STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION UNITED HEALTHCARE WORKERS WEST, Charging Party, v. FRESNO COUNTY IN-HOME SUPPORTIVE SERVICES PUBLIC AUTHORITY, Respondent.	Case No. SA-CE-671-M PERB Decision No. 2418-M March 30, 2015

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union United Healthcare Workers West; Catherine E. Basham, Senior Deputy Counsel, for Fresno County In-Home Supportive Services Public Authority.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Service Employees International Union United Healthcare Workers West (SEIU) to the proposed decision of a PERB administrative law judge (ALJ). The complaint alleged that the Fresno County In-Home Supportive Services Public Authority (Authority) failed and refused to bargain in good faith, in violation of the Meyers-Milias-Brown Act (MMBA) and PERB regulations,[1] by making regressive bargaining proposals; by unilaterally implementing its last, best and final offer (LBFO) in the absence of a genuine impasse in negotiations; and, by imposing tentatively agreed-upon bargaining proposals that

[1] MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

required SEIU and bargaining-unit employees to waive statutory rights to bargain over future changes to negotiable subjects and to strike. The complaint also alleged that the Authority's imposition of a "Separability of Provisions/Savings Clause" and "No Strike/No Lockout" language constituted independent violations of the MMBA and PERB regulations.[2]

After reviewing the entire record and considering SEIU's exceptions and the Authority's response, we affirm in part and reverse in part the proposed decision. The ALJ's findings of fact are supported by the record and we adopt them as the findings of the Board itself, as augmented by the discussion below.

We reverse the ALJ's dismissal of the allegation that the Authority's unilateral imposition of no strikes language violated the duty to bargain. As explained below, because the imposed language would waive or limit the statutory rights of SEIU and employees to strike and/or to engage in other protected, concerted activities, the unilateral imposition of this language constituted a per se violation of the Authority's duty to bargain, notwithstanding that negotiations had reached a bona fide impasse, and notwithstanding that the no strikes language imposed was part of the Authority's final, pre-impasse proposal.

We likewise reverse the ALJ's dismissal of the allegation regarding the Separability/Savings clause. Notwithstanding the fact that it was tentatively-agreed to during pre-impasse negotiations, unilateral imposition of the Separability/Savings clause is inconsistent with MMBA section 3505.7, which states that unilateral imposition of a public agency's LBFO shall not result in a memorandum of understanding (MOU). As with the No

[2] Although the signed copy of the tentative agreement is captioned "No Strikeout/No Lockout," the parties have referred to it as covering "No Strike/No Lockout" throughout these proceedings. We have followed the same convention and disregarded the apparent typographical error. For brevity, we refer to the Separability of Provisions/Savings language as "Separability/Savings" language.

Strike/No Lockout language, we conclude that the Authority's unilateral imposition of the Separability/Savings clause constituted a per se violation of the duty to bargain.

While imposition of the No Strike/No Lockout and Separability/Savings provisions constituted per se violations of the duty to bargain, because their imposition had no discernible effect on the parties' negotiations, nor in any way derogated SEIU's authority as the bargaining representative, SEIU has not shown that the Authority bargained without the requisite "good faith" required by the MMBA. We therefore affirm the ALJ's dismissal of SEIU's overall surface bargaining allegation, subject to the discussion below of SEIU's exceptions.

FACTUAL AND PROCEDURAL HISTORY

SEIU is the exclusive representative of approximately 10,000 In-Home Supportive Services (IHSS) providers in Fresno County (County). The Authority is the employer of IHSS providers for collective bargaining purposes. According to Fresno County Labor Relations Manager John Pinheiro (Pinheiro), although the Authority is a department of the County, it is also a separate legal entity from the County and has its own Labor Relations Ordinance that is similar, but not identical to, the County's Labor Relations Ordinance.[3] The County's Board of Supervisors acts as the governing body of the Authority.

SEIU and the Authority were parties to a MOU in effect from September 2006 through September 2009. The 2006-2009 MOU provided for various increases in IHSS providers' wages and benefits from $9.05 per hour and $0.75 in benefits to $10.25 per hour and $0.85 in benefits, effective October 1, 2008. However, wages and benefits were subject to a Contingency Article, which provided that if federal or state funding was reduced or suspended,

[3] The Authority contracts with the County's Office of Labor Relations to negotiate with SEIU regarding IHSS providers' terms and conditions of employment. Pinheiro served as the lead negotiator for the Authority in negotiations with SEIU.

IHSS providers' wages and benefits could be reduced in equal proportion. Disputes over the application of the Contingency Article were to be resolved through non-binding factfinding. The expired 2006-2009 MOU also included Separability/Savings and No Strike/No Lockout articles which expired by their own terms with the MOU.

In September 2008, the Authority proposed to reduce the wages of IHSS providers from the then contractual rate of $9.65 per hour to $9.15 per hour, effective January 1, 2009, because of a reduction in realignment funding.[4] Several disputes ensued, which resulted in two separate factfinding reports and federal court litigation.

From August 2009 until April 2010, the parties negotiated for a successor MOU. They tentatively agreed on 18 articles, which comprised the vast majority of subjects to be included in the MOU. They also agreed that both sides' LBFOs would include all previously agreed upon tentative agreements, including the Separability/Savings and No Strike/No Lockout provisions at issue in this case.

The parties could not agree on wages and benefits. The Authority consistently proposed concessions from the current level of wages and benefits set forth in the expired MOU, while SEIU proposed maintaining or increasing wages and benefits. Following the Authority's declaration of impasse and mediation, the Authority decided to submit to a vote of the County's Board of Supervisors whether to accept SEIU's LBFO, to impose unilaterally the Authority's LBFO, or to authorize the Authority's negotiators to return to the bargaining table.

On May 25, 2010, the Board of Supervisors voted to implement the Authority's LBFO, including the tentatively-agreed to Separability/Savings and No Strike/No Lockout language. The Supervisors also voted to approve the Authority's LBFO proposal to reduce wages and

[4] Realignment funding consists of revenue from state sales tax and vehicle license fees and is used to fund County social services, including IHSS programs.

benefits. However, due to pending litigation, IHSS providers' wages and benefits remained at the contractually-specified rates included in the expired 2006-2009 MOU.

On May 24, 2010, SEIU filed an unfair practice charge against the Authority and on June 16, 2010, SEIU filed an amended charge and request for injunctive relief. After the Authority was granted extensions of time on June 7, and June 15, 2010,[5] it filed a position statement in response to SEIU's amended charge on June 30, 2010.

On June 21, 2010, the Board denied SEIU's request for injunctive relief.[6]

On July 16, 2010, PERB's Office of the General Counsel issued a complaint, which alleged that the Authority failed and refused to bargain in good faith by: (1) withdrawing its prior offer and, on March 17, 2010, announcing that it would reduce wages for IHSS providers to $8.00 per hour and reduce health care contributions to $0.60 per hour; (2) adopting and approving on May 25, 2010, the unilateral implementation of the Authority's proposal to reduce wages and health care contributions, as described above; and, (3) also on May 25, 2010, adopting and approving the unilateral implementation of No Strike/No Lockout and Separability/Savings provisions that required SEIU and employees to waive statutory rights. The complaint also alleged that the Authority's unilateral implementation of the No Strike/No Lockout and Separability/Savings provisions constituted a separate violation of the Authority's duty to bargain, in violation of the MMBA and PERB regulations. The complaint further alleged that the above bargaining violations also constituted derivative violations by interfering

[5] The Authority apparently had notice that SEIU intended to file an amended charge on June 16, 2010, and, in anticipation of that filing, on June 15, 2010, contacted PERB to request a second extension of time in which to respond.

[6] Although the Authority's June 30, 2010, position statement refers to documents filed in opposition to SEIU's request for injunctive relief, the case file provided to the Board includes no such document.

with SEIU's right to represent employees and by interfering with employees' rights to be represented by the employee organization of their choice.

On July 28, 2010, the Authority answered the complaint by admitting some allegations and denying all material allegations.

After an informal settlement conference on September 21, 2010, failed to resolve the dispute, a formal hearing was held on August 16 and 17, 2011, before the ALJ.

On October 17, 2011, the parties submitted post-hearing briefs and on November 28, 2012, the ALJ issued the proposed decision.

After receiving an extension of time, SEIU filed its exceptions to the proposed decision on January 14, 2013, and on February 5, 2013, the Authority filed its response thereto.

THE PROPOSED DECISION

The ALJ dismissed the overall surface bargaining allegation, and rejected each of the various indicators of bad faith alleged by SEIU. The ALJ found that the Authority's LBFO proposal on wages and benefits was not regressive and therefore did not support an inference of bad faith on the part of the Authority. Although the Authority withdrew its previous wage and benefit proposal for $9.25/hour and $0.60/benefits, and in its place proposed a maximum of $8.60 in wages and benefits combined, the LBFO package contained concessions on other issues. It would permit binding arbitration of disputes, whereas the Authority had previously demanded advisory arbitration, and it included more restrictive contingency language, specifying the circumstances in which the Authority could demand to re-open wages and benefits, in the event of a decline in funding.

The ALJ also rejected SEIU's allegation that the Authority had rushed to impasse as a means of imposing economic concessions without first engaging in good faith bargaining. As discussed in the proposed decision, the parties met approximately once per month from August

2009 until March 17, 2010, when the Authority presented its LBFO. They met again on April 14, 2010, before the Authority's negotiator declared impasse. Throughout these meetings, the Authority provided prompt and thorough responses to SEIU's requests for information, which credibly demonstrated the need for economic concessions from IHSS providers, if Fresno County were to avoid making further cuts to other social services. In particular, County of Fresno Department of Social Services Budget Manager Sanja Kovacevic (Kovacevic) offered detailed explanations for the Authority's rejection of SEIU's demands to maintain the current level of wages and benefits and/or to add new benefits.

According to the proposed decision, the Authority also presented proposals and counterproposals, both separately and as part of packages, on all subjects in dispute. Its proposals included various concessions and its negotiators indicated those areas where it had additional flexibility. The Authority also reached and executed 17 tentative agreements covering the vast majority of subjects discussed; routinely made itself available for additional meetings and, in fact, attempted to schedule multiple meeting dates at a time. Even after declaring impasse, the Authority repeatedly invited SEIU to offer any proposal that might break the deadlock *before* the Authority's governing body voted to implement the terms and conditions included in the LBFO.

By contrast, SEIU's representatives walked out of the September 12, 2009, meeting after receiving the Authority's initial wage and benefit proposals; refused repeated requests from the Authority to schedule more than one meeting date at a time; cancelled six of the meeting dates that had been scheduled, in some cases with little or no notice; insisted on resolving non-economic issues before responding to the Authority's proposal on wages; and ultimately took four months to respond to the Authority's wage proposal. Thus, when the Authority's conduct is viewed in its totality, including in the context of SEIU's own bargaining

conduct, the ALJ concluded that the evidence did not support SEIU's contention that the Authority intended to avoid agreement or that its conduct frustrated negotiations.

Finally, the ALJ dismissed allegations that, by imposing tentatively agreed to language regarding Separability/Savings and No Strike/No Lockout, the Authority committed a per se violation of the duty to bargain, or that the decision to impose these terms constituted evidence of surface bargaining. The ALJ found that the parties had agreed that these two clauses, along with all other tentatively agreed-to proposals would be part of their final proposals, and that, SEIU's claim that it had "only TA'd these clauses for inclusion in a final contract, [but] not as part of an imposed LBFO," was "difficult to follow and cannot be accepted."

SEIU'S EXCEPTIONS

SEIU argues that, upon reviewing the record, the Board should reverse the proposed decision and find that, under the totality of circumstances test, the Authority engaged in surface bargaining. SEIU argues that the Authority approached negotiations with a take-it-or-leave-it attitude, as evidenced by its decision to include less in its 2009-2010 fiscal year budget for providers' wages and benefits than the amount necessary to fund the status quo terms and conditions of the expired MOU.

SEIU also argues that the Authority bargained regressively, by withdrawing its February 9, 2010, economic proposals before SEIU had responded, and by offering in its place a package proposal that included less favorable economic terms. SEIU contends that the Authority gave SEIU no indication that its February 9, 2010, proposals would expire, ignored repeated requests to explore alternative funding sources, and arbitrarily cut off negotiations and declared impasse, after SEIU's proposal showed substantial movement on economic issues.

SEIU also argues that Kovacevic admitted that the Authority's decision to underfund the status quo was driven by discretionary policy choices rather than financial necessity, and

that budget projections and other information presented by Kovacevic during negotiations to SEIU was designed to justify the Authority's policy choice to underfund IHSS services rather than to genuinely seek to resolve differences.

Additionally, SEIU argues that the ALJ should have concluded that the Authority unlawfully imposed two waivers of rights—the right to strike and the right to bargain—in violation of the MMBA, controlling precedent and public policy. In addition to constituting per se violations of the duty to bargain, SEIU argues that, regardless of whether the imposed terms had any appreciable effect on negotiations, the mere fact that the Authority unilaterally imposed them constitutes some evidence of bad faith which the ALJ should have considered.

THE AUTHORITY'S RESPONSE TO SEIU'S EXCEPTIONS

In its response to SEIU's exceptions, the Authority argues that SEIU's statement of exceptions and supporting brief fail to comply with PERB Regulation 32300, subdivision (a), and urges the Board to refuse to consider any of the matters raised by SEIU.

Alternatively, the Authority argues that the proposed decision was adequately supported by the record and applicable authority and should therefore be adopted by the Board. The Authority argues that most of SEIU's contentions regarding take-it-or-leave-it negotiation tactics and the budgetary evidence supporting the Authority's proposals to reduce providers' wages and benefits were previously raised in SEIU's closing brief before the ALJ, and were fully considered and appropriately rejected by the ALJ. The Authority argues that, simply because SEIU disagrees with Kovacevic's methodology for projecting the amount that could be spent on providers' wages and benefits, without taking additional funds from other County services, does not mean that the Authority acted unlawfully or unreasonably, or that the ALJ's decision was not adequately supported by the record.

The Authority argues that its imposition of the tentative agreements regarding No Strike/No Lockout and Separability/Savings violated no law because neither of these articles ever became effective. According to the Authority, because each of the tentative agreements includes language referring to "this Agreement," and because the MMBA expressly states that unilateral imposition of terms does not create or revive an MOU, imposition of these tentative agreements never took effect and thus had no actual impact on SEIU's or providers' statutory rights, nor serve as evidence of the Authority's intent to frustrate negotiations or subvert the bargaining process.

DISCUSSION[7]

Matters Appropriate for Review

We first consider the Authority's argument that SEIU's exceptions are not appropriate for review for non-compliance with PERB's regulations. Pursuant to PERB Regulation 32300, parties may appeal a proposed decision by filing with the Board itself a statement of exceptions to the proposed decision and/or a supporting brief. The regulation requires that the statement of exceptions or brief include: (1) a statement of the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identification of the page or part of the decision to which exception is taken; (3) designation of the portions of the record, if any, relied upon for each exception; and (4) the grounds for each exception. (PERB Reg. 32300, subd. (a)(l)-

[7] Pursuant to PERB Regulation 32315, SEIU has requested oral argument. Although not explicitly stated as such, the Authority has also requested "an opportunity to address any remaining issues." Historically, the Board has denied such requests, when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Arvin Union School District* (1983) PERB Decision No. 300.) Because all of the above criteria are met in this case, we deny SEIU's request for oral argument and the Authority's request for an opportunity to address any remaining issues.

(4).) The purpose of the regulation is to afford the opposing party and the Board an adequate opportunity to address the issues raised. (*Temecula Valley Unified School District* (1990) PERB Decision No. 836.) The Board need not consider exceptions which do not substantially comply with the agency's regulations. (*Los Rios College Federation of Teachers (Sander, et al.)* (1995) PERB Decision No. 1111, p. 4; *State of California (Department of Youth Authority)* (1995) PERB Decision No. 1080-S, p. 3; cf. *San Mateo County Community College District* (1993) PERB Decision No. 1030 (*San Mateo*), p. 11.) Additionally, while the Board reviews the entire record de novo, it need not consider arguments that have already been adequately addressed below (*Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, pp. 4-5; *Morgan Hill Unified School District* (1995) PERB Decision No. 1120, p. 3), particularly where the party seeking review has simply reasserted its claims, without identifying a specific error of fact, law or procedure to justify reversal. (*Los Rios (Sander, et al.), supra,* at pp. 6-7; *State of CA (Youth Authority), supra,* at pp. 2-3; see also *San Bernardino City Unified School District* (2012) PERB Decision No. 2278, pp. 2-3; *County of San Diego* (2012) PERB Decision No. 2258-M, pp. 2-3.)

The Authority is correct that SEIU's brief is largely a repetition of its closing brief before the ALJ, and that it does little more than re-argue the facts and assert that the ALJ should have come to a different conclusion, without necessarily identifying any particular error of fact, law or procedure in the proposed decision. However, SEIU raises two points that substantially comply with the requirement that the excepting party state the grounds for its exceptions. First, SEIU argues that the ALJ failed to consider Kovacevic's testimony that, based on a policy choice rather than economic necessity, the Authority had set a pre-determined amount that it was willing to pay for IHSS providers' wages and benefits, and that it never deviated from that amount. According to SEIU, this conduct demonstrates the

Authority's bad faith in negotiations, because no legitimate changed circumstances justified the regressive economic proposal included in the Authority's LBFO and/or because the Authority's policy choice demonstrates a "take-it-or-leave-it" approach to negotiations. SEIU has explained how further consideration of certain, allegedly neglected facts, could affect the outcome, in compliance with PERB Regulation 32300.

Second, SEIU argues that the ALJ failed to give serious consideration to allegations that the Authority's unilateral imposition of the No Strike/No Lockout and Separability/ Savings language constituted *both* per se violations of the duty to bargain and evidence of bad faith. By asserting an error of law, this exception also complies with the regulation and is therefore appropriate for consideration. Accordingly, our discussion below focuses on these two exceptions and disregards the remainder of SEIU's brief.

Legal Standard for Allegations of Failure and Refusal to Bargain in Good Faith

The MMBA requires public agencies and the recognized representatives of their employees 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." (MMBA, § 3505; *Jefferson School District* (1980) PERB Decision No. 133, p. 11; *NLRB v. General Electric Co.* (2d Cir. 1969) 418 F.2d 736, 750.)[8] The meet and confer process does not bind the

[8] Although *Jefferson* involved interpretation of the Educational Employment Relations Act (EERA), section 3540 et seq., where California's public-sector labor relations statutes are similar or contain analogous provisions, agency and court interpretations under one statute are instructive under others. (*Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 623-624.) Additionally, private-sector precedent established under the National Labor Relations Act (NLRA), 29 U.S.C. section 151 et seq., and California's Agricultural Labor Relations Act, Labor Code sections 1140-1166.3, is persuasive for interpreting parallel or comparable provisions in the PERB-administered statutes. (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 311

public agency to any particular result in the matter, but does require that the parties seriously consider and attempt to resolve their differences. (*Los Angeles County Civil Service Com. v. Superior Court of Los Angeles County* (1978) 23 Cal.3d 55, 61–62.) Good-faith bargaining "thus involves both a procedure for meeting and negotiating, which may be called the externals of collective bargaining, and a bona fide intention, the presence or absence of which must be discerned from the record." (*General Electric Co. (New York, N.Y.)* (1964) 150 NLRB 192, 194, affd. (2d Cir. 1969) 418 F.2d 736; *Dublin Professional Fire Fighters v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 118 (*Dublin Professional Fire Fighters*); *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823-24; *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 (*City of Placentia*).)

In determining whether a party has violated its duty to meet and confer in good faith, PERB utilizes both a "per se" and a "totality of the conduct" analysis, depending on the specific conduct involved, and its effect on the negotiating process. (*Muroc Unified School District* (1978) PERB Decision No. 80 (*Muroc*), pp. 13-14; *Pajaro Valley Unified School District* (1978) PERB Decision No. 51, pp. 4-5.) The statutory scheme of collective bargaining speaks in terms of a procedural duty shared equally by the employer and the exclusive representative. (*Los Angeles Unified School District* (2013) PERB Decision No. 2326 (*LAUSD*), p. 40.) Per se violations generally involve conduct that is contrary to the procedures for bargaining or the express language or purposes of the statute, irrespective of the party's intent. (*San Mateo County Community College District* (1979) PERB Decision No. 94 (*San Mateo*), pp. 14-17; *Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton*); Higgins, *Developing Labor Law*, 6th Ed., Vol. I: Ch. 13.II.A, p. 892.)

(*McPherson*); *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 196 (*Moreno Valley*).)

By contrast, the "totality of conduct" test is used for allegations of "surface bargaining," which has been described as going "through the motions of negotiations," and "weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement." (*Muroc*, *supra*, PERB Decision No. 80, p. 13; *Davis Unified School District, et al.* (1980) PERB Decision No. 116, pp. 17-19, 28.) In surface bargaining cases, specific conduct may appear proper when viewed in isolation, but, when placed in the narrative history of negotiations, may also demonstrate that the charged party was not negotiating with the requisite subjective intent to reach agreement. (*Muroc, supra*, at pp. 13-14.) The question of good or bad faith is a factual determination based on the totality of the circumstances. (*City of Placentia, supra,* 57 Cal.App.3d 9, 25.) The Board looks to the entire course of negotiations, including the parties' conduct at and away from the table, to determine whether the respondent has bargained with the requisite intent to reconcile differences and reach agreement. (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 22; *University of California, Lawrence Livermore National Laboratory* (1995) PERB Decision No. 1119-H, p. 3; *NLRB v. A-1 King Size Sandwiches, Inc.* (11th Cir. 1984) 732 F.2d 872, 873.)

PERB recognizes various forms of conduct that may serve as evidence of a party's lack of good faith in negotiations. While not exhaustive, possible "indicators" of bad faith have included dilatory or evasive conduct at the table, such as cancelling or failing to prepare for meetings (*Oakland Unified School District* (1983) PERB Decision No. 326, p. 34); refusing to make counterproposals or otherwise explain one's bargaining positions (*Compton Community College District* (1989) PERB Decision No. 728, adopting proposed dec. at pp. 53; *City of San Jose, supra,* PERB Decision No. 2341-M); refusing to discuss a mandatory subject of bargaining or conditioning its discussion on prior agreement over other subjects (*City of San Jose, supra*, at pp. 31-32; *San Ysidro School District* (1980) PERB Decision No. 134);

failing to authorize representatives with sufficient authority to conduct meaningful negotiations (*Oakland, supra,* at pp. 41-42; *Stockton, supra,* PERB Decision No. 143, p. 27; cf. MMBA, § 3505.1; *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25); committing separate unfair practices at or away from the table (*City of San Jose, supra,* PERB Decision No. 2341-M, p. 23; *Beaumont Unified School District* (1984) PERB Decision No. 429 (*Beaumont*), p. 9); adopting a "take-it-or-leave-it" approach to negotiations (*General Electric Co., supra,* 150 NLRB 192, 195); and making regressive proposals or reneging on tentative agreements (*Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 420; *Stockton, supra,* at pp. 24-26; *Charter Oak Unified School District* (1991) PERB Decision No. 73 (*Charter Oak*), pp. 17-18). However, the ultimate test for surface bargaining is whether, under the totality of circumstances, the respondent's conduct was sufficiently egregious to frustrate negotiations or avoid agreement. (*City of San Jose, supra,* at pp. 19-22; *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S.)

Unlike a surface bargaining allegation, "per se" violations require no inquiry into the respondent's subjective intent or finding of bad faith. (*Charter Oak, supra,* PERB Decision No. 873, p. 8, fn. 3; *California State University* (1990) PERB Decision No. 799-H, adopting proposed dec. at pp. 51-52; *NLRB v. Katz* (1962) 369 U.S. 736, 742-743.) Examples of per se violations include refusing to provide necessary and relevant information upon request (*Stockton, supra,* PERB Decision No. 143, pp. 18-19); refusing outright to meet or negotiate regarding a mandatory subject (*Dublin Professional Fire Fighters, supra,* 45 Cal.App.3d 116, 118; *Sierra Joint Community College District* (1981) PERB Decision No. 179 (*Sierra*)); by-passing the representative and dealing directly with employees over negotiable matters (*City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M, p. 7; *Charter Oak, supra,* PERB Decision No. 873, p. 8, fn. 3); attempting to dictate who may serve

as the opposing party's representative in negotiations (*Yolo County Superintendent of Schools* (1990) PERB Decision No. 838); making pre-impasse unilateral changes to terms and conditions of employment (*Stockton, supra*, PERB Decision No. 143, pp. 19-21; *NLRB v. Katz, supra,* 369 U.S. 736, 742-743; *Moreno Valley, supra,* 142 Cal.App.3d 191, 196); making post-impasse unilateral changes to subjects of bargaining not previously discussed or included in the employer's LBFO (*Laguna Salada Union School District* (1995) PERB Decision No. 1103, pp. 15-16; *Lou's Produce* (1992) 308 NLRB 1194, 1195, enforced (9th Cir. 1994) 21 F.3d 1114); insisting to impasse on and/or imposing non-mandatory subjects of bargaining (*Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista*), pp. 19-23; *City of San Jose, supra*, PERB Decision No. 2341-M, pp. 43-44, 46, 49-50); insisting to impasse and/or imposing proposals whose provisions waive or limit the statutory rights of the representative and/or employees (*Rowland Unified School District* (1994) PERB Decision No. 1053 (*Rowland*), p. 7, fn. 5; *Berkeley Unified School District* (2012) PERB Decision No. 2268 (*Berkeley*), pp. 3-9, esp. fn. 3; *Gaso Pumps, Inc.* (1985) 274 NLRB 532, 535-537); and, imposing proposals to retain unfettered discretion over key subjects of bargaining, regardless of good-faith negotiations, where such implementation would be inherently destructive of collective bargaining. (*LAUSD, supra,* PERB Decision No. 2326, pp. 38-39, 43; *McClatchy Newspapers* (1996) 321 NLRB 1386, enforced (D.C. Cir. 1997) 131 F.3d 1026, cert. den. (1998) 524 U.S. 937; *Anderson Enterprises* (1999) 329 NLRB 760, 777-79; *KSM Indus., Inc.* (2001) 336 NLRB 133, 134-135, 144; cf. *NLRB v. A-1 King Size Sandwiches, Inc., supra*, 732 F.2d 872, 877.)

Identical or overlapping facts may support more than one of the above theories of liability. As we explained in *City of San Jose, supra,* PERB Decision No. 2341-M, because the "totality of circumstances" analysis used for surface bargaining allegations requires an

examination of all the evidence relevant to the respondent's subjective intent, it may include evidence of *separate* unfair practices committed at or away from the bargaining table to the extent they would "support a conclusion that the charged party was not negotiating with the requisite subjective intent to reach agreement." (*Id.* at p. 23; *Muroc, supra,* PERB Decision No. 80, p. 13; see also *Patent Trader, Inc.* (1967) 167 NLRB 842, 851-852, enforced by (2d Cir. 1969) 415 F.2d 190, as mod. on other grounds by (2d Cir. 1970) 426 F.2d 791.) Thus, where conduct is alleged to constitute a per se violation of the duty to bargain, it may also indicate the absence of subjective good faith in support of a surface bargaining charge. (*City of San Jose, supra*, at pp. 37-39, 49-50; *San Mateo, supra,* PERB Decision No. 1030, pp. 13-14; see also *Stockton, supra*, PERB Decision No. 143, p. 24 [piecemeal bargaining tactics]; *Radisson Plaza Minneapolis* (1992) 307 NLRB 94, 95, 109 [refusal to provide information]; *NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229, 234 [unilateral wage increase].)

Whether the ALJ Failed to Consider Allegations in the Complaint

The essence of SEIU's charge is that the Authority engaged in surface bargaining by, among other acts, making regressive and "take-it-or-leave-it" bargaining proposals and by prematurely or insincerely declaring impasse as an excuse to act unilaterally with respect to statutory rights. Under Board precedent, such allegations are analyzed under a "totality of circumstances" test to determine whether the conduct at issue indicates a subjective intent to subvert the negotiations or undermine the authority of the representative. (*State of California (Department of Corrections & Rehabilitation, Department of Personnel Administration)* (2010) PERB Decision No. 2115-S (*State of CA (CDCR/DPA))*, p. 10; *Regents of the University of California* (1985) PERB Decision No. 520-H (*UC Regents*), pp. 14 and 25, fn. 13; *County of Riverside* (2014) PERB Decision No. 2360-M, pp. 11, 19.)

However, embedded within (or alongside) SEIU's surface bargaining allegation are separate allegations that the Authority has breached its duty to bargain by unilaterally imposing proposals requiring SEIU and employees to waive statutory rights. Insisting on, or imposing a waiver of statutory rights, a non-mandatory subject of bargaining, is, in effect, a refusal to bargain over the subjects that are within the scope of mandatory bargaining. (*Berkeley, supra,* PERB Decision No. 2268, pp. 3-9, esp. fn. 3; *Lake Elsinore School District* (1986) PERB Decision No. 603, pp. 2-3; see also *NLRB v. Wooster Div. of Borg-Warner Corp.* (1958) 356 U.S. 342; *Industrial Union of Marine & Shipbuilding Workers of America v. NLRB* (3d Cir. 1963) 320 F.2d 615, 619.) Though they may also serve as evidence of bad faith in support of a surface bargaining charge, allegations that an employer has unilaterally implemented terms that waive or limit statutory rights are analyzed as per se violations. (*Rowland, supra,* PERB Decision No. 1053, p. 7, fn. 5; *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S (*State of CA (DPA)*), pp. 8, 10, fn. 9; *Roosevelt Memorial Med. Ctr.* (2006) 348 NLRB 1016, 1017.)[9]

In drafting the complaint in this case, the Office of the General Counsel carefully reflected *both* theories of liability alleged in SEIU's charge. Paragraph 10 of the complaint alleged that, on May 25, 2010, the Fresno County Board of Supervisors, in its capacity as the governing board of the Authority, voted to adopt and approve the unilateral implementation of No Strike/No Lockout and Separability/Savings provisions that required SEIU and IHSS providers employed by the Authority to waive statutory rights. According to the complaint,

[9] Indeed, where a proposal is contrary to external law or public policy, or its unilateral adoption would subvert the language or policies of the collective bargaining statutes, good faith is no defense. (*Berkeley, supra,* PERB Decision No. 2268, p. 9; *San Mateo, supra,* PERB Decision No. 1030, p. 18, fn. 11; *City of Pinole* (2012) PERB Decision No. 2288-M, pp. 11-13; see also *NLRB v. Katz, supra,* 369 U.S. 736, 743.)

this conduct constituted a failure and refusal to meet and confer in good faith, in violation of MMBA sections 3505 and 3509, subdivision (b), and PERB Regulation 32603, subdivision (c).

Paragraph 11 of the complaint similarly alleged that the Authority failed and refused to meet and confer in good faith with SEIU in violation of the same statutory and regulatory provisions, by, among other things, approving the unilateral implementation of the No Strike/No Lockout and Separability/Savings provisions that required SEIU and IHSS providers to waive statutory rights. Thus, the same conduct regarding the implementation of the No Strike/No Lockout and Separability/Savings provisions appears twice in the complaint as allegedly violating the same provisions of the MMBA and PERB regulations. The repetition of these allegations indicates the Office of the General Counsel's view that the Authority's imposition of these provisions should be analyzed as *both* per se violations of the Authority's duty to bargain *and* as indicators of its subjective bad faith in support of the surface bargaining allegation.

The proposed decision offered the following analysis of the waiver issue, which is quoted here in its entirety:

> [SEIU] asserts that the implementation of the [Separability/Savings] clause as part of the May 2010 LBFO imposed a waiver of its statutory rights to bargain, and implementation of the No Strike/No Lockout article waived its and the IHSS providers' rights to engage in concerted activities. Both sections were TA'd on September 1 and October 29, 2009, respectively. Both parties agreed that these two clauses, along with the remaining TA's, would be part of their final proposals. The Union's claim that [its negotiator] only TA'd the clauses for inclusion in a final contract, and not as part of an imposed LBFO, is difficult to follow and cannot be accepted.

While the proposed decision asserts elsewhere that, "Conditioning agreement on the waiver of rights has been analyzed under both the totality of circumstances test and as a per se violation of the duty to bargain in good faith," it is not apparent from the above analysis *which*

of these tests was used or why post-impasse implementation raises issues of conditional bargaining. Nor does the proposed decision explain *how* the decision was made to apply one or the other (or both) of PERB's tests for bargaining violations.

Issuance of a complaint by the Office of the General Counsel signifies that the dispute is not only one that the charging party wishes to pursue, but also one that the agency has determined *should be pursued.* (*County of Fresno* (2014) PERB Decision No. 2352-M, p. 4.) While the Board may decline to consider legal theories that are cumulative or that would not affect the remedy (*Stockton, supra*, PERB Decision No. 143, p. 24; *Sierra, supra,* PERB Decision No. 179, pp. 6-7), where, as here, identical or overlapping facts support more than one theory of liability, each of which is set forth in the complaint, consideration of one theory will generally not replace or subsume consideration of the others. (*City of San Jose, supra,* PERB Decision No. 2341-M, pp. 49-50; *UC Regents, supra,* PERB Decision No. 520-H, pp. 10-11; .cf. *Stockton, supra*, PERB Decision No. 143, p. 24.) Where the evidence of bad faith in a surface bargaining charge includes allegations of separate per se violations, the per se allegations should be analyzed both in their own right *and* as evidence in support of the surface bargaining allegation. (*City of San Jose, supra,* at pp. 37-39, 49-50.)

At minimum, a proposed decision must address the allegations included in the complaint or justify the decision to do otherwise. (*County of Fresno, supra,* PERB Decision No. 2352-M, p. 4; *Stockton, supra*, PERB Decision No. 143, p. 24.) We therefore agree with SEIU that the proposed decision failed to consider the allegation in the complaint that the Authority unilaterally implemented provisions that waived or limited statutory rights.

We next turn to the merits of SEIU's allegations that the Authority committed per se violations of the duty to bargain by unilaterally imposing terms that waived or limited statutory rights, before addressing whether these allegations, when considered in conjunction with

SEIU's other exception, constitute evidence of the Authority's bad faith in negotiations. We first review the scope and purpose of an employer's right to act unilaterally at impasse under MMBA section 3505.7 (former section 3505.4),[10] before addressing SEIU's contention that the Authority is categorically prohibited from unilaterally implementing the provisions of the No Strike/No Lockout and Separability/Savings tentative agreements, even after reaching impasse and exhausting all applicable impasse resolution procedures.

Whether the Authority's Post-Impasse Imposition of No Strike/No Lockout and Separability/Savings Language Constituted Per Se Violations of the Duty to Bargain

Impasse is a point in negotiations at which, despite the parties' genuine efforts to resolve their differences, they have exhausted the prospects for concluding an agreement, so that, absent changed circumstances, further discussion would be pointless. (*Regents of the University of California* (1996) PERB Decision No. 1157-H, p. 3; *Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124, p. 5; *Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*).) Upon a declaration of impasse, the parties must participate in any statutory or other applicable impasse resolution procedures according to the same "good faith" standard governing their conduct in pre-impasse negotiations. (MMBA, §§ 3505.4, 3505.5; 3505.7; *City & County of San Francisco* (2009) PERB Decision No. 2041-M, p. 5; *Ventura County Community College District* (1998) PERB Decision No. 1264, adopting warning letter at pp. 4-5.)

[10] MMBA section 3505.4 provided in pertinent part, that upon reaching a bona fide impasse in negotiations and exhausting any applicable mediation and factfinding procedures, a public agency not subject to interest arbitration may, after holding a public hearing regarding the impasse, implement its LBFO. Effective January 2012, former section 3505.4 was renumbered as section 3505.7 to accommodate the factfinding language now included in the MMBA following enactment of Assembly Bill 646 (Atkins).

Under MMBA section 3505.7, once all statutory or other applicable impasse resolution procedures and public hearing requirements have been exhausted, if negotiations remain deadlocked, the same rules as are applicable in the private sector apply. (*County of Riverside, supra,* PERB Decision No. 2360-M, p. 11; *Rowland, supra,* PERB Decision No. 1053, p. 6.) That is, the duty to bargain is suspended, a public agency that is not required to proceed to interest arbitration may unilaterally implement terms and conditions of employment reasonably comprehended by its final pre-impasse proposals, presented to and rejected by the union, and the union may exercise its right to strike. (MMBA, § 3505.7; *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900-901; *Atlas Tack Corp.* (1976) 226 NLRB 222, 227; *County Sanitation Dist. No. 2 of Los Angeles County v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564 (*County Sanitation*); see also *Charter Oak, supra,* PERB Decision No. 873.) The term "reasonably comprehended" excludes those changes better than the last offer, and also any changes which the parties did not discuss during negotiations which are less than the status quo. (*Orange Unified School District* (2000) PERB Decision No. 1416, p. 15, fn. 10.)

An employer's imposition of its LBFO does not create an MOU nor revive an expired MOU. (MMBA, § 3505.7.) An employer's imposition of its LBFO cannot "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." (MMBA, § 3505.7; *Rowland, supra,* PERB Decision No. 1053, p. 7, fn. 5.) As we explained in *City of Santa Rosa* (2013) PERB Decision No. 2308-M (*Santa Rosa*), the purpose of authorizing the employer to act unilaterally upon reaching a "second" or "final" impasse, *i.e.*, after exhausting any applicable impasse resolution

procedures, is to break the deadlock and thereby *encourage* further negotiations, not to insulate either party from all bargaining demands. (*Santa Rosa, supra*, at p. 5.)

Nor may the impasse rule be used to destroy the very basis for resolving disputes through collective bargaining. (MMBA, § 3500, subd. (a); *State of CA (DPA), supra,* PERB Decision No. 2130-S, p. 9, citing *Rowland, supra*, PERB Decision No. 1053; see also *Charles D. Bonanno Linen Service, Inc. v. NLRB* (1982) 454 U.S. 404, 412.) Even when the duty to bargain is temporarily suspended by impasse, the employer may not take unilateral action that disparages the collective bargaining process or undermines the authority of the representative. (*LAUSD, supra,* PERB Decision No. 2326, pp. 38-39, 43; *Toledo Typographical Union No. 63 v. NLRB* (D.C. Cir. 1990) 907 F.2d 1220, 1222-25, cert. den. (1991) 498 U.S. 1053; *Central Metallic Casket Co.* (1950) 91 NLRB 572, 573-74; *NLRB v. Borg-Warner Corp., supra,* 356 U.S. 342; *Boise Cascade Corp.* (1987) 283 NLRB 462, 463, affd. (D.C. Cir. 1988) 860 F.2d 471.)

PERB has also held that an employer may not unilaterally impose terms that waive or limit statutory rights, because "[t]o do so would be destructive of those rights." (*San Mateo, supra,* PERB Decision No. 1030, p. 18, fn. 11; *City of Pinole, supra,* PERB Decision No. 2288-M, pp. 11-13.) Because "not all terms and conditions contained within a last, best and final offer may lawfully be implemented by an employer," (*Rowland, supra,* PERB Decision No. 1053), the existence of a bona fide impasse through good-faith negotiations, by itself, does not authorize imposition of proposals that waive or limit statutory rights. (*City of Pinole, supra,* at pp. 11-13; see also *Berkeley, supra,* PERB Decision No. 2268, p. 9.)

SEIU argues that the prohibition against unilateral employer action at impasse extends to proposals to waive or limit employee rights to engage in concerted activities, such as the right to strike, and to proposals that rely on the existence of a collective bargaining agreement. As explained below, we affirm prior Board precedent holding that, while not absolute, the right to strike falls within the statutorily-protected right of public-sector employees to participate in union activities. (MMBA, § 3502; *Modesto, supra,* PERB Decision No. 291.) Following federal private-sector law, we hold that, even after bargaining in good faith to impasse and exhausting all applicable impasse resolution procedures, the MMBA's obligation to meet and confer in good faith prohibits an employer from unilaterally imposing terms that waive or limit the statutory rights of employees to engage in concerted activity, including the right to strike. Although we rely on different reasoning, we conclude that because the Separability/Savings language and its underlying purpose necessarily imply the existence of a bi-lateral *agreement*, the Authority was similarly prohibited by MMBA section 3505.7 from imposing this language unilaterally.

While Not Absolute, the MMBA Guarantees Public Employees a "Basic Right to Strike."

By sanctioning statutory and other impasse dispute resolution procedures, the Legislature has sought to defer and, if possible, avoid the disruption of government services caused by work stoppages. (MMBA, §§ 3505.4, 3505.5; *San Diego Teachers Assn. v. Superior Court of San Diego County* (1979) 24 Cal.3d 1, 15 (*San Diego Teachers*); see also *San Francisco Unified School District* (1979) PERB Order No. IR-10, p. 3.) However, the

MMBA includes no blanket prohibition against strikes by public employees. (*County Sanitation, supra*, 38 Cal.3d 564, 572-573.)[11]

The California Supreme Court has interpreted the absence of an express legislative *prohibition* as providing public employees with a "basic right to strike," unless or until it is clearly shown that the strike poses a substantial and imminent threat to public health and safety. (*County Sanitation, supra,* 38 Cal.3d 564, 585-586; see also *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 606.) Because we presume that the Legislature was aware of existing judicial decisions having a direct bearing on the particular legislation enacted, we conclude that, when the Legislature transferred MMBA jurisdiction from the courts to PERB in 2000, it did so with the intent of preserving the view of the California Supreme Court that "public employees have a right to strike *unless* it is clearly shown that there is a substantial and imminent threat to public health and safety." (MMBA, § 3509, subd. (b); *City of San Jose v. Operating Engineers, supra,* 49 Cal.4th 597, 606.)

While *County Sanitation* removed the judicially-created prohibition against strikes by public-sector employees and held that such conduct is not per se illegal (*id.* at pp. 564, 585), it did not address whether such conduct is *statutorily protected* by the MMBA, i.e., whether a union may, for example, call for, encourage or support a strike without being charged with

[11] It is true that, like other PERB-administered statutes, MMBA section 3510, subdivision (b), provides that, "The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees." (See also, e.g., § 3549 [EERA].) In language modeled after section 7 of the NLRA, Labor Code section 923 guarantees the right of private-sector employees in California to engage in concerted activities, including work stoppages. (*Petri Cleaners, Inc. v. Automotive Employees, etc.* (1960) 53 Cal.2d 455.) However, in *County Sanitation*, the California Supreme Court concluded that, by exempting public employees from the provisions of Labor Code section 923, the Legislature did *not* intend to prohibit strikes by all public-sector employees, as evidenced by *other* legislation specifically prohibiting certain categories of employees from striking. (*County Sanitation, supra,* at pp. 572-73; see also Lab. Code, §§ 1138.5 [peace officers] and 1962 [fire fighters].)

failing or refusing to bargain in good faith, or whether a public employer may discipline or discharge employees for engaging in a work stoppage. However, in a separate line of cases, the Supreme Court has repeatedly held that, by delegating to PERB the power and duty to investigate and remedy unfair practices, the Legislature vested the agency with exclusive, initial jurisdiction to determine whether strikes and strike-related activities by public employees may be prohibited *or protected* by the public-sector labor relations statutes. (*San Diego Teachers Assn. v. Superior Court, supra,* 24 Cal.3d 1, 15; *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 948 (*El Rancho*).) The Supreme Court's discussion in *El Rancho* is instructive. There, the Court cited, with approval, the view of the Michigan Supreme Court that public school teachers who participated in an illegal strike may nonetheless have a defense against discipline or discharge, if the strike was provoked by the employer's unfair labor practices. (*Id.* at p 958, citing *Lamphere Schools v. Lamphere Federation of Teachers* (1977) 400 Mich. 104, 117-118; see also *Mastro Plastics Corp. v. NLRB* (1956) 350 U.S. 270, 278-784 (*Mastro Plastics*).)

More recently, in *City of San Jose v. Operating Engineers,* the California Supreme Court rejected a city's argument that, because the MMBA includes no express reference to strikes, PERB was without jurisdiction to determine whether to seek an injunction against an allegedly unlawful strike by public employees. Following its earlier decisions in *San Diego Teachers* and *El Rancho*, the Court again explained that, notwithstanding the absence of any statutory provision expressly referencing strikes by public employees, PERB has exclusive initial jurisdiction to determine whether strikes and strike-related conduct is arguably prohibited *or protected* by the PERB-administered statutes. (*City of San Jose v. Operating Engineers, supra*, 49 Cal.4th 597, 606-607; *El Rancho, supra,* 33 Cal.3d 946, 956.) In light of these decisions, the law is clear: Unless the Legislature has expressly stated otherwise, as it

has with peace officers and firefighters, PERB may determine whether, and under what circumstances, public employees and employee organizations have a *statutorily-protected* right to strike. (*El Rancho, supra,* at pp. 958-59; *Modesto, supra,* PERB Decision No. 291, pp. 68-69, fn. 36.)

By way of example, PERB has repeatedly endorsed the notion of "unfair labor practice strikes," as developed by the National Labor Relations Board (NLRB) and the federal courts. Under private-sector precedent, striking employees are generally protected from being disciplined, discharged or otherwise discriminated against for participating in a strike, if one of the purposes of the strike was to protest an employer's unfair labor practice. (*Mastro Plastics, supra,* 350 U.S. 270, 278-284; *NLRB v. International Van Lines* (1972) 409 U.S. 48, 50-53; *Columbia Portland Cement Co. v. NLRB* (6th Cir. 1992) 979 F.2d 460, 463.) Thus, in *Modesto, supra,* PERB Decision No. 291, pp. 66-69, the Board determined that a strike was protected conduct and not a violation of EERA, because it was provoked by the employer's unfair practices. (*Id.* at pp. 65-66.) To "remedy any discriminatory action taken against Association members for participating in [the] strike," the Board ordered the employer to rescind and expunge from employee personnel files all letters of commendation issued to non-striking employees. (*Id.* at p. 68.) In *Modesto City Schools/Modesto City Schools, et al.* (1980) PERB Order No. IR-12, the Board concluded that a strike called to protest a public school employer's refusal to consider new concessions made after the completion of impasse resolution procedures was "a protected response to an employer's unfair practices." (*Id.* at pp. 3-4, citing *Mastro Plastics, supra,* 350 U.S. 270) and ordered the employer to return to the bargaining table upon conclusion of the strike. (*Id.* at pp. 5-6.) In such cases, the question is whether the employer has committed an unfair practice that provoked or prolonged the work stoppage. (*San Ramon Valley Unified School District* (1984) PERB Order No. IR-46

(*San Ramon*), p. 10; see also *Mastro Plastics, supra*, 350 U.S. 270, 273, 278-79; *Southwestern Porcelain Steel Corp.* (1961) 134 NLRB 1733, 1734-1735, 1744, enforced (10th Cir. 1963) 317 F.2d 527.)

In several cases, the Board has determined that even a *pre-impasse* strike may be statutorily protected, notwithstanding the legislative purpose of preventing or deferring labor unrest until impasse resolution procedures have been completed. Although strikes conducted during negotiations or before the completion of impasse resolution procedures are presumptively regarded as unlawful pressure tactics, a union may rebut that presumption by showing that the strike was caused or prolonged by the employer's unfair practices. (*Westminster School District* (1982) PERB Decision No. 277, pp. 14-15; *Sacramento City Unified School District* (1987) PERB Order No. IR-49; *Santa Maria Joint Union High School District* (1989) PERB Order No. IR-53, p. 5; *Regents of the University of California* (2010) PERB Decision No. 2094-H (*UC Regents*), pp. 32-33; see also *Sweetwater Union High School District* (2014) PERB Order No. IR-58 (*Sweetwater*), p. 9.)[12] Thus, under well-settled Board law, "There is no question . . . that a strike provoked by an employer's unfair labor practices would be protected *at any time at which it occurs in the bargaining process* as long as the striking employee organization has not failed to participate in good faith in the statutory impasse procedure." (*San Ramon, supra*, PERB Order No. IR-46, p. 10.)

In *Modesto, supra,* PERB Decision No. 291, the Board explained that EERA section 3543, which guarantees public school employees the right "to form, join, and

[12] Although PERB has applied private-sector precedent regarding "unfair labor practice strikes" to a variety of fact patterns, we raise the subject here merely by way of example of strikes as protected activity. Because the present case involves no actual or threatened strike, we need not and do not attempt here to define the full scope or any limitations on public employees' right to participate in strikes under the PERB-administered statutes.

participate in the activities of employee organizations of their own choosing," provides the statutory basis for concluding that strikes may be statutorily-protected activity.[13] After reviewing other labor relations statutes, including section 923 of the Labor Code and section 7 of NLRA, which are generally understood as guaranteeing private-sector employees' right to strike under the rubric of "concerted activities," the Board reasoned as follows:

> The only difference we find between the right to engage in concerted action for mutual aid and protection and the right to form, join and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process. Membership drives, meetings, bargaining, leafletting and informational picketing are activities which are, without question, authorized by section 3543. Similarly, work stoppages must also qualify as collective actions traditionally related to collective bargaining. Thus, except as limited by other provisions of EERA, section 3543 authorizes work stoppages.

(*Modesto, supra*, at p. 62.) Thus, in addition to the qualified *legal* right to strike under *County Sanitation* and other judicial authority, strikes and strike-related conduct may also be statutorily *protected* by the MMBA and other California public-sector labor relations statutes. (*Modesto, supra*, at p. 15, *Sweetwater, supra*, PERB Order No. IR-58, p. 9.)[14]

Although Ostensibly Overruled, the *Modesto* Rule Remains Part of Board Law.

In contrast to *Modesto* and the other cases cited above stands *Compton Unified School District* (1987) PERB Order No. IR-50 (*Compton*). In *Compton*, a majority of the Board

[13] As the Board held: "Even though EERA does not prohibit strikes, the Board cannot hold that a work stoppage is protected unless there is language in EERA which actually authorizes such a decision. We find that there is." (*Modesto, supra,* at p. 61.)

[14] Because MMBA section 3502 contains identical language to that found in EERA section 3543, we consider *Modesto* instructive for interpreting the scope of employee rights under the MMBA. (*Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 623-624; see also *UC Regents, supra,* PERB Decision No. 2094-H, p. 31.)

sought to enjoin a series of intermittent strikes allegedly called to protest a school district's unfair practices. A majority of the *Compton* Board found reasonable cause to conclude that the intermittent strikes constituted an unfair practice or other violation of EERA. However, the two members making up the Board majority wrote separate opinions expressing different views on some of the key issues, including the legality and/or protected status of strikes under EERA.

In the lead opinion, Member Porter argued that, by omitting from EERA and other public-sector statutes, including the MMBA, any reference to strikes or the right to engage in "other concerted activities," the Legislature intended to prohibit *all* strikes by public employees. (*Compton, supra*, at pp. 42-44, 74-75, 85, 87, 90, 115.) Member Porter also argued "that any such strikes or concerted activities are not protected by EERA" and specifically criticized the *Modesto* Board's reasoning. (*Compton*, *supra*, at pp. 94-97, 101-104.) Specifically, Member Porter asserted that *Modesto* "is clearly incorrect and is overruled insofar as it interprets EERA section 3543 as authorizing work stoppages by public school employees for the purpose of collective bargaining or other mutual aid or protection." Member Porter argued that the Board's decision in *San Ramon, supra,* PERB Order No. IR-46 "is also incorrect and is overruled insofar as it follows [*Modesto*] and holds that public school employees have a protected right under EERA to engage in unfair practice strikes." (*Compton, supra*, at p. 106; see also pp. 125, 128.)

In her concurring opinion, Chairperson Hesse disagreed with Member Porter that EERA prohibits all strikes by public school employees, but agreed with the result that the series of intermittent strikes under consideration in *Compton* was unlawful, and should be enjoined, because it caused a "total breakdown" of basic, constitutionally and statutorily-guaranteed educational services, and of the collective bargaining process guaranteed by EERA.

(*Compton, supra*, at pp. 167-168.) Chairperson Hesse also agreed with Member Porter's view that *Modesto* was wrongly decided and should be overruled to the extent it holds that the right "to form, join, and participate in the activities of employee organizations of their own choosing" under EERA section 3543 includes a statutorily-protected right to strike. (*Compton, supra*, at p. 164, fn. 3.) Elsewhere in her opinion, however, Chairperson Hesse seemed to accept the *Modesto* premise that striking employees may be protected, even before the completion of impasse resolution procedures, if their strike was provoked by employer unfair practices. However, she concluded that in this particular case the issue was moot, because employees had returned to work and then struck again, and because the available evidence did not establish that the series of strikes was in any way provoked or prolonged by employer unfair practices. (*Modesto, supra,* at p. 169, fn. 8.)[15]

Although the Board has never formally overruled *Compton*, its status as precedential authority is uncertain at best. Whatever the merits of Member Porter's exhaustive history of private and public-sector labor relations statutes, it is true, as pointed out in Member Craib's dissenting opinion, that the Supreme Court's *County Sanitation* opinion had already disposed of the argument that the absence of express "right to strike" or "concerted activities" language in EERA indicated an intent to ban all strikes by public employees.[16] Moreover, no other

[15] Member Craib, the third member of the *Compton* Board, wrote a dissenting opinion which argued that, unless otherwise limited by provisions of EERA, section 3543 authorizes strikes, and which endorsed the soundness of *Modesto*'s reasoning regarding unfair labor practice strikes. (See *Compton, supra*, PERB Order No. IR-50, p. 173.)

[16] Compare Member Porter's open disagreement with the reasoning in *County Sanitation*, pages 104-122, 147, with Member Craib's discussion, pages 171-172. See also the discussion in Zerger, et al., *California Public Sector Labor Relations* (Matthew Bender 2014) Chapter 25, section 25.03[3][a], suggesting that, contrary to Member Porter's interpretation, the Supreme Court had "repeatedly rejected" the notion that *all* strikes by public employees are illegal.

member of the *Compton* Board shared Member Porter's view that EERA establishes a blanket prohibition against *all* strikes by public employees and no Board majority since *Compton's* publication has ever adopted that view either. (*Compton, supra*, PERB Order No. IR-50, p. 168 [Hesse concurring opn.]; *Vallejo City Unified School District* (1993) PERB Decision No. 1015 (*Vallejo*), adopting warning letter at p. 2; see also *Charter Oak, supra,* PERB Decision No. 873.) To the contrary, the Board has since stated that, "[n]otwithstanding the absence of any specific statutory language in the MMBA addressing the right to strike, it is now well established that certain public sector strikes are lawful." (*City of San Jose* (2010) PERB Decision No. 2141-M, p. 7, citing *County Sanitation, supra,* at pp. 572-573.) In at least two other cases decided since *Compton*, the Board has interpreted contractual no strikes provisions to determine whether a union's sponsorship or support for a sympathy strike constituted an unlawful unilateral change. (*Oxnard Harbor District* (2004) PERB Decision No. 1580-M and *Regents of the University of California* (2004) PERB Decision No. 1638-H.) Although both cases turned on principles of contract interpretation, the underlying assumption in both cases was that, absent contractual language expressly prohibiting sympathy strikes, employees may lawfully strike in sympathy with other employees to the extent the primary strike is lawful.

Additionally, while the *Compton* majority expressly rejected *Modesto* as "wrongly decided" and overruled it to the extent it held that the right "to form, join, and participate in the activities of employee organizations of their own choosing" under EERA section 3543 includes the right to strike, in subsequent decisions, the Board has clearly returned to, or retained, the notion of unfair practice strikes as protected conduct, *without* however overruling *Compton* or acknowledging the *Compton* majority's disagreement with *Modesto* on this point. Thus, in *Regents, supra*, PERB Decision No. 2094-H, the Board stated that *Compton* overruled

Modesto, but "did not overrule prior PERB decisions recognizing the legality [sic] of unfair practice strikes." (*UC Regents, supra,* at pp. 29-30.)[17] As explained above, prior Board precedent was not concerned so much with the *legality* of unfair practice strikes. That issue was definitively resolved by *County Sanitation* and has since been affirmed by subsequent judicial authority. (*City of San Jose v. Operating Engineers, supra,* 49 Cal.4th 597, 606.)

Rather, the question addressed in unfair practice strike cases is whether striking employees have engaged in *a statutorily-protected activity*, so that they or their representative may rebut the presumption of unlawfulness. We believe the *Modesto* Board's answer to this question remains the better rule and therefore overrule *Compton* to the extent it holds that there is no statutorily-protected right to strike in protest against an employer's unfair practices. The right to form, join and participate in the activities of employee organization encompasses the qualified right to strike recognized by the Supreme Court, including the right to strike in protest against unfair practices. MMBA section 3502 states, in pertinent part, that, "Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (MMBA, § 3502.) As such, strikes by public employees are statutorily protected, except as limited by other provisions of the MMBA or other public-sector labor relations statutes and controlling precedent.

The *Modesto* Rule is Consistent with Federal and California Precedent.

Modesto's interpretation of employee rights under EERA is consistent with the language and purpose of the MMBA and other labor relations statutes. It is also consistent

[17] See also *UC Regents, supra*, PERB Decision No. 2094-H, at pages 31-34, which reaffirmed PERB's case law regarding unfair practice strikes, but neither rehabilitated *Modesto* nor explained how an otherwise unlawful strike could be an "unfair practice strike," unless it was also statutorily protected.

with judicial authorities which have generally directed PERB to follow "the array of sound NLRA precedent" when deciding the parameters of protected employee conduct under the PERB-administered statutes. (*McPherson, supra,* 189 Cal.App.3d 293, 311; see also *San Lorenzo Education Assn. v. Wilson* (1982) 32 Cal.3d 841, 845-846.) Section 7 of the NLRA guarantees private-sector employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C., § 157.) Like the MMBA, section 7 thus includes no explicit reference to work stoppages. Nevertheless, there has never been any serious question that Congress intended that section 7's guarantee of the right to engage in "concerted activities" includes a *protected* right to strike. (29 U.S.C., § 157; *NLRB v. Erie Resistor Corp.* (1963) 373 U.S. 221, 233 (*Erie Resistor*), citing H. R. Rep. No. 245, 80th Cong., 1st Sess. 26; see also *NLRB v. Fleetwood Trailer Co.* (1967) 389 U.S. 375, 378; *Alwin Mfg. Co., Inc. v. NLRB* (D.C. Cir. 1999) 192 F.3d 133, 138-142; and *NLRB v. Curtin Matheson Scientific, Inc.* (1990) 494 U.S. 775, 795.)

Because we hold that public employees enjoy a statutorily-protected right to strike under the MMBA and other PERB-administered statutes, it follows that a no strikes or similar clause purporting to waive or limit that right must be exempt from the employer's right to impose terms and conditions of employment, even where the employer has bargained in good faith to a genuine impasse and the no strikes language is consistent with the employer's "last, best and final" pre-impasse proposals. Here again, we look to the decisional law of the NLRB and the federal courts for guidance.

Under federal private-sector law, the parties' mutual obligation to bargain in good faith may exist side-by-side with the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties." (*NLRB v. Insurance Agents International Union* (1960) 361 U.S. 477, 489.) Rather than demonstrating bad faith, whose hallmark is a desire to

frustrate negotiations and *avoid* reaching agreement, the use of economic pressure, even when aimed at extracting concessions, may in fact assist in *breaking a deadlock* and thus furthering the principles of collective bargaining. (*Id.* at p. 490; *Erie Resistor, supra,* 373 U.S. 221, 234.) While federal labor policy seeks to avoid disruptions to commerce caused by labor disputes, it nonetheless recognizes that, because of the "inequality in bargaining power" stemming from the employer's ability to control terms and conditions of employment, a threatened or actual strike may be the employees' only means of restoring some measure of equality of bargaining power between employers and employees and encouraging employers to engage in collective bargaining. (NLRA, 29 U.S.C., §§ 151, 152(3), 157; *Mastro Plastics, supra,* 350 U.S. 270, 280) In this sense, the right to strike is generally regarded as "fundamental" to the system of collective bargaining established by the NLRA, even if its actual use may be disfavored. (*Gary-Hobart Water Corp.* (1974) 210 NLRB 742, 744, enforced (7th Cir. 1975) 511 F.2d 284, cert. den. (1975) 423 U.S. 925; *Children's Hosp. Med. Ctr. v. California Nurses Assn.* (9th Cir. Cal. 2002) 283 F.3d 1188, 1192.)

While the NLRB and the federal courts have determined that methods for resolving workplace disputes, including grievance and arbitration procedures and no strikes clauses, are mandatory subjects for bargaining (29 U.S.C., § 158(d); *United Electrical, etc. v. NLRB* (D.C. Cir. 1969) 409 F.2d 150, 156), they have removed from the employer's arsenal the ability to impose no strikes clauses unilaterally, even upon reaching a bona fide impasse in negotiations. (*Roosevelt Memorial, supra*, 348 NLRB 1016, 1016-1017.) Because the right to strike is fundamental to the federal scheme of collective bargaining, it cannot be relinquished by employees, except by consent, in the form of specific contractual language. (*Gary-Hobart, supra,* 210 NLRB 742, 744-745.) Where there has been no express waiver of the right to strike, no such waiver will generally be inferred. (*NLRB v. Lion Oil Co.* (1957) 352 U.S. 282,

293; but cf. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.* (1962) 369 U.S. 95, 105-106; *Goya Foods, Inc.* (1978) 238 NLRB 1465, 1467; see also *Boys Markets, Inc. v. Retail Clerk's Union, Local 770* (1970) 398 U.S. 235, 251-255.) Thus, under federal private-sector law, an employer may not impose terms containing a waiver or limitation on the right to strike, even after bargaining in good faith to impasse, because such provisions entail a surrender of statutory rights. (*Roosevelt Memorial, supra*, 348 NLRB 1016-1017.)

California authorities, including the Supreme Court, have also endorsed views similar to those embodied in the federal labor policy on which the MMBA was modeled. In *County Sanitation*, the Supreme Court observed that, "In the absence of some means of equalizing the parties' respective bargaining positions, such as a credible strike threat, both sides are less likely to bargain in good faith," which, "in turn leads to unsatisfactory and acrimonious labor relations and ironically to more and longer strikes." (*Id.* at p. 583.) In *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, the Supreme Court held that a public employer may not promulgate rules that interfere with the rights of public employees to join organizations of their own choice, and to participate in their activities, even those activities include an unlawful strike. (34 Cal.3d at 198.) In *Sweetwater, supra,* PERB Order No. IR-58, we also recognized that a threatened or actual strike, even when aimed at extracting concessions, may serve to break a stalemate and thereby *further* rather than frustrate negotiations. (*Sweetwater, supra,* at p. 15, citing *South Bay Unified School District* (1990) PERB Decision No. 815, p. 15, Member Craib dissenting.)

Even if we were to conclude that the policy reasons expressed by federal authorities were inapplicable in the MMBA context, we would nonetheless be constrained by existing judicial authority under which public employees have a right to strike *unless* it is clearly shown

that the strike poses a substantial and imminent threat to public health and safety. (MMBA, § 3509, subd. (b); *County Sanitation, supra*, 38 Cal.3d 564, 586; *City of San Jose v. Operating Engineers, supra,* 49 Cal.4th 597, 606.) Because the imposition of a no strikes clause is in the nature of a general prohibition, it is not a *clear* showing of any articulable, *imminent* threat to public health and safety, much less one that is substantial.

We therefore conclude that an employer may not impose terms that waive or limit employees' right to strike or engage in other concerted activities, even after bargaining in good faith to impasse and exhausting any dispute resolution procedures, because permitting one side to compel a waiver of a statutorily-protected right is contrary to PERB and controlling judicial precedent and would undermine the fundamental principles of collective bargaining. (*Roosevelt Memorial, supra*, 348 NLRB 1016, 1017; *County Sanitation, supra*, 38 Cal.3d 564, 583; *Vallejo, supra,* PERB Decision No. 1015.) Consequently, in the present case, the Authority was not authorized to impose the No Strike/No Lockout clause.

Because the Imposition of an LBFO at Impasse Does Not Create an MOU or Establish a Waiver, the Authority Could Not Unilaterally Impose Language Whose Only Logical Purpose Was to Preserve the Terms of a Bi-Lateral Agreement.

Citing *Rowland* and other cases holding that a waiver of statutory rights must be clear and unmistakable, SEIU argues that no waiver may be inferred here. At most, SEIU agreed that all tentative agreements would be included in the parties' LBFOs, though it denies that it thereby consented to imposition of the Separability/Savings language. We agree with SEIU that the Authority was not privileged to implement the Separability/Savings provision, though not for the reasons argued by SEIU.

MMBA section 3505.7 (formerly MMBA section 3505.4) is clear that, while a public agency that has bargained in good faith to impasse may implement its last, best, and final offer that was presented to and rejected by the union, it "shall not implement a memorandum of

understanding." As explained in *Santa Rosa*, which adopted the ALJ's proposed decision, this language was added to the statute in 2000 to overrule *Cathedral City Public Safety Mgmt. Assn. v. City of Cathedral City* (1999) 72 Cal.App.4th 821, review den. and opn. ordered depublished (September 15, 1999), in which the Fourth District, Division 2, Court of the California Court of Appeals held that, after bargaining to impasse, it was not an unfair labor practice for a public agency to impose a memorandum of understanding with a duration clause of two and one-half years. (*Santa Rosa, supra,* PERB Decision No. 2308-M, p. 4.) Although the Supreme Court ordered the *Cathedral City* decision depublished, the Legislature amended the statute in 2000 to prohibit an employer from imposing a memorandum of understanding and to guarantee recognized employee organizations the right "each year" to meet and confer on any matters within scope before the adoption of the agency's annual budget or as otherwise required by law, and regardless of whether the negotiable matters had been included in the agency's unilaterally-imposed terms. (Stats. 2000, c. 316 (A.B. 1852) (Longville).) By enacting AB 1852, the Legislature established a categorical rule against imposing a memorandum of understanding. (*Santa Rosa.*)

In addition to the language of the statute itself, the amendment's purpose is made uniformly clear from various legislative reports. (See California Bill Analysis, Senate Committee, 1999-2000 Regular Session, Assembly Bill 1852, CA B. An., A.B. 1852 Sen., 6/26/2000, June 26, 2000; California Bill Analysis, Senate Floor, 1999-2000 Regular Session, Assembly Bill 1852, CA B. An., A.B. 1852 Sen., 6/19/2000, June 19, 2000; California Bill Analysis, Assembly Committee, 1999-2000 Regular Session, Assembly Bill 1852, CA B. An., A.B. 1852 Assem., 5/03/2000, May 03, 2000; and, California Bill History, 1999-2000 Regular Session, Assembly Bill 1852, CA Assem. B. Hist., 1999-2000 A.B. 1852, 1999-2000.) MMBA section 3505.7 establishes a statutory right of employees and employee organizations to be free

from the unilateral imposition of a memorandum of understanding and from imposed terms purporting to affect matters that can only be established by consent. (*Rowland, supra,* PERB Decision No. 1053, p. 7, fn. 5; *Los Angeles County Assn. of Environmental Health Specialists v. County of Los Angeles* (2002) 102 Cal.App.4th 1112, 1119.)

Separability and savings language of the kind at issue here is thus only meaningful in the context of a "final" agreement. Absent a comprehensive MOU covering *other* subjects of bargaining, there are no other terms to separate and save, in the event one term is nullified or declared unenforceable. This purpose is reflected in the language of the parties' tentatively agreed article, which refers to "this Agreement," and which purports to be effective "for the duration of this Agreement." While separability and savings language generally promotes stability and protect settled expectations in the context of a comprehensive, *bi-lateral* agreement, when unilaterally imposed as part of an LBFO, such provisions are inconsistent with MMBA section 3505.7's directive that a public agency "shall not implement a memorandum of understanding," even after bargaining in good faith to impasse and exhausting all impasse resolution procedures.

In its defense, the Authority argues that the "plain language" of the Separability/Savings provision demonstrates that it "had no effect on the statutory rights of [SEIU] or its members." According to the Authority, the imposed language "never became effective," because imposed terms do not constitute or revive an agreement (MMBA, § 3505.7), and because, by its express terms, the Separability/Savings provision is only effective "[d]uring the term *of this Agreement*." (Emphasis added.) However, the controlling question is not whether the imposed terms ever *became effective*, but whether their promulgation is inconsistent with the statutory scheme of collective bargaining, exclusive representation and employee choice, including the Legislature's directive that a public agency

"shall not implement a memorandum of understanding." Whether an employer's policy is facially inconsistent with the governing statute, or whether it was adopted in a manner that violates the bargaining process, PERB has long held that *a firm decision* to implement a policy is the event that triggers liability, not whether the policy was *actually* implemented or *ever* became effective. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 27; *Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712, pp. 2-3, adopting proposed dec., at pp. 19-21; *Clovis Unified School District* (2002) PERB Decision No. 1504, pp. 19-20.)

The Authority also characterizes its conduct as an innocent attempt to comply with its obligation to implement only those changes reasonably comprehended within its LBFO. However, the law is clear that an employer has no obligation to mechanically impose all proposals included in its LBFO (*City of Clovis* (2009) PERB Decision No. 2074-M, pp. 7-8) and it is equally clear that, regardless of what it has proposed as part of its LBFO, it cannot impose proposals affecting matters that can *only* be established by consent. To effectuate the legislative purpose of MMBA section 3505.7, and to avoid precisely the kind of confusion created in the present case, we hold that an employer has a duty to segregate or excise from its imposed terms language purporting to "establish a memorandum of understanding" or other agreement, as well as language that is reasonably susceptible to such an interpretation. (MMBA, § 3505.7; *Santa Rosa, supra*, PERB Decision No. 2308-M; *State of CA (DPA), supra,* PERB Decision No. 2130-S, pp. 9-10.) Because we interpret MMBA section 3505.7 as precluding unilateral adoption of the Separability/Savings language, a per se violation, what motivated the Authority to implement that provision or whether it took effect is not germane to this analysis. (*NLRB v. Borg-Warner Corp., supra,* 356 U.S. 342, 349; *City of Sacramento, supra,* PERB Decision No. 2351-M, p. 27.)

Additionally, there is an issue of waiver. Although not expressly stated in the proposed decision, the ALJ apparently concluded that SEIU consented to unilateral imposition of the Separability/Savings provision either by tentatively agreeing to its language in pre-impasse negotiations and/or by agreeing that all tentative agreements would be included in the parties' LBFOs. We reject either line of reasoning as inconsistent with the language and purpose of the MMBA and with PERB precedent regarding the doctrine of waiver.

Because a waiver of rights is disfavored, it may be established only by clear and unmistakable evidence. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74 (*Amador*); *Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693, 708 (*Metropolitan Edison*).) A waiver will not be lightly inferred and any doubt or ambiguity is resolved against the party asserting waiver. (*City of Escondido* (2013) PERB Decision No. 2311-M, p. 13; *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639* (1960) 362 U.S. 274, 282; *Standard Concrete Products Inc. v. General Truck Drivers, Office, Food & Warehouse Union, Local 952* (9th Cir. 2003) 353 F.3d 668, 676.) Waiver may be established either by agreement or by conduct. (*Amador*.) To establish a waiver by agreement, the parties must "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." (*Finley Hosp.* (Sept. 28, 2012) 359 NLRB No. 9.) A waiver by conduct may also be established through the parties' bargaining history, but only if the issue was fully discussed and consciously explored and the union intentionally yielded its interest in the matter. (*Amador*; *Metropolitan Edison, supra,* 460 U.S. 693, 708; see also

Local Joint Executive Bd. of Las Vegas v. NLRB (9th Cir. 2008) 540 F.3d 1072, 1079.) Neither is the case here.[18]

First, the language of an *unratified* tentative agreement may no more waive a statutory right than a unilaterally-imposed term can create a bi-lateral memorandum of understanding. The MMBA makes any agreement reached by the representatives of a public agency and a recognized employee organization "tentative," until expressly adopted by the agency's governing body. (MMBA, § 3505.1; *City of Clovis, supra,* PERB Decision No. 2074-M, pp. 6-7.)

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[18] Our concurring colleague asserts that, "Waiver, typically, is an affirmative defense to a charge of unlawful unilateral change in which the employer has made a change in policy on a matter within the scope of bargaining *without* providing the exclusive representative adequate notice and a meaningful opportunity to bargain before implementing the change." We respectfully disagree. PERB's case law is quite clear that, where there has been *inadequate* notice and/or *no* meaningful opportunity to bargain, *there can be no waiver*. (*City of Sacramento, supra,* PERB Decision No. 2351-M, pp. 38-42; *County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 22-29; *Trustees of the California State University* (2006) PERB Decision No. 1876-H, pp. 11-12; *Santee Elementary School District* (2006) PERB Decision No. 1822, pp. 7-8; *San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 21-23.) Waiver issues typically arise where the employer has made a change in policy *after providing* notice and opportunity for bargaining, but the representative's inaction or delay in the face of such notice and opportunity creates doubt as to whether it has relinquished any interest in negotiating the subject. (See, *e.g.*, *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M, pp. 4-5; *Santee, supra,* PERB Decision No. 1822, pp. 2-6; *San Mateo, supra,* PERB Decision No. 94, pp. 23-25.) However, a union can only ever waive a reasonable opportunity to bargain over a decision that has not already been firmly made by the employer. (*San Mateo, supra*, at p. 22.)

We agree with our concurring colleague that wavier is not relevant to whether an employer may impose its bargaining proposals upon reaching a bona fide impasse in negotiations. But the element of consent necessary to establish a waiver may also be demonstrated by clear and unmistakable contract language (*San Mateo, supra*, PERB Decision No. 94, pp. 21-22) and, although not clearly set forth in the proposed decision, the fact that the parties reached *tentative* agreements on language that was ultimately imposed appears to be the basis of the ALJ's cursory dismissal of SEIU's exceptions. We believe the parties to this case and PERB's wider constituency deserve a cogent explanation of the Board's decision, including its rejection of a party's exceptions or the Board's disagreement with the reasoning of a proposed decision (*McPherson, supra,* 189 Cal.App.3d 293, 311; 2 Cal. Jur. 3d Administrative Law, § 574; see also *Judulang v. Holder* (2011) 132 S.Ct. 476, 479.) Consequently, we explain our view that the parties' *unratified* tentative agreements cannot *clearly and unmistakable* establish a waiver of statutory rights.

California courts and PERB have repeatedly held that a public employer's governing body is free to adopt *or reject* a tentative agreement, without thereby incurring liability for failing and refusing to bargain in good faith. (*Long Beach City Employees Assn., Inc. v. City of Long Beach* (1977) 73 Cal.App.3d 273, 277; *Temple City Unified School District* (2008) PERB Decision No. 1972; *State of California (Department of Personnel Administration)* (2006) PERB Decision No. 1836-S.) Indeed, the exercise of such legislative discretion is part of the "reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations" envisioned by the Legislature. (MMBA, § 3500; *City of Long Beach, supra,* 73 Cal.App.3d 273, 277.)

Although it would exceed PERB's authority to mandate that employee organizations follow a parallel ratification process (*Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106, pp. 15-17), no doubt the Legislature was familiar with the words "tentative agreement" as a term of art in labor law and was aware that many employee organizations, either by policy or practice, conduct some form of membership vote, executive board approval, or other ratification process before agreements with the public employer will be binding on the organization. (*Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 20.) PERB has similarly held that where an employee organization has internal policies or established practices governing ratification, or has entered into ground rules with the employer requiring ratification, tentative agreements shall not be given legal effect until the organization has completed the ratification process. (*Capistrano Unified School District* (1994) PERB Order No. Ad-261; cf. *Apple Valley Unified School District* (1990) PERB Order No. Ad-209.)

Because the statutory scheme of collective bargaining speaks in terms of a procedural duty shared equally by the employer and the exclusive representative (*LAUSD, supra*, PERB

Decision No. 2326, p. 40), it would be anomalous to hold that an employee organization is bound by an unratified tentative agreement, while the public employer is not.[19] Thus, even assuming the language of the Separability/Savings provision is "explicit," it cannot establish a waiver by contract, because, in the absence of ratification, it is not an agreement.

Nor does the bargaining history support an inference of waiver. The parties' ground rules state that a proposed MOU "is tentative, subject to ratification by union members and approval by the [Authority]." The purpose of making agreements tentative, until ratified, was obviously to *reserve* rather than *relinquish* any rights which affected such agreements. A union's recognition that the employer will proceed to act unilaterally after negotiations have reached impasse is not, by itself, an intentional relinquishment of the right to future bargaining on the subject, in the event the impasse is broken. (*Trustees of the California State University (San Marcos)* (2004) PERB Decision No. 1635-H, pp. 4-5.) We will not infer a waiver of a statutory right, including the right not to have a memorandum of understanding unilaterally imposed, simply because negotiations have reached impasse and the parties have agreed to include tentative agreements in their LBFOs. As SEIU points out in its exceptions, a contrary rule would discourage unions from ever concluding tentative agreements on difficult subjects in order to remove those issues from the bargaining table.

In sum, the fact that SEIU tentatively agreed to carry over the Separability/Savings language from the previous MOU neither demonstrates a binding agreement, nor consented to the unilateral imposition of terms that imply the existence of a memorandum of understanding.

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[19] The public sector labor relations statutes attempt to deal with the likelihood of conflict over terms and conditions of employment by establishing a balance of rights and obligations between the parties and "[i]t was certainly not the Legislature's intent to permit the employer, through its use of economic power, to upset this balance, intentionally or innocently, and thereby pit one social interest against another." (*San Mateo, supra*, PERB Decision No. 94, pp. 16-17.)

(MMBA, § 3505.7; *Rowland, supra*, PERB Decision No. 1053, p. 7, fn. 5; *Roosevelt Memorial, supra*, 348 NLRB 1016, 1017.)

SEIU's Surface Bargaining Allegation

In addition to its allegations regarding unilateral implementation of the No Strike/No Lockout and Separability/Savings language, the complaint also alleged that the Authority failed and refused to meet and confer in good faith by making a regressive proposal regarding IHSS providers' wages and benefits, that is, by withdrawing its more generous wage and benefit proposal of February 9, 2010, before SEIU formally rejected that proposal and demanding instead that SEIU agree to deeper concessions. SEIU argues, more fundamentally, that *all* of the Authority's proposals for wages and benefits constitute evidence of a "take-it-or-leave-it attitude," and thus of bad faith in negotiations, because they reflect a "policy choice" dictated not by financial necessity, but by an "arbitrarily" arrived-at amount of what the County was willing to pay for IHSS providers' wages and benefits from which the Authority never deviated. SEIU argues that the ALJ failed to acknowledge or afford sufficient weight to evidence of the Authority's arbitrarily pre-determined spending limit on IHSS providers' wages and benefits. We find nothing in SEIU's brief which convinces us to disturb the ALJ's findings or conclusions regarding the Authority's pre-impasse bargaining conduct.

SEIU's exception focuses on testimony that, in early 2010, when the County was preparing its budget, the County's Chief Administrative Officer (CAO) directed Kovacevic to determine what the County could afford to pay in IHSS provider wage and benefit contributions using only realignment funds, even though there is no requirement that the County use only realignment monies to fund IHSS provider wages and benefits. SEIU contends that there were thus no changed circumstances that prompted the Authority to withdraw its February 9, 2010, wage proposal and submit in its place its less generous proposal

of March 17, 2010. Rather, SEIU argues that Kovacevic, at the direction of the County's CAO, devised a formula to justify an arbitrarily, pre-determined policy *choice* to spend less on the IHSS program than on other social services.

The ALJ found that in late September 2008, the Authority notified SEIU of a proposal to reduce IHSS provider wages by $1.10 per hour, from to $10.25 to $9.15, effective January 1, 2009, "because state realignment funds had been reduced for fiscal year (FY) 2008-2009, triggering the Contingency [A]rticle of the MOU." As explained in the proposed decision, the Contingency language in the parties' 2006-2009 MOU provided that, if federal and/or state funding was reduced and/or suspended, the Authority's contribution to IHSS providers' wages and benefits would be reduced proportionately.

SEIU disagreed and pursuant to the MOU, the parties participated in two rounds of factfinding. Although advisory only, the first factfinding decision concluded, among other things, that the Authority had properly invoked the Contingency language, because of a reduction in base realignment funding in both FY 2007-2008 and FY 2008-2009. However, it also recommended that the Authority's efforts to recapture $1,310,489 in wage and benefit concessions be distributed over the course of one year rather than six months. A second factfinding decision, prompted by changes in state funding for the IHSS program, recommended no reduction in wages or benefits, because the MOU, including the Contingency language, was set to expire in three months, and because increased federal funding, retroactive to October 2008, was expected to be available from the American Recovery and Reconciliation Act of 2009, PL 111-5, February 17, 2009, 123 Stat. 115.

In late June 2009, the U.S. District Court for the Northern District of California issued a preliminary injunction prohibiting the Governor and other officials of his administration from implementing legislation that would reduce the cap on the state's contribution to IHSS

provider wages and benefits without first conducting a study under the federal Medicaid Act. The district court later clarified that counties may reduce the wages of IHSS providers, so long as the decision was not based on the reduction in the state cap approved by the Legislature.

The proposed decision found that Kovacevic's testimony and the supporting documents presented at the hearing, most of which had also been presented to SEIU during negotiations, "demonstrated that, based on past years' revenues and projections, money was not available to maintain the [Authority's] obligations under the expired MOU which continued to be paid," because of the federal court's injunction. SEIU does not dispute that the County implemented workforce reductions, furloughs and wage reductions affecting County employees other than IHSS providers to address its budget shortfall. Nor does SEIU dispute Kovacevic's testimony that other social services, including the County's General Relief benefits, were cut or reduced, that vacant positions were not filled, and that the Board of Supervisors had to "backfill," i.e., transfer funds from other County programs to maintain the wages and benefits of IHSS providers in accordance with the federal court's decision. Thus, SEIU has not presented any evidence to dispute the ALJ's finding that Kovacevic's testimony and the supporting documentation demonstrated that a combined $8.60 in wages and benefits was the maximum amount that the Authority could offer IHSS providers, *without taking additional money from other County-wide funding sources*. Instead, SEIU argues that it sought to identify *additional* funding sources that would enable the Authority to make a more generous economic proposal, without affecting other social services, but that the Authority's negotiators outright refused to consider this option. The evidence fails to support this contention as well.

On March 17, 2010, the Authority withdrew its package proposal of February 9, 2010, which would have decreased IHSS providers' wages from the current figure of $10.25 to $9.25 per hour. As part of its March 17, 2010 proposal, the Authority proposed that wages be

further reduced to $8.00 per hour. As with its previous package proposal, the Authority indicated that, at SEIU's *complete* discretion, some or all of the 60 cents per person to be paid by the County for health benefits could be transferred to employee wages, with a corresponding decrease in the employer contribution to health benefits, *i.e.*, up to a maximum of $8.60 per hour in wages but with no employer-paid health benefits contributions.

When it presented its March 17, 2010 proposal, the Authority also provided several spreadsheets and a detailed explanation of how it had arrived at its figures, based on changes in realignment funding. The Authority's chief negotiator explained that the March 17, 2010 proposal was labeled a LBFO because, while there was still room for negotiation over *how* to allocate the $8.60 figure between wages and benefits, "it would be disingenuous on our part to suggest that something could eclipse that number by way of [additional] funding and by way of being able to meet the demands of fiscal year '10-'11." When SEIU responded with a proposal calling for increases in wages and benefits during the second year of the MOU, without identifying any additional or alternative funding sources, the Authority declared impasse.

SEIU argues that the declaration of impasse was premature, because SEIU had additional proposals to present and because the Authority's negotiators focused exclusively on obtaining concessions, whereas SEIU's negotiators were interested in working with the Authority to identify additional sources of revenue. However, despite repeated requests from the Authority's negotiators, at no point between September 2009, when SEIU received the Authority's proposal for wage concessions, and the Authority's declaration of impasse *six months later*, did SEIU identify *any* additional funding sources that would support its demands for increases in wages and benefits.

After March 17, 2010, when SEIU asserted that negotiations were not at impasse because it had additional proposals to make, Pinheiro asked SEIU to make its proposals so that

the impasse could be broken but SEIU made no further proposals. At one point after the Authority had declared impasse but before the Board of Supervisors voted to impose terms, SEIU's Lead Negotiator Rebecca Mahlberg (Mahlberg) placed a call to the CAO to discuss this topic. However, Mahlberg then refused to communicate any specifics when Pinheiro, the Authority's designated chief spokesperson, returned her call and reminded her that, because this topic involved matters then under negotiation, inquiries should be directed to Pinheiro, rather than to the County's CAO.

Under the circumstances, including the Authority's repeated assertions in bargaining that it needed concessions on IHSS providers' wages and benefits, and that no other funding sources were available, it is not unreasonable to expect that, if SEIU had *any* concrete suggestions for additional funding sources, then it would have presented them to the Authority, to avoid the impending declaration of impasse and the imposition of terms. The urgency of doing so only increased during the period between March 17, 2010, when the Authority proposed even *deeper* cuts to employee wages and benefits in its LBFO and declared impasse, and May 25, 2010, when the County's Board of Supervisors approved the imposition of terms included in the Authority's LBFO. In sum, the evidence does not support SEIU's contention that the Authority imposed an arbitrary limit on what it would pay for IHSS providers' wages and benefits. Nor does it demonstrate that the Authority refused to consider alternative funding sources. To maintain the current level of wages and benefits, as required by the federal court injunction, the County would have to redirect money from other social service programs. Moreover, SEIU never identified any alternative funding sources to cover the costs of the increased wages and benefits it demanded.

Additionally, even assuming the ALJ had, as SEIU urges, assigned greater weight to Kovacevic's testimony, and had drawn different inferences from that testimony to find that the

Authority had set a pre-determined spending limit on the costs of its economic proposals, such a finding would not affect the overall conclusion that SEIU's evidence was insufficient to establish that the Authority had engaged in surface bargaining. While a party may not merely go through the motions with no intent to reach agreement, it may lawfully insist on its position on any negotiable issue. (*State of CA (CDCR/DPA), supra,* PERB Decision No. 2115-S, pp. 11-12; *Oakland Unified School District* (1982) PERB Decision No. 275.) A party "may have either good or bad reasons, or no reason at all, for insistence on the inclusion or exclusion of a proposed contract term" but "[i]f the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produce a stalemate. . . ." (*City of Placentia, supra,* 57 Cal.App.3d 9, 23, citing *NLRB v. Herman Sausage Co., supra,* 275 F.2d 229, 231-232; cf. *General Electric Co., supra,* 150 NLRB 192, 195.)

Although the distinction between lawful "hard bargaining" and a "take-it-or-leave-it" attitude is often a fine one (see *Regents of the University of California* (1983) PERB Decision No. 356-H, pp. 21-22), generally, no unlawful motive may be inferred where a party's insistence on its position is supported by rational arguments that are communicated during bargaining. (*UC Regents, supra,* PERB Decision No. 2094-H, p. 20.) PERB has dismissed allegations of surface bargaining based on an employer's refusal to budge from its initial economic proposals, even when it admitted that more money might be available. (*Turlock Joint Union High School District* (1996) PERB Decision No. 1151 (*Turlock*); *Beaumont, supra,* PERB Decision No. 429.) Even if we were to accept SEIU's version of the facts, we would still conclude that the Authority was legally authorized to limit what it wished to pay in employee wages and benefits, based on a "policy" choice of avoiding further cuts to other social services. Accordingly, the Authority's refusal to budge from its position was neither per se unlawful nor evidence of bad faith.

The cases cited by SEIU are inapposite. In *Oakland Unified School District* (1985) PERB Decision No. 540, the employer refused to provide information or meet with the bargaining representative over the effects of layoffs, until after its intentions were made public by the school board resolution and it had notified employees directly of their layoffs. (*Id.* at p. 16-17.) *General Electric, supra,* 150 NLRB 192, similarly involved an employer that refused to provide information to the union, announced its intent to implement an insurance plan first to employees and then to the union, and insisted that the plan would take effect "as is" or not at all.

SEIU is hard-pressed to point to anything in the Authority's conduct that suggests bad faith. In fact, the record includes ample evidence—much of it undisputed—that undermines any inference that the Authority sought to frustrate negotiations or undermine SEIU's authority. The Authority provided prompt and thorough responses to SEIU's requests for information. It presented numerous proposals and counterproposals both separately and as packages on all subjects in dispute; made various concessions and indicated where it had additional flexibility; and negotiated and executed tentative agreements for the vast majority of subjects discussed. It also offered detailed explanations of its need for economic concessions and its reasons for rejecting SEIU's demands to maintain or increase wages and/or benefits. The Authority's negotiators routinely made themselves available for meetings and, in fact, asked to schedule multiple meetings at a time; and, even after declaring impasse, repeatedly invited SEIU to offer any proposal that might break the impasse before the Authority's governing body voted to implement the Authority's LBFO.

Even on the economic issues that proved most divisive and ultimately caused the impasse in negotiations, the Authority insisted that $8.60 was the maximum amount it would pay in wages and benefits combined, but indicated it would agree to any division of that amount between wages and benefits that SEIU, as the employees' designated representative,

wished to propose. Such conduct falls squarely within the realm of lawful "hard bargaining," and does not constitute a "take-it-or-leave-it" offer. (*UC Regents, supra,* PERB Decision No. 2094-H, p. 20; *General Electric, supra,* 150 NLRB 192, 195; see also *Turlock, supra,* PERB Decision No. 1151; and *Beaumont, supra,* PERB Decision No. 429.)

As part of the totality of circumstances relevant to a surface bargaining charge, the Board may also consider the charging party's own conduct, regardless of whether the respondent has filed a countercharge. (*City of San Jose, supra*, PERB Decision No. 2341-M, p. 41; *Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M, pp.14-15; *Compton Community College District* (1989) PERB Decision No. 720, pp. 15-16; *NLRB v. Reed & Prince Mfg. Co.* (1st Cir. 1953) 205 F.2d 131, 134.) Numerous authorities hold that a party may not be heard to complain about the pace or tenor of negotiations, when the result may be attributed to its own conduct. (*University of California, Lawrence Livermore National Laboratory, supra,* PERB Decision No. 1119-H; *Carl Joseph Maggio, Inc. v. Agricultural Labor Relations Bd.* (1984) 154 Cal.App.3d 40, 70-71; *Seattle-First National Bank v. NLRB* (9th Cir. 1981) 638 F.2d 1221, 1225, 1226-1227; cf. *NLRB v. Katz, supra,* 369 U.S. 736, 741-742.)

On June 26, 2009, the Authority requested several meeting dates in mid-July. However, SEIU was not prepared to meet until August 12, 2009. The parties then met approximately once per month in each of the following months until April 17, 2010, when the Authority presented its LBFO. SEIU's representatives walked out of one meeting to protest the Authority's proposals for wage and benefits concessions; refused repeated requests to schedule more than one meeting date at a time; cancelled six of the meeting dates that had been scheduled, in some cases with little or no notice; insisted on resolving non-economic issues

before responding to the Authority's proposal on wages; and ultimately took four months to respond to the Authority's wage proposal with a counterproposal.

Whether the Authority's Unlawful Imposition of the No Strike/No Lockout and Separability/Savings Language Demonstrates Bad Faith

Although we have concluded *above* that the Authority's imposition of the No Strike/No Lockout and Separability/Savings provisions constituted per se violations of its duty to bargain, SEIU contends that the same facts should be analyzed as evidence of bad faith in support of its overall surface bargaining allegation. We next consider this contention.[20]

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[20] Our concurring colleague criticizes the majority opinion for "returning" to the totality of circumstances analysis in order to *separately* consider whether the Authority's post-impasse conduct *alters* the nature of pre-impasse negotiations. We respectfully disagree with this characterization of the decision, as there is *one* surface bargaining allegation in this case, which, *pursuant to the complaint*, includes SEIU's allegations about the Authority's post-impasse imposition of two unratified tentative agreements. The issue raised by any surface bargaining claim is whether *the totality* of circumstances demonstrates that the respondent lacked the subjective "good faith" required by the statute, *i.e.*, whether it went through the motions of bargaining with no real intent to reconcile differences or reach agreement. (*Mt. Diablo Unified School District* (1983) PERB Decision No. 373, p. 24; *Muroc, supra,* PERB Decision No. 80, p. 13; *NLRB v. Reed & Prince Mfg. Co.* (1st Cir. 1953) 205 F.2d 131, 134.) Although the post-impasse events in this case do not, in our view, demonstrate bad faith by the Authority, because the totality of circumstance analysis necessarily turns on the particular facts of each case, we reject a categorical rule that post-impasse events can *never* be relevant to the analysis of the respondent's subjective state of mind during negotiations. We explain.

PERB has long held that a premature, unfounded, or insincere declaration of impasse may serve as evidence of bad faith in support of a surface bargaining allegation. (*UC Regents, supra,* PERB Decision No. 520-H, pp. 14 and 25, fn. 13.) Whether a respondent has "rushed to impasse" turns on whether the respondent's strategy was to move negotiations as rapidly as possible to impasse and then impose its demands unilaterally, without taking the presumably more time-consuming route of bargaining in good faith to a bona fide impasse or agreement. (*City of San Jose, supra,* PERB Decision No. 2341-M, pp. 40-41.) Such allegations are analyzed under the totality of circumstances test. (*County of Riverside, supra,* PERB Decision No. 2360-M, pp. 11-12, 15, 19; *City of Selma* (2014) PERB Decision No. 2380-M, pp. 12-13.) Whether the respondent actually imposed some or all of the proposals included in its last, best and final offer is logically relevant to whether it rushed to impasse with the purpose of short-circuiting the bargaining process.

PERB has long held that a premature, unfounded, or insincere declaration of impasse may serve as evidence of bad faith in support of a surface bargaining allegation. (*UC Regents, supra,* PERB Decision No. 520-H, pp. 14 and 25, fn. 13; *City of San Jose, supra,* PERB Decision No. 2341-M, pp. 40-41; *County of Riverside, supra,* PERB Decision No. 2360-M, pp. 11, 19.) A bona fide impasse exists only if the employer's conduct is free of unfair labor practices; its right to impose terms and conditions at impasse is therefore dependent on prior good faith negotiations from their inception through exhaustion of statutory or other applicable impasse resolution procedures. (*Temple City Unified School District* (1990) PERB Decision No. 841 (*Temple City*).) Thus, an employer's separate, unremedied unfair practices may interfere with the bargaining process and thereby invalidate any impasse. (*Intermountain Rural Electric Assn.* (1991) 305 NLRB 783, enforced (10th Cir. 1993) 984 F.2d 1562; *New Associates* (1992) 307 NLRB 1131, 1135-1136, review granted and enforcement denied on other grounds (3d Cir. 1994) 35 F.3d 828.) However, an otherwise bona fide impasse in negotiations is not

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Our reluctance to declare categorically that subsequent events are never probative of the respondent's state of mind during negotiations is also supported by persuasive private-sector precedent. In *Stanislaus Implement & Hardware Co., Ltd.* (1952) 101 NLRB 394, the union and employer met several times over the course of two months and reached tentative agreement on most issues, but negotiations eventually broke down over the union's demand for a union shop clause. After negotiations had ended, the employer unilaterally granted wage increases that had never been proposed or discussed during negotiations. (*Id.* at p. 395.) Several months later, the union notified the employer of its desire to resume negotiations and requested information pertaining to employee wages, which the employer never provided. (*Id.* at pp. 395-396.) The parties agreed on meeting dates, but the employer's representative failed to appear and then informed the union's representative that the employer was going to "stall" the union for a year and "have a decertification election." (*Id.* at p. 396.) Although the parties' negotiations had *already ended* and never resumed, the NLRB considered the employer's *subsequent* per se violations of its duty to bargain, including its unilateral wage increase and its refusal to provide information, as part of the totality of circumstances demonstrating its absence of good faith during negotiations. (*Id.* at pp. 396, 411.) On the employer's petition for review, the Ninth Circuit Court of Appeals affirmed the NLRB's reasoning and enforced its order that the employer remedy its unfair labor practices and return to the table to bargain in good faith. (*NLRB v. Stanislaus Implement & Hardware Co.* (9th Cir. 1955) 226 F.2d 377, 379-381.)

invalidated by an employer's separate unfair practices, if there is no evidence that the unlawful conduct contributed to the deadlock in negotiations. (*Pleasantview Nursing Home, Inc. v. NLRB* (6th Cir. 2003) 351 F.3d 747, 762.) Evidence of separate unfair practices whose occurrence was remote in time or otherwise not probative of the respondent's state of mind in negotiations is not relevant or appropriate for consideration. (*Pleasantview*; *Temple City, supra,* at pp. 2-4; *Gavilan Joint Community College District* (1996) PERB Decision No. 1177, pp. 5-6.)

So it is here. SEIU does not contend that the Authority's proposals for No Strike/No Lockout and Separability/Savings language were predictably unacceptable, or that the Authority improperly insisted on these proposals to the point of impasse. In fact, SEIU tentatively agreed to both proposals during the initial bargaining sessions with relatively little discussion. We therefore reject SEIU's contention that the post-impasse imposition of the No Strike/No Lockout and Separability/Savings provisions had any effect on negotiations or otherwise demonstrate an absence of subjective good faith on the part of the Authority.

As the appropriate remedy, the Authority must rescind the unlawfully imposed No Strike/No Lockout and Separability/Savings provisions and cease and desist from imposing proposals that require SEIU and/or employees to waive statutory rights and/or that imply the existence of a bi-lateral agreement. It must also post a notice informing employees of their rights. (*City of Sacramento, supra,* PERB Decision No. 2351-M.) However, because the evidence does not demonstrate that the Authority engaged in an overall pattern of conduct designed to frustrate bargaining or undermine SEIU's authority, we dismiss the allegation of surface bargaining.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this case and pursuant to the Meyers-Milias-Brown Act (MMBA), Government Code section 3509, the Public Employment Relations Board (PERB or Board) REVERSES the administrative law judge's (ALJ) proposed decision in part and finds that the Fresno County In-Home Supportive Services Public Authority (Authority) violated sections 3505 and 3506.5, subdivision (c), of the Government Code, and committed an unfair practice pursuant to section 3509, subdivision (b) of the Government Code and PERB Regulation 32603, subdivision (c) (Cal. Code Regs., tit. 8, § 31001 et seq.), by unilaterally implementing No Strike/No Lockout and Separability/Savings provisions. The above conduct also violated section 3506.5, subdivisions (b) and (a), of the Government Code, by denying the Service Employees International Union United Healthcare Workers West (SEIU) rights guaranteed to it by the MMBA, and by interfering with the rights of employees to join, form and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

The Authority, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Unilaterally imposing the No Strike/No Lockout and Separability/Savings provisions that require SEIU and/or employees to waive statutory rights and/or that imply the existence of a bi-lateral agreement.

2. Denying SEIU rights guaranteed by the MMBA to represent employees.

3. Interfering with the rights of employees of the Authority to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

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

1. Restore the status quo as of the date the parties reached a bona fide impasse in negotiations and exhausted applicable impasse resolution procedures by rescinding the unilaterally imposed No Strike/No Lockout and Separability/Savings provisions.

2. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to employees of the Authority are customarily posted, copies of the Notice attached hereto as an Appendix, signed by an authorized agent of the Authority. Such posting shall be maintained for at least thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the Authority to communicate with In-Home Supportive Services providers employed by the Authority. The Authority, its governing board and its representatives shall take reasonable steps to ensure that the posted Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The Authority 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 SEIU or its designated counsel.

All other allegations included in this charge are hereby dismissed.

Member Huguenin joined in this Decision.

Chair Martinez's concurrence begins on page 58.

MARTINEZ, Chair, concurring: I concur with the majority's conclusion that there is a qualified statutory right to strike under the Meyers-Milias-Brown Act (MMBA); that under the impasse rule, employers are not entitled to unilaterally impose bargaining proposals that seek to limit statutory rights or contravene the statutory scheme; and that, in this case, the Fresno County In-Home Supportive Services Public Authority (Authority) negotiated in good faith, but, upon reaching impasse, was not privileged to unilaterally impose the "No Strike/No Lockout" proposal or the "Separability of Provisions/Savings Clause." I write separately because I respectfully disagree with portions of the discussion in the majority opinion, which I view as analytically doubtful and ultimately unnecessary[1] to explain our conclusion.

Bargaining

This case raises two issues related to the bargaining conduct of the Authority. Did the Authority violate its duty to bargain in good faith by engaging in surface bargaining – making regressive bargaining proposals and imposing its last, best and final offer (LBFO) before reaching a bona fide impasse? And, did the Authority commit a per se violation of its duty to bargain by unilaterally imposing the "No Strike/No Lockout" proposal and the "Separability of Provisions/Savings Clause" upon reaching a bona fide impasse in negotiations? Regarding the surface bargaining issue, the majority rightly affirms the ALJ's conclusion that the record evidence does not support the alleged violation. The Authority did not engage in regressive

[1] As stated in *Ventress v. Japan Airlines* (9th Cir. 2014) 747 F.3d 716, 723-724 (conc. opn. of Bea, J.):

> [T]he "cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799, 360 U.S. App. D.C. 344 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment), *cited in Morse v. Frederick*, 551 U.S. 393, 431, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part), *and Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1030 (9th Cir. 2013) (Bea, J., concurring in part and dissenting in part).

bargaining nor did it impose its LBFO before reaching a bona fide impasse in negotiations. Regarding the issue whether the Authority was privileged to impose the "No Strike/No Lockout" proposal and the "Separability of Provisions/Savings Clause," the majority rightly concludes that, as a matter of law, neither the proposal nor the clause was subject to unilateral imposition.

The conclusion that the Authority bargained in good faith prior to reaching impasse is not called into question by our examination of the separate legal issue whether the Authority was privileged to impose the "No Strike/No Lockout" proposal and the "Separability of Provisions/Savings Clause" upon reaching impasse. As the majority concludes, "[w]e find nothing in SEIU's brief which convinces us to disturb the ALJ's findings or conclusions regarding the Authority's pre-impasse bargaining conduct." (Maj. opn., *ante*, at p. 45.)

Nevertheless, after rejecting the one cognizable exception concerning the surface bargaining issue, i.e., whether the ALJ sufficiently considered the testimony of Sanja Kovacevic (maj. opn., *ante*, at pp. 45-53), the majority returns to the subject of surface bargaining and analyzes it anew. (Maj. opn., *ante*, at pp. 53-55.) This time, the majority considers the question whether the Authority's unilateral imposition of the "No Strike/No Lockout" proposal and the "Separability of Provisions/Savings Clause," which occurred ***after*** the parties negotiated in good faith and reached a bona fide impasse in negotiations, gives rise to a surface bargaining violation.

Revisiting the subject of surface bargaining and analyzing the allegations related to the imposition of the "No Strike/No Lockout" proposal and the "Separability of Provisions/Savings Clause" under a totality of circumstances test is not called for factually or legally. Factually, the parties reached tentative agreements on both the "No Strikes/No Lockout" proposal and the "Separability of Provisions/Savings Clause" and there are no related

surface bargaining allegations.[2] Legally, *Rowland Unified School District* (1994) PERB Decision No. 1053 (*Rowland*), the one Board decision that addresses post-impasse imposition of a bargaining proposal seeking to limit statutory rights, supports a per se, not a totality of circumstances, approach.

The principle invoked by the majority in support of the second surface bargaining discussion is that an employer's separate, un-remedied unfair practices may interfere with the bargaining process and invalidate any impasse. "Un-remedied unfair practices" presumably refers to the Authority's post-impasse unilateral imposition of the "No Strike/No Lockout" proposal and the "Separability of Provisions/Savings Clause." The suggestion posited by the majority is that the Authority's unilateral imposition of the "No Strike/No Lockout" proposal and the "Separability of Provisions/Savings Clause" may have had the retroactive effect of interfering with an already-concluded bargaining process and invalidating an otherwise bona fide impasse.

The cases relied on by the majority do not support this notion.[3] They stand for the principle that an employer's good faith may be called into question when it acts unilaterally

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[2] The complaint does not direct that the allegations concerning imposition of the "No Strike/No Lockout" proposal and the "Separability of Provisions/Savings Clause" be analyzed under the "totality of circumstances" test. The allegations concerning imposition of the "No Strike/No Lockout" proposal and the "Separability of Provisions/Savings Clause" are referenced in two separate paragraphs of the complaint alleging generally that such conduct, on its own or *in combination with* the surface bargaining allegations, violates section 3505 of the MMBA and constitutes an unfair practice.

[3] Included in the private-sector precedent asserted by the majority to be persuasive in its second discussion of surface bargaining is *NLRB v. Stanislaus Implement & Hardware Co.* (9th Cir. 1955) 226 F.2d 377, 379-381. (Maj. opn., *ante,* at pp. 53-54, fn. 20, ¶ 3.) In *Stanislaus*, the company was found to have shifted positions, refused to bargain on a union security proposal, unilaterally implemented a wage boost, failed to resume negotiations, failed or refused to furnish pertinent wage data or appear at scheduled meetings during a strike, and made a statement through its agent that the company was going to stall for a year and have a decertification election. The court held that these facts shed light on the company's intent and "support the inference drawn by the Board that Respondent did not bargain in good faith." (*Id.* at p. 381.) That negotiations had broken down and ultimately never resumed does not mean

while negotiations are *ongoing*. For example, in *Intermountain Rural Electric Assn.* (1991) 305 NLRB 783, enforced (10th Cir. 1993) 984 F.2d 1562, 1570 (maj. opn., *ante*, at p. 54), the employer implemented three "serious" unilateral changes "in the midst of ongoing negotiations." The court held:

> [W]e uphold the Board's determination that valid impasse was not possible on March 20, 1989 due to the fact that IREA's unilateral changes negatively impacted the bargaining arena. First, we note that IREA implemented three unilateral changes while negotiations were still ongoing. As a result, the Board is justified in considering the effect of these changes on the overall negotiations. . . .

Here, there is no allegation of un-remedied unfair practices committed by the Authority during the course of negotiations, let alone any that would call into question the Authority's good faith; or would call into doubt the genuineness of the parties' impasse or the validity of the Authority's right to take unilateral action under the impasse rule. The wrong committed by the Authority after negotiations concluded had to do with the substance of the two proposals being "un-imposable," not with any other aspect of the employer's conduct.

An employer's right to impose terms and conditions of employment at impasse is dependent on prior good faith negotiations from their inception through exhaustion of statutory or other applicable impasse resolution procedures. (Maj. opn., *ante*, at p. 54.) The temporal focus of any inquiry analyzing whether an impasse is bona fide is the period of negotiations *leading up* to the impasse. The parties' conduct during negotiations determines whether they had the subjective intent to reach agreement. There is no plausible argument that good faith

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that the parties were in a post-impasse environment. Given the employer's bad faith throughout negotiations, no genuine impasse was possible, and the employer's last, best and final offer could not have been legally imposed. The "totality of the circumstances" that led the court to conclude that the employer had engaged in surface bargaining included unlawful unilateral action by the employer, *not post-impasse conduct*, as is the case here.

negotiations may be converted into bad faith negotiations based on conduct that has yet to occur after negotiations have concluded.

Service Employees International Union United Healthcare Workers West (SEIU) contends that the same facts concerning the Authority's imposition of the "No Strike/No Lockout" proposal and the "Separability of Provisions/Savings Clause" should be analyzed as evidence of bad faith in support of its overall surface bargaining allegation. (Maj. opn., *ante,* at p. 53.) The response to SEIU's argument is not that the Authority's post-impasse imposition of the "No Strike/No Lockout" proposal and the "Separability of Provisions/Savings Clause" did not have any effect on negotiations or otherwise demonstrate an absence of subjective good faith on the part of the Authority. (Maj. opn., *ante*, at p. 55.) It is that the argument is illogical on its face. By entertaining SEIU's argument and resurrecting the question whether the Authority prematurely declared impasse, the majority suggests that under different facts, the outcome could change. In my opinion, under no set of facts may an employer who has been found to have negotiated in good faith and reached a bona fide impasse in negotiations nonetheless be charged with pre-impasse surface bargaining under a rush-to-impasse theory based on the subject matter of proposals imposed at impasse.[4]

Waiver

The "Separability of Provisions/Savings Clause" is a creature of contract. Under the statutory scheme, however, a memorandum of agreement cannot be unilaterally imposed. (MMBA, § 3505.7.) Because the "Separability of Provisions/Savings Clause" has life only in

[4] The majority characterizes my opinion in the following way: "[P]ost-impasse events can *never* be relevant to the analysis of the respondent's subjective state of mind during negotiations." (Maj. opn., *ante*, at p. 53, fn. 20, ¶ 1, italics in the original.) Absent from the majority's re-statement are two postulates of the original statement: (1) good faith negotiations, i.e., the employer had the subjective intent to reach agreement as required by statute; and (2) a bona fide impasse in negotiations, i.e., the employer neither rushed to impasse nor prematurely or insincerely declared impasse.

the context of a binding agreement, it is not a *term or condition of employment* subject to post-impasse unilateral imposition. Therefore, the Authority was not privileged to impose the clause under the impasse rule.

The "No Strike/No Lockout" proposal seeks to limit the right to strike. If such a bargaining proposal were mutually agreed to by the parties and incorporated within a binding agreement (as SEIU and the Authority had done in their previous memorandum of understanding), SEIU would be found to have waived its right to bargain over the right to strike. Such a limitation on the exercise of a statutory right, however, is not a *term or condition of employment* subject to post-impasse unilateral imposition. (*Rowland, supra,* PERB Decision No. 1053.) Therefore, the Authority was not privileged to impose the proposal under the impasse rule.

The majority's discussion of the post-impasse imposition issue includes an analysis of "waiver," i.e., whether SEIU waived its right to collectively bargain the "No Strike/No Lockout" proposal and the "Separability of Provisions/Savings Clause" by entering into tentative agreements during negotiations. (Maj. opn., *ante,* at pp. 41-45.) It is axiomatic that tentatively agreed-to bargaining proposals do not constitute a binding comprehensive agreement. Waiver, however, plays no role in an analysis of the impasse rule.

Waiver is predicated on consent. The impasse rule, which allows the employer to unilaterally impose its LBFO on reaching a bona fide impasse in negotiations, is not predicated on consent. The impasse rule is part of an administratively and judicially developed doctrine intended to break impasse and restore active collective bargaining. (*McClatchy Newspapers* (1996) 321 NLRB 1386, 1390-1391.)

Waiver, typically, is an affirmative defense to a charge of unlawful unilateral change in which the employer has made a change in policy on a matter within the scope of bargaining

without providing the exclusive representative adequate notice and a meaningful opportunity to bargain before implementing the change. (*San Mateo County Community College District* (1979) PERB Decision No. 94.) Waiver may be established by contract, by negotiations history or by inaction. (See generally, Zerger, California Public Sector Labor Relations (2014) § 10.07[1]-[3], pp. 10-47-10-53.) Regardless of the factual circumstances in which the issue of waiver arises, the central issue is whether the exclusive representative has waived its right to bargain in clear and unmistakable terms; the evidence must indicate an intentional relinquishment of the right to bargain. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74.)

Waiver issues do not arise in the context of a post-impasse unilateral imposition of terms and conditions of employment. After all, the sine qua non of the impasse rule is that the employer has bargained in good faith and the parties have reached a bona fide impasse in negotiations. The only analytical commonality between an effective waiver and a bona fide impasse in negotiations is that each results in a suspension of the duty to bargain, albeit a temporary one in the case of the latter.[5]

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[5] As Justice Edwards explained in *NLRB v. McClatchy Newspapers, Inc. Publisher of Sacramento Bee* (D.C. Cir. 1992) 964 F.2d 1153, 1157 (*McClatchy Newspapers*):

> Generally, the "waiver" cases to which the Board alludes address a substantially different facet of the employer/union relationship than the one here at issue; they most often arise during the pendency of a collective bargaining agreement and focus on whether a union has given its assent (or waived objections) to unilateral employer action. In these so-called "waiver" cases, the employer typically acts on a claim of contractual authority, or pursuant to asserted reserved rights, under the parties' existing collective bargaining agreement; thus, in such cases, the employer usually does not bargain before taking the specific action. By contrast, the Board here found that McClatchy bargained in good faith with the union over the merit pay proposal and that the parties had reached impasse. . . .

involved consideration of the impasse rule as it applied to bargaining proposals conferring on the employer unfettered discretion over mandatory subjects of bargaining. In reaching the conclusion that such proposals are not subject to the impasse rule, the Board concluded that the principle of waiver plays no role in any analysis concerning the impasse rule. It said:

> If we failed to recognize an exception to the post-impasse implementation rule, impasse would become an opportunity to act unilaterally concerning matters within the scope of representation on a recurring basis without regard to the collective bargaining process.
>
> In reaching this conclusion, we have determined that the doctrine of waiver is inapplicable, for the reasons given by Justice Edwards in *NLRB v. McClatchy Newspapers, Inc., supra,* 964 F.2d 1153. The District has not unilaterally decided to change an existing policy falling within the scope of representation during the life of the agreement without providing the exclusive representative with notice and opportunity to bargain. Such cases turn on whether the exclusive representative has consented to the change by waiving its right to bargain in clear and unmistakable contractual terms. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74.) By contrast, the context involved here is negotiations over a successor agreement. Ordinarily the employer need not obtain the union's consent to implement a proposal if the proposal is lawful and the parties have negotiated over it in good faith and reached impasse.

(*LAUSD, supra*, at p. 39.)

After laying down the law of waiver, the majority concludes that neither the language of the tentatively agreed-to "No Strike/No Lockout" proposal or the "Separability of Provisions/Savings Clause," nor the bargaining history supports an inference of waiver because tentative agreements are not agreements unless ratified. (Maj. opn., *ante,* at pp. 41-45.) As explained above, in my view, I would hold that waiver of the right to bargain is not raised and does not apply in the context of a post-impasse imposition of terms and conditions of employment. The impasse rule, which sanctions unilateral action by the employer, and the

principle of waiver, which turns on mutuality and consent, serve fundamentally dissimilar doctrinal purposes.[6] As stated in *McClatchy Newspapers, supra,* 964 F.2d 1153, 1168:

> The Board has attempted to take the words from decisions involving claims of "waiver" in situations where an agreement exists and apply them to cases where the parties are bargaining to secure an agreement; it does not work because, in the latter situation, the impasse rule comes into play (thus making "waiver" irrelevant).

[6] I write separately not to point out that waiver is irrelevant to whether an employer may impose at impasse. (Maj. opn., *ante*, at p. 42, fn. 18, ¶ 2.) I write separately to make the point that an exclusive representative cannot be found by any of its agreements, actions or inactions during the course of negotiations to have waived collective bargaining rights in the event the parties reach impasse and the employer imposes. This is so not because the employer has failed to prove up the defense, but because waiver is a doctrine unavailable in the setting of a post-impasse imposition. The majority's waiver analysis supports an unprecedented notion that an exclusive representative may be found to have waived collective bargaining rights in the context of a post-impasse unilateral imposition of terms and conditions by the employer depending on the facts of a particular case. The majority's *acceptance* of waiver as an appropriate analytical issue in the setting of a post-impasse imposition is the subject of my disagreement.

APPENDIX

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-671-M, *Service Employees International Union United Healthcare Workers West v. Fresno County In-Home Supportive Services Public Authority*, in which all parties had the right to participate, it has been found that the Fresno County In-Home Supportive Services Public Authority (Authority) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq.

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

A. CEASE AND DESIST FROM:

1. Unilaterally imposing No Strike/No Lockout and Separability/Savings provisions that require the Service Employees International Union United Healthcare Workers West (SEIU) and/or employees to waive statutory rights and/or that imply the existence of a bi-lateral agreement.

2. Denying SEIU rights guaranteed by the MMBA to represent employees.

3. Interfering with the rights of employees of the Authority to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

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

Restore the status quo as of the date the parties reached a bona fide impasse in negotiations and exhausted applicable impasse resolution procedures by rescinding the unilaterally imposed No Strike/No Lockout and Separability/Savings provisions.

Dated: _____

FRESNO COUNTY IN-HOME SUPPORTIVE SERVICES PUBLIC AUTHORITY

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.