA, including interest at 7 percent per annum.

4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the City are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on DCEA.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. 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

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

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 California Code of Regulations, title 8, section 32135, subdivision (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.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Shawn P. Cloughesy
Chief Administrative Law Judge