STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS LOCAL 39, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Charging Party, v. CITY OF LINCOLN, Respondent.	Case No. SA-CE-756-M PERB Decision No. 2284-M September 6, 2012

Appearances: Weinberg, Roger & Rosenfeld by Gary P. Provencher, Attorney, for Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO; Best, Best & Krieger by Stacey N. Sheston, Attorney, for City of Lincoln.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (Local 39) to the proposed decision (attached) of a PERB administrative law judge (ALJ) dismissing a complaint and underlying unfair practice charge. The complaint and charge alleged that the City of Lincoln (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to consider, conduct a vote, or take any other action related to a tentative agreement entered into between Local 39 and the City's negotiator and ratified by the Local 39 membership, thereby violating its duty to meet and confer in good faith. The ALJ determined that the evidence failed to establish a violation of the MMBA and dismissed the complaint and underlying charge. Local 39 excepts to that determination.

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

The Board has reviewed the proposed decision and the record in light of Local 39's exceptions, the City's response, and the relevant law. Based on this review, we find the ALJ's proposed decision to be well-reasoned, adequately supported by the record, and in accordance with applicable law. Accordingly, the Board adopts the ALJ's proposed decision as the decision of the Board itself, supplemented by the discussion below of Local 39's exceptions.[2]

FACTUAL SUMMARY[3]

The City and Local 39 were parties to a memorandum of understanding (MOU) that expired on June 30, 2011. On June 29, the bargaining teams reached a tentative agreement that was presented to the Local 39 membership for ratification. On July 14, 2011, the Local 39 membership voted to reject the tentative agreement. On August 4, 2011, the Local 39 membership rejected a second tentative agreement reached by the bargaining teams. On August 10, 2011, the City declared that the parties were at impasse and presented its last, best, and final offer (LBFO). Subsequently, the City notified Local 39 that the LBFO would be presented to the City Council for consideration.[4]

On September 7, 2011, Local 39 notified the City that its membership had authorized a strike.

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[2] The Board declines to adopt footnote 4 of the proposed decision. The issue there discussed, viz., the duty of negotiators to support tentative agreements in the ratification process, was raised for the first time in Local 39's post-hearing brief and properly deemed an unalleged violation. (Fresno County Superior Court (2008) PERB Decision No. 1942-C.) Moreover, since neither party excepted to it, the issue is not properly before the Board. (PERB Reg. 32300(c) [An exception not specifically urged shall be waived].) Thus, we express no opinion thereon. (PERB regs. are codified at Cal. Code of Regs., tit. 8, sec. 31001 et seq.)

[3] The Board adopts the findings of fact set forth in the attached ALJ's proposed decision.

[4] Although originally scheduled for presentation on August 23, 2011, the LBFO was not presented to the City Council until September 13, 2011, due to a City emergency that required cancellation of the August 23, 2011 meeting.

On September 13, 2011, the City Council voted to impose the LBFO, effective October 2, 2011. The employees went on strike on September 14, 2011.

The parties continued to meet and negotiate. On September 19, 2011, the bargaining teams reached agreement on a third tentative agreement. On September 20, 2011, the Local 39 membership ratified the tentative agreement.

The City placed the third tentative agreement on the agenda for the City Council's meeting on September 27, 2011. The agenda language recommended that the City Council consider authorizing the City Manager to enter into a new MOU with Local 39 based upon the parties' recent negotiations. According to the City's representative, the use of the term "authorize" instead of "approve" was intentional, as staff was not confident that the City Council would approve the tentative agreement.

After meeting in closed session on September 27, 2011, the City Council discussed the tentative agreement in open session. All five City Council members commented on the agreement. One Council member stated that, while there was some good work or good effort done, there was still more work to be done. The City Council members directed staff to continue to work with Local 39 to come to a comprehensive agreement that they could agree to. The City Council did not take a formal vote to approve or disapprove the tentative agreement.

The City continued to offer to meet and confer with Local 39 in an effort to reach a comprehensive agreement, but no further bargaining sessions were held.

THE ALJ'S PROPOSED DECISION

The ALJ determined that the City Council members' words and specific directions to staff to continue to work with Local 39 on agreement were sufficient to demonstrate the City Council's rejection of the tentative agreement. Accordingly, the ALJ concluded that the

evidence did not establish that the City failed to meet and confer in good faith when it failed to take a formal vote on the tentative agreement.

LOCAL 39'S EXCEPTIONS

Local 39 excepts to the following determinations by the ALJ:

1. The ALJ erred in its statement of Local 39's position. Local 39 asserts that it did not merely contend that the City had an obligation to formally vote on the tentative agreement, but instead that it argued that the City Council was obligated to take some type of formal action or provide a specific directive to the parties regarding the tentative agreement.

2. Local 39 contends that the ALJ erred in relying on *Beverly Hills Firemen's Association v. City of Beverly Hills* (1981) 119 Cal.App.3d 620 (*Beverly Hills*), and that the facts of that case are distinguishable from those of the present case.

DISCUSSION

MMBA Section 3505.1 provides:

> If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination.

Local 39 contends that the City failed to make a "determination" required by section 3505.1. According to Local 39, such a determination requires that the City "authoritatively decide whether or not to accept the agreement." To do so, Local 39 contends, required the City to either take formal action on the tentative agreement or give specific instructions as to the deficiencies of the tentative agreement. According to Local 39, the City Council's failure to take formal action and its instruction to its negotiators to keep negotiating failed to comply with the requirements of MMBA section 3505.1.

We agree with the ALJ that the evidence failed to establish a violation of MMBA section 3505.1. We further find that the ALJ relied correctly on *Beverly Hills* in interpreting section 3505.1. In *Beverly Hills*, the court stated:

> The response called for by such a presentation is a determination either that the MOU is approved and shall be effective or that it is not approved, in which event further negotiations to reach an acceptable agreement are in order.

(*Beverly Hills* at p. 628; emphasis added.)

In making such a determination, "[t]he statute does not require the use of any specific words to express the council's ratification." (*Ibid.*) Therefore, the court concluded, a resolution directing the city to "carry out" an agreement was an appropriate manner in which to express approval of the agreement, despite the lack of a specific vote to approve the agreement (*Ibid.*)

Local 39 argues that *Beverly Hills* is distinguishable from this case because, in that case, the city council issued a formal resolution directing the actions of the city, while in this case no formal directive of any kind was issued. We agree with the ALJ that the comments of the City Council members that the tentative agreement did not go far enough and that they had directed staff to continue negotiating to reach a comprehensive agreement the City Council could approve satisfied the requirements of MMBA section 3505.1 in conveying the City Council's determination not to approve the tentative agreement. Consistent with the language emphasized above, the record indicates that each of the City Council members expressed the opinion that further negotiations to reach an acceptable agreement were in order, thereby signifying their disapproval of the tentative agreement presented.

Local 39 further contends that the City Council was obligated to do more than simply indicate its approval or disapproval of the agreement, and that it was required to provide some "specific directive" or "guidance" to Local 39 regarding what needed to be done to make the

tentative agreement acceptable to the City Council. We find no such requirement in section 3505.1 or any other provision of the MMBA. Had the City Council simply voted to reject the tentative agreement, it would not have needed to provide any reasons or directive. Accordingly, we reject the argument that more was required in this instance.[5]

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-756-M are hereby DISMISSED.

Chair Martinez and Member Huguenin joined in this Decision.

[5] We further reject Local 39's argument that the ALJ misconstrued its position. In any event, we have addressed its argument that the conduct required by MMBA section 3501.1 encompassed more than just voting on the tentative agreement.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS LOCAL 39, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Charging Party, v. CITY OF LINCOLN, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-756-M PROPOSED DECISION (June 7, 2012)

Appearances: Weinberg Roger & Rosenfeld by Gary P. Provencher, Attorney, for Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO; Best Best & Krieger by Stacey N. Sheston, Attorney, for City of Lincoln.

Before Robin W. Wesley, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges that an employer breached its duty to bargain in good faith when the governing body failed to take a vote on a tentative agreement for a successor contract. The employer denies committing any unfair practices.

On October 5, 2011, the Charging Party, Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (Local 39), filed an unfair practice charge against the City of Lincoln (City). The City submitted a position statement in response to the charge on October 24, 2011.

On November 22, 2011, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint that alleged the City failed to meet and confer in good faith when the governing body failed or refused to consider a tentative agreement, conduct a vote, or take any other action. By this conduct, the City is alleged to

have violated the Meyers-Milias-Brown Act (MMBA),[1] sections 3503, 3505, 3506 and 3509(b), and PERB Regulation 32603(a), (b) and (c).[2]

The City answered the complaint on December 13, 2011, denying any violation of the MMBA and asserting affirmative defenses.

The parties participated in a settlement conference conducted by a Board agent on January 5, 2012, but the matter was not resolved.

A formal hearing was held in Sacramento on March 15, 2012. Following the filing of briefs, the case was submitted for decision on May 14, 2012.

FINDINGS OF FACT

The City is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a). Local 39 is an exclusive representative within the meaning of PERB Regulation 32016(b) of the employees in the City's Classified Employees Bargaining Unit.

James Britton (Britton) is employed by Local 39 as a Business Representative and served as Local 39's Chief Negotiator. Joan Bryant (Bryant) is the Local 39 Director of Public Employees. Jim Estep (Estep) is the City Manager and Larry Menth (Menth) served as the City's Chief Negotiator.

Local 39 and the City are parties to a memorandum of understanding (MOU) and an addendum that expired on June 30, 2011.[3] In or about May, Local 39 and the City initiated negotiations for a successor agreement. The parties' ground rules required all bargaining

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

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

[3] Hereafter, all dates are in 2011, unless otherwise noted.

sessions to be held at City Hall. The parties held approximately ten bargaining sessions between May 17 and September 19.

On June 29, the bargaining teams reached a tentative agreement for a new MOU. The Local 39 membership considered the tentative agreement, but voted to reject it on July 14.

Local 39 and the City resumed negotiations and met on August 1. The parties reached a second tentative agreement. Local 39 held a ratification vote on August 4, but the membership again rejected the tentative agreement.

On August 10, the City declared the parties were at impasse and gave Local 39 the City's last, best, and final offer (LBFO).

In an August 19 letter to Britton, Estep confirmed the parties were at impasse. Estep notified Local 39 that the LBFO would be presented to the City Council for consideration on August 23. Ultimately, the City Council did not meet on August 23, after a railroad propane tank car emergency caused the evacuation of the City's downtown area, including City offices. The City rescheduled consideration of the LBFO for September 13, a date when Local 39 representatives could be present.

On September 7, Local 39 notified the City that the membership had authorized a strike.

On September 13, the City Council considered the LBFO. The LBFO item was placed on both the closed session and open session portions of the City Council's agenda. The agenda item memorandum stated:

> City staff recommends that the City Council approve to impose a one-year Last, Best and Final (LBF) offer for the International Union of Operating Engineers (IUOE), Local 39, Classified Unit.

The City Council voted to impose the LBFO. The new terms were to be effective October 2.

On September 14, employees in the Classified Employees Bargaining Unit went on strike.

Local 39 and the City met at the bargaining table on September 19. Bryant attended the bargaining session for the first time on behalf of Local 39. The bargaining teams reached agreement on a third tentative agreement for a successor MOU. The Local 39 membership ratified the tentative agreement on September 20.

The tentative agreement was placed on the City Council's September 27 agenda. The agenda indicated the matter would be considered in both closed session and open session. The agenda item memorandum included the following recommendation:

> City staff recommends the City Council consider authorizing the City Manager to enter into a new Memorandum of Understanding (MOU) with the International Union of Operating Engineers (IUOE), Local 39, Classified Unit based on recent negotiations.

The options portion of the memo informed the Council that it could take the following action:

1. Approval to enter into a new Memorandum of Understanding (MOU) for the Classified Unit of the IUOE.

2. Provide staff with additional direction.

Estep testified that the difference in this agenda item language "authorizing" a new MOU, compared to the September 13 item "approving" the LBFO, was intentional. Estep explained that the economic benefits in the September 19 tentative agreement were less beneficial to the City than what the Council had already approved in the LBFO. As a result, staff was not confident the Council would approve the tentative agreement.

On September 27, the City Council considered the tentative agreement in closed session. Later, in open session, several Council members commented on the tentative agreement, stating that it was a good effort but there was more work to be done. The Council did not vote on the tentative agreement, stating they had given staff direction in closed session.

In open session, the Council directed staff to continue to work with Local 39 to reach a comprehensive agreement they could approve.

Later that evening, after the City Council meeting, Menth sent an e-mail to Local 39, stating "the City is ready, willing and able to again meet with Local 39 in an effort to reach a comprehensive Agreement."

In a letter to Estep on September 28, Bryant referenced Menth's email and questioned whether Menth had the authority to approve the tentative agreement on behalf of the City. Bryant also asked Estep to provide the rationale for the Council's actions.

Estep responded on September 30, assuring Bryant that Menth had authority to meet and confer on behalf of the City. Estep asserted that while the City Council did not approve the tentative agreement, the City remained willing to meet with Local 39.

The Local 39 and City bargaining teams scheduled a bargaining session at City Hall for October 5 at 9:00 a.m. Shortly before the scheduled bargaining session, Bryant emailed a letter to Estep indicating she was unavailable to attend. Bryant's letter stated, "I told Mr. Britton to convey to you that I was available to meet today, October 5, 2011, at our Sacramento location because I had previously scheduled meetings at this office, but I was willing to take the time to speak with representatives of the City of Lincoln."

Estep reminded Bryant that the ground rules set bargaining sessions at City Hall. Estep declined to have the members of the bargaining teams travel to Sacramento to meet in Bryant's office. The bargaining session was canceled.

Estep and Bryant continued to exchange correspondence through October 21. The City continued to assert its willingness to resume negotiations, while Local 39 requested information detailing the items the City wanted to discuss. No further bargaining sessions were held.

On February 27, 2012, the City sent a letter to Local 39 and all other bargaining units inviting the unions to commence negotiations for the upcoming year.

ISSUE

Did the City fail to meet and confer in good faith when it failed to vote on the September 19 tentative agreement?

CONCLUSIONS OF LAW

MMBA section 3505 sets forth the requirement that local public agencies and recognized employee organizations "shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment." MMBA section 3505.1 requires:

> If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination.

In reviewing MMBA section 3505.1, the Supreme Court has held that once a tentative agreement is approved by a local agency, the agreement is binding. (*Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328.) However, the courts have uniformly held that the actions of a local agency's representatives in reaching a tentative agreement cannot bind the agency. (*United Public Employees, Local 390/400, SEIU, AFL-CIO v. City and County of San Francisco* (1987) 190 Cal.App.3d 419 ["[A] governing body has no commitment to accept agreements negotiated by its representatives."].) In *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, the Supreme Court stated,

> Although there is provision for a written memorandum of understanding by employee organizations and *representatives* of a negotiating public agency, the act expressly provides that the memorandum "shall not be binding" but shall be presented to the governing body of the agency or its statutory representative for determination, thus reflecting the legislative decision that the

> ultimate determinations are to be made by the governing body itself or its statutory representative and not by others.

(*Ibid.* at p. 25, emphasis in original; See also *City of Clovis* (2009) PERB Decision No. 2074-M.)

In *Long Beach City Employees Association v. City of Long Beach* (1977) 73 Cal.App.3d 273, the court held that to require a city council to adopt the tentative agreement negotiated by the city manager would nullify MMBA section 3505.1. The court further concluded it was not bad faith for the city manager to advise the members of the city council that they did not have to approve the tentative agreement. (See also *Stationary Engineers, Local 39, IUOE, AFL-CIO v. San Juan Suburban Water District* (1979) 90 Cal.App.3d 796, 802 [The failure of the bargaining team to recommend adoption of a final MOU does not demonstrate bad faith.].)

Local 39 contends that MMBA section 3505.1 requires the City to make a "determination" on the tentative agreement, meaning that the City has an obligation to formally vote to approve or reject the tentative agreement. Local 39 argues that the failure to take an official vote on the proposal signifies the City took no action and, thus, the status of the tentative agreement remains the same as before the meeting. In addition, Local 39 claims the City Council thereafter failed to inform Local 39 of the deficiencies in the tentative agreement.

The City asserts the City Council considered the tentative agreement, found it unacceptable and provided staff with direction to continue working with Local 39 to reach an agreement that was satisfactory to both parties. The City contends this was a "determination" pursuant to MMBA section 3505.1.

In *Beverly Hills Firemen's Association v. City of Beverly Hills* (1981) 119 Cal.App.3d 620, the court considered whether the city had approved the proposed MOU. The city council did not vote on the MOU. Rather, the city council adopted a resolution directing that amendments to the city's ordinances to carry out the MOU be prepared for consideration by

the council. The court found that in presenting a proposed MOU to the governing body, MMBA section 3505.1 requires a determination of approval or rejection. However, the court held that no specific words were required to comply with a local agency's authority to accept or reject a tentative agreement. Thus, notwithstanding the council's failure to specifically vote on the MOU, "[a] direction to 'carry out' an agreement is an appropriate manner in which to express approval." (*Ibid.* at p. 628.)

In the same manner, comments by members of a city council that a tentative agreement did not go far enough and providing direction to staff to continue negotiations in an effort to reach an acceptable comprehensive agreement, is an equally persuasive means by which to adequate convey disapproval of the tentative agreement.

There could be no confusion based on the City Council members' public comments that the agreement was not acceptable. The Council members stated it was a good effort, but that more work needed to be done. The Council then took specific action, invoking one of the options in the agenda item memorandum, and gave direction to staff to continue to work with Local 39 on an agreement. The Council members' words and specific direction to staff were sufficient to demonstrate the Council's rejection of the tentative agreement. Further, contrary to Local 39's assertion, the City Council was not required to share with Local 39 the specific instructions given to staff in closed session. (*County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721.) Accordingly, the evidence does not establish that the City failed to meet and confer in good faith when it failed to take a formal vote on the tentative agreement.

In its post-hearing brief, Local 39 raised for the first time the allegation that the City's negotiator reneged on an agreement to support the tentative agreement based on differences in the agenda language where staff recommended "authorizing" rather than "approving" the tentative agreement. This is an unalleged violation that was not included in the complaint.

The City had no notice of this allegation prior to Local 39's post-hearing brief or an opportunity to defend itself, and the matter was not fully litigated. (*Fresno County Superior Court* (2008) PERB Decision No. 1942-C.) Therefore, this allegation cannot be considered.[4]

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE-756-M, *Stationary Engineers, Local 39, International Union or Operating Engineers, AFL-CIO v. City of Lincoln*, are hereby DISMISSED.

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

[4] Even if the allegation could properly be addressed, the claim would fail. As discussed above, the courts have held that the failure of the agency's negotiator to recommend approval of a proposed MOU does not demonstrate bad faith. (*Stationary Engineers*, *supra*, 90 Cal.App.3d 796; *Long Beach*, *supra*, 73 Cal.App.3d 273.)

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).)

Robin Wesley
Administrative Law Judge