STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY & COUNTY OF SAN FRANCISCO (DEPARTMENT OF HUMAN RESOURCES), Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Respondent.	Case No. SF-CO-306-M PERB Decision No. 2374-M May 16, 2014

Appearances: Stephanie G. Bickham, Deputy City Attorney, for City & County of San Francisco (Department of Human Resources); Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 1021.

Before Martinez, Chair; Huguenin and Banks Members.

DECISION[1]

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the City & County of San Francisco (Department of Human Resources) (City) from the dismissal (attached) by PERB's Office of the General Counsel of its unfair practice charge. The City's charge, as amended, alleges that the Service Employees International Union, Local 1021 (SEIU or Union) violated section 3505 of the Meyers-Milias-

[1] PERB Regulation 32320(d), provides in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

Brown Act (MMBA)[2] and PERB Regulation 32604(e) when it authorized a labor stoppage prior to reaching impasse and in violation of the parties' memorandum of understanding (MOU).

We have reviewed the unfair practice charge, the amended charge, the warning and dismissal letters, the appeal, SEIU's response thereto and the entire record in light of relevant law. Based on this review, we affirm the Office of the General Counsel's dismissal of the City's charge.

PROCEDURAL HISTORY

On November 19, 2012, the City filed its initial unfair practice charge against SEIU. On January 28, 2013, SEIU filed its initial position statement. On March 25, 2013, the Office of the General Counsel issued the City a warning letter notifying it that its charge, as then written, did not state a prima facie case.

On April 18, 2013, the City filed its first amended charge. On May 7, 2013, SEIU filed its position statement in response to the City's first amended charge. On May 24, 2013, the City filed a reply to SEIU's position statement. On September 12, 2013, the Office of the General Counsel dismissed the City's charges.

On October 4, 2013, the City appealed the Office of the General Counsel's dismissal of its unfair practice charges. On October 28, 2013, SEIU filed its response to the City's appeal.

FACTUAL SUMMARY

Our discussion below addresses charge allegations. We presume the facts alleged are true. We do so because when assessing the dismissal of an unfair practice charge, we view the allegations in the light most favorable to the charging party.[3]

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

[3] At this stage of the proceedings, we assume, as we must, that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB Decision

The City is a public agency within the meaning of MMBA section 3501(c). SEIU is a recognized employee organization within the meaning of MMBA section 3501(b). The City and SEIU have been parties to a series of MOUs for represented staff and per diem nurses (Nurses) at several locations in San Francisco, including San Francisco General Hospital, Laguna Honda Hospital and the San Francisco County Jail. Between July 1, 2010 and June 30, 2012, the City and SEIU were parties to an MOU which set forth the wages, hours and terms and conditions of employment for the Nurses. Article I.C of the MOU contains a provision barring work stoppages during the life of the agreement. In relevant part, Article I.C states:

> It is mutually agreed and understood that during the period this MOU is in force and effect the Union will not authorize or engage in any strike, sympathy strike, slowdown or work stoppage.

The parties began negotiations on a successor agreement in January of 2012. Between January 27 and May 17, 2012, the parties met for fourteen (14) formal bargaining sessions all at SEIU's San Francisco office. On May 16, 2012, the City suggested that the parties seek the assistance of a third party neutral.[4]

On May 17, 2012, SEIU expressed its belief that the parties were not at impasse. According to the City, SEIU's lead negotiator also expressed his disappointment in the City's "provocative" bargaining proposals and stated "we advised you not to do that." The City asked SEIU if it was making a threat. SEIU's lead negotiator stated that he was not making a threat but that there might be "repercussions" for the City's proposals. SEIU went on to state that the Nurses were "deeply distressed" by the City's proposals.

No. 12 [prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755-H.)

[4] The City submitted a print out of SEIU's web page as an exhibit. This web page states, inter alia, that SEIU proposed mediation on May 14, 2012.

On May 25, 2012, SEIU informed the Nurses that it would conduct a strike authorization vote. On May 29, 2012, the City contacted an outside employment agency to inquire about strike replacement nurses in the event of a strike. The City received a quote for the replacement of up to 600 nurses and had the agency on standby.

The parties met at SEIU's San Francisco office for a fifteenth (15^{th}) bargaining session on May 30, 2012. When the City's bargaining team arrived they observed leaflets regarding the strike authorization vote. During the bargaining session, an SEIU representative informed the City's negotiators that SEIU was seriously considering a strike and the Nurses were currently voting on the matter. SEIU gave the City its wage proposal and both parties agreed to select a mediator from State Mediation and Conciliation Services (SMCS) while agreeing that they were not yet at impasse.

On May 31, 2012, SEIU announced that the Nurses had authorized the bargaining team to call a strike if other options were exhausted. An SEIU leaflet dated May 31, 2012, indicated that 98 percent of the Nurses had voted in favor of the strike authorization. The leaflet also stated, "Nurses don't want to strike, but we will if we have to." On June 2, 2012, the parties began voluntary mediation with SMCS and, after three mediation sessions, reached a tentative agreement on June 6, 2012. The Nurses approved the agreement on June 25, 2012. SEIU's leaflet recommending a "yes" vote on the new agreement, as well as the announcement of the contract approval on its website, both cited the strike authorization vote as one of the reasons the agreement was reached.

DISMISSAL OF THE CITY'S CHARGES

The Office of the General Counsel determined that conducting a strike authorization vote which gives the party's bargaining team discretion to determine when a strike will be scheduled is not a per se unfair labor practice. (*Konocti Unified School District* (1982) PERB Decision

No. 217 (*Konocti*).) Noting that the Board in *Konocti* left open the possibility that a strike authorization vote could be considered an indicia of bad faith under a totality of circumstances test, the Office of the General Counsel determined that a single indicia of bad faith is insufficient to state a prima facie case of surface bargaining. (*Contra Costa Community College District* (2005) PERB Decision No. 1756.)[5]

The Office of the General Counsel also determined that the City failed to demonstrate that SEIU's alleged breach of Article I.C had a "generalized effect or continuing impact on bargaining unit members' terms and conditions of employment." (*East Side Union High School District* (1997) PERB Decision No. 1236.) The Office of the General Counsel noted that it did not appear that SEIU breached Article I.C by conducting a strike authorization vote because SEIU never authorized a strike, it merely asked its members to authorize union leadership to have the discretion to call a strike at a later date if all other options were exhausted. Moreover, according to the Office of the General Counsel, assuming that SEIU's strike authorization vote did breach the MOU, PERB does not have jurisdiction to enforce agreements between the parties or remedy mere breaches of a contract. (*State of California (Departments of Veterans Affairs & Personnel Administration)* (2008) PERB Decision No. 1997-S.) Accordingly, the City's charges were dismissed.

POSITIONS OF THE PARTIES

On appeal, the City contends that SEIU's pre-impasse strike authorization vote and other indicia of bad faith bargaining constitutes an unfair practice under PERB's "totality of the

[5] PERB recently held that rigid adherence to the "more than one indicia" rule "is ultimately inconsistent with the 'totality of the circumstances' test long used by PERB when assessing surface bargaining allegations. It fails to account for the potentially detrimental effect that one indicator, by itself, may have on the course of negotiations or the parties' bargaining relationship and its formulaic nature detracts from the ultimate question raised in every surface bargaining case—whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations." (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 19, internal citations omitted.)

circumstances" test. (*Regents of the University of California* (2010) PERB Decision No. 2094-H.) In addition, the strike authorization, according to the City, was a blatant breach of the parties' MOU and, therefore, was a "per se" violation of the duty to bargain in good faith. Lastly, the City argues that the strike authorization was an unlawful unilateral change of policy which necessarily had a generalized effect and continuing impact on terms and conditions of employment. The City asks that the Board reverse the dismissal and direct the Office of the General Counsel to issue a complaint.

SEIU contends that the Office of the General Counsel properly dismissed the City's bad faith bargaining allegations. SEIU notes that the City fails to allege a causal connection between the strike authorization vote and its agreement to the successor MOU. SEIU urges that the City must allege that the strike authorization unlawfully pressured it to take an action it would not have otherwise taken in order to maintain that the strike authorization was an unlawful pressure tactic. SEIU further contends that the strike authorization vote, without more, is insufficient to demonstrate bad faith bargaining by SEIU. SEIU urges that Article I.C of the MOU did not prohibit it from conducting a strike authorization vote. Lastly, SEIU argues that under PERB Regulation 32635(b), unless good cause is shown, the City cannot allege for the first time on appeal that the strike authorization constituted an unlawful unilateral change.

DISCUSSION

Per Se Violation of Duty to Bargain in Good Faith

The City contends that SEIU's strike authorization vote satisfies both the per se and the totality of the circumstances tests for violations of the duty to bargain in good faith. The per se categories for a failure to bargain in good faith under MMBA include: (1) an outright refusal to bargain (*Public Employees of Riverside County, Inc. v. Riverside County* (1977) 75 Cal.App.3d 882); (2) the refusal to provide information necessary and relevant to an

employee organization's duty to represent its bargaining unit members (*City of Burbank* (2008) PERB Decision No. 1988-M); (3) insistence to impasse on a non-mandatory subject of bargaining (*City of Pinole* (2012) PERB Decision No. 2288-M); (4) bypassing the exclusive representative (*Omnitrans* (2010) PERB Decision No. 2143-M); and (5) implementation of a unilateral change in working conditions without notice and opportunity to bargain (*City of San Juan Capistrano* (2012) PERB Decision No. 2238-M).

In itself, a strike authorization vote is not a per se violation of the duty to bargain in good faith. As the Board has previously stated:

> While a union's conduct may take on more of the character of coercion than of collective bargaining, the mere fact that a given employer claims to have been coerced is insufficient to support such a finding. The conduct must, at the least, be of such a nature as to permit the reasonable expectation that such would be the effect. Strike votes—like strike talk—are commonplace in labor relations, particularly in the face of approaching deadlines. They cannot be viewed as per se violations of the good-faith obligation.

(*Konocti, supra,* PERB Decision No. 217, pp. 11-12, emphasis in original.) The *Konocti* Board also found the union's strike authorization vote insufficient under the totality of the circumstances test to sustain the employer's bad faith bargaining charge in light of the absence of "other relevant evidence." (*Id.*)

Totality of the Circumstances Test

However, when a strike authorization vote is coupled with evidence of significant strike preparation activities the Board has found a possible violation of the bargaining duty under the totality of the circumstances test. (*South Bay Union School District* (1990) PERB Decision No. 815 (*South Bay*), p. 8 [the District's allegations that the union conducted a strike authorization vote and strike preparation activities to place pressure on the employer to reach an agreement, constitute sufficient facts to state a prima facie violation of the duty to bargain in good faith]; *Regents of the University of California* (2010) PERB Decision No. 2094-H,

p. 31 (*Regents*) [a strike threat and preparations constitute an unfair practice if they are: (1) in furtherance of an unlawful strike; and (2) sufficiently substantial to create a reasonable belief in the employer that the strike will occur].)

The City maintains that the *Regents, supra,* PERB Decision No. 2094-H decision is directly on point here. According to the City, there were six factors the Board considered in finding that the union in *Regents* violated the good faith bargaining duty: (1) a strike authorization vote; which (2) passed with a 95 percent approval; (3) the union commented publicly on the pending strike; (4) the union established an emergency task force in preparation for the strike; (5) the union gave the employer 24-hour written notice of the strike; and (6) the union issued a strike manual to its bargaining unit members. (*Regents*, p. 34.) The City maintains that four of those factors are present in this case: (1) SEIU took a strike authorization vote; which (2) passed with 98 percent approval; (3) SEIU commented on the strike authorization on its website and through handouts posted at its headquarters; and (4) the City "began to line up emergency/replacement nurses."

As an initial matter we conclude that the approval margin is of no particular relevance to the analysis. A prima facie case was established in *South Bay, supra,* PERB Decision No. 815, despite the fact that the strike authorization vote was rejected by the bargaining unit members. The relevant issue is whether or not the vote itself is an unlawful pressure tactic. We also are not persuaded that SEIU's comments on its own website which, presumably, is primarily intended as a means of communication with its own membership is similar to making comments in a newspaper intended for general distribution on a university campus. Lastly, we do not find that the City's inquiry with an outside employment agency about possible strike replacement employees is evidence of an unlawful pressure tactic by the union. The City has not provided any evidence of SEIU's strike preparations which is not surprising since SEIU

had not yet scheduled a strike. The City's due diligence in preparing for a possible strike at some future date is neither comparable to the extensive strike preparations conducted by the union for the pending strike in *Regents, supra,* PERB Decision No. 2094-H nor attributable to the union as evidence of its intent to create a reasonable belief in the employer that a strike will occur.

The strike in *Regents, supra,* PERB Decision No. 2094-H was not merely authorized, it was scheduled to take place at a certain date and time. The date and time scheduled for the strike in *Regents* was prior to the completion of the impasse procedures. Therefore, in *Regents* there was a rebuttable presumption that the scheduled strike was illegal and in violation of the duty to bargain. In this case no strike was scheduled and there is no allegation that SEIU was unwilling to proceed with bargaining. By its very terms, the member vote here allowed SEIU to call for a strike only after all other options were exhausted. Those "other options" were not exhausted.

Unlawful Unilateral Change

We note that the City failed to raise the unilateral change issue in its initial or amended charges. PERB regulations prohibit a party from presenting new evidence or make new charge allegations on appeal unless good cause is shown. (PERB Reg. 32635(b).) The City has not shown good cause why the Board should consider the City's new theory on appeal. Even if the City had timely made its unilateral change allegation, however, the City fails to establish that the strike authorization vote is anything more than an isolated breach of the parties' agreement as we explain.

The issue of whether the alleged breach of the MOU constituted an unlawful unilateral change by SEIU was first addressed by the office of the General Counsel in the dismissal letter. The Office of the General Counsel noted that an alleged breach of a negotiated

agreement must have "a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment." (*East Side Union High School District* (1997) PERB Decision No. 1236.) In other words, SEIU's alleged breach of the agreement must constitute an unlawful unilateral change by the union. This is so because PERB does not have jurisdiction to enforce agreements between parties unless the breach of the agreement also constitutes an unfair practice. (*Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant Union)*; *County of Riverside* (2003) PERB Decision No. 1577-M [applying *Grant Union* to the MMBA].)

While unilateral change allegations are more commonly made against employers, the same standards can be applied to unlawful unilateral changes by unions. (*The Regents of the University of California* (1992) PERB Decision No. 922-H.) The criteria to establish a per se unilateral change violation are

> (1) the exclusive representative breached or altered the parties' written agreement or an established past practice;
>
> (2) such action was taken without giving the other party notice or an opportunity to bargain over the change;
>
> (3) the change was not merely an isolated breach of the contract but amounts to a change of policy (i.e. has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and
>
> (4) the change in policy concerns a matter within the scope of representation.

(*Regents of the University of California* (2010) PERB Decision No. 2105-H [internal citations omitted].)[6] While SEIU's conduct may arguably have met three of the criteria to establish a

[6] In *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield*), the Board stated a more nuanced formulation of the test for unilateral change. Under *Fairfield*, the charging party must establish that: (1) the responding party took action to change a policy; (2) the policy concerns a matter within the scope of representation; (3) the action was taken without giving the charging party notice or an opportunity to bargain over the

unilateral change, the City has not alleged any facts sufficient to demonstrate that the strike authorization vote was anything more than an isolated breach of the contract. The City merely asserts that there is a continuing impact, without alleging facts demonstrating how the strike authorization has a generalized effect or continuing impact on SEIU bargaining members' terms and conditions of employment. By its very terms, the strike authorization granted SEIU leadership the authority to call a strike "if other options are exhausted." Since the "other options" resulted in a new agreement, the strike authorization is no longer in effect.

In light of the fact that both the National Labor Relations Board (NLRB) and the U.S. Supreme Court have held that no-strike clauses typically do not survive the expiration of a collective bargaining agreement the City would be hard pressed to show any continuing impact from a strike-authorization for an expired contract. (See *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 [when interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions]; *CC-1 Limited Partnership d/b/a Coca Cola Puerto Rico Bottlers* (2012) 359 NLRB No. 129 [the Board has long held, with Supreme Court approval, that a no-strike clause typically does not survive the expiration of a collective-bargaining agreement]; *Litton Financial Printing Division v. NLRB* (1991) 501 U.S. 190, 199 [some terms and conditions of employment, including no-strike clauses, do not survive expiration of an agreement].)

We conclude therefore that the City has failed to establish a prima facie violation of the duty to bargain in good faith.

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change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment.

The reformulation of the unilateral change test has no bearing on this case as the fourth criteria under the new standard is virtually identical to the third criteria under the old standard and the City fails to establish either criteria.

ORDER

The unfair practice charge in Case No. SF-CO-306-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
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Telephone: (510) 622-1021
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September 12, 2013

Stephanie Bickham, Deputy City Attorney
San Francisco City Attorney's Office
1390 Market Street, 5th Floor
San Francisco, CA 94102

Re: *City & County of San Francisco (Department of Human Resources) v. Service Employees International Union Local 1021*
Unfair Practice Charge No. SF-CO-306-M
DISMISSAL LETTER

Dear Ms. Bickham:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 19, 2012. The City and County of San Francisco (CCSF or Charging Party) alleges that the Service Employees International Union Local 1021 (SEIU or Respondent) violated section 3505 of the Meyers-Milias-Brown Act (MMBA or Act),[1] and PERB Regulations by taking a strike authorization vote before SEIU provided CCSF with a wage proposal, before the parties reached impasse in bargaining, in violation of the applicable labor agreement, and before the parties engaged in a mediation process.

On January 24, 2013, SEIU filed a position statement in response to the initial charge.

CCSF was informed in the attached Warning Letter dated March 25, 2013, that the above-referenced charge did not state a prima facie case. CCSF was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. CCSF was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to April 8, 2013, the charge would be dismissed. Subsequently, an extension of time was granted.

On April 16, 2013, CCSF filed a First Amended Charge. On May 6, 2013, SEIU filed a further position statement in response to the First Amended Charge. On May 22, 2013, CCSF filed a letter in reply to SEIU's further position statement.

[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

Summary of Facts

As detailed in the Warning Letter, CCSF generally alleges that SEIU violated the MMBA by taking a strike authorization vote.

The First Amended Charge asserts the following allegations to supplement those previously analyzed in the Warning Letter. SEIU conducted a vote of its members from May 25, 2012, through May 30, 2012. Ninety-eight percent of the members voted to authorize the bargaining team to call a strike, if other options were exhausted. At the time, SEIU and CCSF were engaged in negotiations for a successor Memorandum of Understanding (MOU) to replace the one set to expire on June 30, 2012. Tentative agreement on a successor MOU was reached on June 6, 2012.

The MOU in effect at the time of the strike authorization vote stated in pertinent part:

> It is mutually agreed and understood that during the period this MOU is in force and effect the Union will not authorize or engage in any strike, sympathy strike, slowdown or work stoppage.

On May 29, 2012, CCSF contacted a replacement worker company to provide workers in the event of a strike. CCSF obtained a quote for replacement services for up to 600 nurses and arranged for the replacement worker company to be "on standby."

SEIU widely publicized the strike authorization vote by its members, including posting information about the vote on its website and in flyers. After tentative agreement on a new MOU was reached, SEIU continued to communicate with its members, stating:

> We have a contract because of the membership unity in the worksites, including a 98 percent strike authorization vote…
>
> Thanks to RN members for encouraging your bargaining team and supporting your union, including signing petitions, wearing stickers, attending rallies, meetings, political actions … and a 98% strike authorization vote!

In addition, CCSF alleges that SEIU bargained in bad faith under the "totality of the circumstances" test articulated in *Pajaro Valley Unified School District* (1978) PERB Decision No. 51.

In the initial charge, CCSF alleged a violation of PERB Regulation 32604(b), but appears to have withdrawn this allegation in the First Amended Charge. When an amended charge does not address an allegation found insufficient in a warning letter, the allegation is dismissed. (*Los Angeles Community College District* (2000) PERB Decision No. 1377.)

Discussion

The charge alleges that the employer violated Government Code section 3505 and PERB Regulation 32603(c) by engaging in bad faith or "surface" bargaining. Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 (*Placentia Fire Fighters*).) PERB has held it is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (*Oakland Unified School District* (1982) PERB Decision No. 275; *Placentia Fire Fighters*, at p. 25.)

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

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (*Stockton Unified School District* (1980) PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134); and reneging on tentative agreements the parties already have made (*Charter Oak Unified School District* (1991) PERB Decision No. 873; *Stockton Unified School District*, *supra*; *Placerville Union School District* (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (*Placentia Fire Fighters*, *supra*, 57 Cal.App.3d 9, 25; *Oakland Unified School District*, *supra*, PERB Decision No. 275.) "The obligation of [a party] to bargain in good faith does not require the yielding of positions fairly maintained." (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229.)

As discussed in the Warning Letter, conducting a strike authorization vote, which gives a party's bargaining team the discretion to determine whether a strike will be scheduled, is not, itself an unfair practice and is often a common part of the bargaining process. (*Konocti Unified School District* (1982) PERB Decision No. 217.) The facts alleged do not establish

that the strike authorization vote here was a per se violation of the duty to bargain in good faith.

In *Konocti Unified School District*, *supra*, PERB Decision No. 217, the Board left open the possibility that a strike authorization vote may be considered an indicia of bad faith under the totality of a party's conduct. However, a single indicia of bad faith is insufficient to state a prima facie case of surface bargaining. (*Contra Costa Community College District* (2005) PERB Decision No. 1756.) CCSF does not allege that SEIU's conduct in general was dilatory, designed to thwart agreement, or otherwise was intended to delay negotiations. None of the other indicia identified above are suggested by the facts. Accordingly, a prima facie case of surface bargaining is not stated.

Breach of Agreement

The Board has consistently held that a party alleging a breach of a negotiated agreement must show that the breach has "a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment." (*East Side Union High School District* (1997) PERB Decision No. 1236.) In *County of Riverside* (2003) PERB Decision No. 1577-M, the Board adopted this standard in a case interpreting the MMBA.

CCSF appears to allege that SEIU breached the no-strike clause in the MOU, which was in effect at the time of the strike authorization vote. However, it does not appear that the no-strike clause was in fact breached, because SEIU did not authorize a strike, rather, it asked its members to vote to authorize union leadership to have the discretion to call a strike at a later date. Even assuming that SEIU's conduct did breach the agreement, PERB does not have jurisdiction to enforce agreements between the parties or to remedy mere contract breaches. (See *State of California (Departments of Veterans Affairs & Personnel Administration)* (2008) PERB Decision No. 1997-S.) CCSF does not allege sufficient facts to show that SEIU's conduct constitutes an unlawful unilateral change, including having a generalized effect or continuing future impact upon the bargaining unit.

Right to Appeal

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

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

Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

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

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

Service

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

Extension of Time

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

Final Date

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

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Laura Z. Davis
Senior Regional Attorney

Attachment

cc: Kerianne R. Steele, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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March 25, 2013

Stephanie Bickham, Deputy City Attorney
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Re: *City & County of San Francisco v. Service Employees International Union Local 1021*
Unfair Practice Charge No. SF-CO-306-M
WARNING LETTER

Dear Ms. Bickham:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 19, 2012. The City and County of San Francisco (CCSF or Charging Party) alleges that the Service Employees International Union Local 1021 (SEIU or Respondent) violated section 3505 of the Meyers-Milias-Brown Act (MMBA or Act),[1] and PERB Regulations 32604(b)[2] and (e), by taking a strike authorization vote before SEIU provided CCSF with a wage proposal, before the parties reached impasse in bargaining, in violation of the applicable labor agreement, and before the parties engaged in a mediation process.

Summary of Facts

SEIU is the exclusive representative of a bargaining unit of staff and per diem nurses employed by CCSF. SEIU and CCSF were signatories to a Memorandum of Understanding (MOU) which expired by its own terms on June 30, 2012. Beginning in January 2012, the parties engaged in negotiations for a successor agreement. The bargaining sessions were held at SEIU's offices.

In May 2012, after more than ten bargaining sessions, CCSF suggested mediation to assist the parties in reaching agreement. However, CCSF did not believe the parties were at impasse. At a bargaining session on May 17, 2012, SEIU's chief negotiator stated that the parties were not at impasse, that he was "disappointed" in CCSF's proposals, and that there was an adversarial bargaining environment which, he implied, was the fault of CCSF. CCSF replied that its

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

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

proposals were fair and the economic proposals it had made were equivalent to, or more generous than, proposals it had made to other bargaining units.
On May 25, 2012, "SEIU commenced a strike authorization vote by the Nurses which was held through May 30, 2012."

On May 30, 2012, the parties held their fifteenth bargaining session. Like the others, this session was held at SEIU's offices. When the CCSF representatives arrived, leaflets regarding the strike vote were posted in plain view.

During the May 30, 2012 bargaining session, SEIU brought in a "high level representative" to work with SEIU's lead negotiator. The high level representative started the session by explaining that SEIU was seriously considering a strike, that it members were currently voting to authorize a strike, and that she fully expected the bargaining unit members to vote in favor of authorizing a strike. She further stated that CCSF had some "problematic" issues on the table, that staffing levels were a strike issue, and that "you know we're voting." She stated that some of the proposals that CCSF had made were matters the bargaining unit would strike over, and that "I've never been known to take a strike vote without knowing the likely outcome." She stated that CCSF should consider taking some of its proposals off the table.

CCSF responded that the MOU, then still in effect, had a provision for no work stoppages.

On May 30, 2012, CCSF and SEIU agreed to obtain a mediator through the State Mediation and Conciliation Service (SMCS), although both parties acknowledged that they were not at impasse.

On May 31, 2012, SEIU announced that the strike authorization had been passed by 98% of the voting members. SEIU posted this announcement on its website, and distributed leaflets at worksites and at SEIU's office where the mediation was scheduled to be held. Some of the leaflets state:

> The City has proposed lower staffing and reductions to the RN benefit package. Strike Authorization APPROVED! Bargaining has been scheduled with a State Mediation Conciliation Services (SMCS) mediator ... Now it is time for the City to negotiate a fair contract!

The parties participated in three days of mediation. On June 6, 2012, the parties reached a tentative agreement on all outstanding terms. According to SEIU, the successor MOU has a term from July 1, 2012 through June 30, 2014.[3]

[3] SEIU provided a position statement dated January 24, 2013. While, at this stage of the proceedings, Charging Party's allegations are taken as true, the reviewing Board agent may consider undisputed facts alleged by the Respondent. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489; *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

Failure to Bargain in Good Faith

CCSF alleges that SEIU's strike vote was an unlawful pressure tactic, in that SEIU intended the strike vote to pressure CCSF to change its bargaining position. CCSF contends that SEIU's pre-impasse threat of a strike, which would have violated the MOU, was a failure to bargain in good faith and a per se unfair labor practice. CCSF asks PERB to issue a complaint on the basis that SEIU sought a strike authorization: (1) before providing CCSF with a wage proposal; (2) prior to reaching impasse; (3) in violation of the MOU; and (4) before mediation.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.)[4]

In *Konocti Unified School District* (1982) PERB Decision No. 217, PERB upheld a hearing officer's decision, which found that a union of classified public school employees did not commit an unfair labor practice by taking a strike authorization vote of its membership during negotiations.[5] In that case, the parties began negotiating in June 1978, and impasse was declared in October. In November, the union membership authorized the negotiating team to call a strike if necessary to get an agreement. In December 1978, the parties met with a mediator, at which time a tentative agreement was reached. PERB held that the union's conduct was not shown to be coercive.

In holding that the strike authorization vote was not a per se violation of the duty to bargain in good faith, PERB held as follows:

> Strike votes—like strike talk—are commonplace in labor relations, particularly in the face of approaching deadlines. They cannot be viewed as per se violations of the good faith obligation.

(*Konocti Unified School District*, *supra*, PERB Decision No. 217.)

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[4] It is noted that CCSF only alleges that the strike vote conduct was a per se violation, and it does not allege that SEIU's conduct constituted a failure to bargain in good faith under the totality of the circumstances under the standard articulated in *Pajaro Valley Unified School District* (1978) PERB Decision No. 51.

[5] This case was decided under the Educational Employment Relations Act (EERA; Gov. Code, §§ 3540 et seq.) When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

By comparison, in *Regents of the University of California* (2010) PERB Decision No. 2094-H, PERB found that a union engaged in unlawful pressure tactics, in violation of the duty to bargain in good faith, when it engaged in significant preparations for a pre-impasse strike. This conduct included a strike vote by the membership, but also included written 24-hour notice to the employer of a strike on a certain day and time, and the distribution of instructions (a "One Day Strike Manual") to members of the bargaining unit, identifying the same specific strike day.

Here, like in *Konocti Unified School District, supra*, PERB Decision No. 217, the CCSF alleges that a strike vote was taken toward the end of negotiations, prior to mediation, and that a tentative agreement was reached. However, CCSF does not allege any facts to show that there was a planned strike, or that the circumstances of the vote were coercive such that they would constitute a per se violation of the duty to bargain in good faith.

Interference

CCSF also alleges that the strike vote conduct violated PERB Regulation 32604(b), prohibiting an employee organization from interfering with or discriminating against, public employees because of their exercise of rights guaranteed by the MMBA.

The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons.

(*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.)

Here, CCSF does not allege facts from which PERB can determine whether SEIU has unlawfully interfered with employee rights.

For these reasons the charge, as presently written, does not state a prima facie case.[6] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies

[6] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or

explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before **April 8, 2013**,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Z. Davis
Senior Regional Attorney

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contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

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