STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MILPITAS SUPERVISORS' ASSOCIATION, Charging Party, v. CITY OF MILPITAS, Respondent.	Case No. SF-CE-958-M PERB Decision No. 2443-M July 29, 2015

Appearances: Clisham & Sortor by David P. Clisham, Attorney, for Milpitas Employees Association; Renne, Sloan, Holtzman & Sakai by Charles D. Sakai and Erich W. Shiners, Attorneys, for City of Milpitas.

Before Huguenin, Banks and Gregersen, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Milpitas Supervisors' Association (MSA) and a cross exception filed by the City of Milpitas (City) to a proposed decision (attached) issued on August 30, 2013, by an administrative law judge (ALJ) pursuant to the Meyers-Milias-Brown Act (MMBA).[1] The complaint issued by PERB's Office of the General Counsel in Case No. SF-CE-958-M, alleged that the City violated the duty to meet and confer in good faith by changing unilaterally its policies reflected in the notice provision of the parties' memorandum of understanding (MOU), as well as City Resolution 5981, Section IV, in conjunction with a decision to contract out services.

A companion case, Case No. SF-CE-956-M, alleging the same essential facts was filed contemporaneously by the Milpitas Employees Association (MEA), and was consolidated for

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

processing. At the consolidated hearing, the complaints in both cases were amended to allege that the City failed to meet and confer over its decision to outsource bargaining unit work and thereby violated the MMBA and PERB regulations.

In her consolidated proposed decision, the ALJ concluded that the City had a duty to meet and confer, that the City failed to provide reasonable notice of the decision to outsource bargaining unit work, but that both by agreement and by inaction, the Unions[2] had waived the right to meet and confer. On that basis, the ALJ proposed to dismiss both cases. Both Unions filed exceptions.

Subsequent to filing exceptions, MEA and the City entered a settlement agreement under which they mutually sought to have PERB dismiss the complaint and vacate the proposed decision in Case No. SF-CE-956-M. In *City of Milpitas* (2015) PERB Decision No. 2412-M (*Milpitas*), we granted this request.

In the remaining Case No. SF-CE-958-M, the Board has reviewed the record, the ALJ's proposed decision, MSA's exceptions, and the City's response thereto and its cross-exception. Except for one omission,[3] the ALJ's findings of fact are supported by the record, and we adopt them as the findings of the Board itself subject to our correction of that omission. To the extent they are consistent with our discussion below, we affirm the ALJ's conclusions and the proposed remedy.

PROCEDURAL HISTORY

On April 30, 2012, MSA filed an unfair practice charge against the City. On May 23, 2012, the City filed its response. On August 3, 2012, PERB's Office of the General Counsel issued a complaint. On August 28, 2012, the City filed its answer to the complaint denying the

[2] We shall refer to MSA and MEA, collectively as the "Unions."

[3] See discussion regarding "Waiver by Inaction," p. 22, *post.*

material allegations in the complaint and asserting several affirmative defenses. On September 12, 2012, the parties met for an informal settlement conference, but the matter was not resolved.

On February 11, 2013, the City filed a joint request along with the Unions that the formal hearings separately scheduled for February 20, 2013, in Case No. SF-CE-956-M, and February 21, 2013, in Case No. SF-CE-958-M, be consolidated for hearing. On February 20, 2013, a formal hearing was held on the consolidated cases. At hearing, the Unions moved to amend the complaint to allege that the City breached its duty to meet and confer over the decision to contract out bargaining unit work and withdrew allegations that the City failed to meet and confer regarding the effects of that decision, including the subsequent lay-offs of bargaining unit members. The ALJ granted the motion to amend over the City's objection. On August 30, 2013, the ALJ issued her proposed decision.

On October 18, 2013, the Unions filed exceptions to the ALJ's proposed decision. On November 12, 2013, the City filed its response to the Unions' exceptions and a cross-exception to the ALJ's conclusion that the City failed to provide reasonable notice. On December 4, 2013, the cases were placed on the Board's docket.

On February 6, 2015, pursuant to a settlement with the City, MEA requested that PERB dismiss its complaint and vacate the proposed decision in Case No. SF-CE-956-M. We did so. (*Milpitas, supra,* PERB Decision No. 2412-M.)

FACTUAL BACKGROUND

MSA is a recognized employee organization within the meaning of MMBA section 3501(a)(1) and PERB Regulation 32016(b).[4] MSA represents certain miscellaneous supervisorial employees working for the City, including certain parks and maintenance

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

employees. The City is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a). MSA and the City were parties to an MOU effective January 1, 2011 through December 31, 2012.

Section 5.00 of the parties' MOU "ADVANCE NOTICE" provides:

> Except in cases of emergency as provided in this section, the City shall give reasonable written notice to each recognized employee organization affected by an ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation including actions taken under City Rights that affect wages, hours, and other terms and conditions of employment proposed to be adopted by the City and shall give such recognized employee organizations the opportunity to meet and confer with City representatives.

Section 7.00 of the parties' MOU concerns layoffs. Section 7.01.4 of the MOU provides:

> No layoffs or new outsourcing of MSA positions during the term of this contract, except if the State eliminates any portion of RDA impacting the City and/or the General Fund's deficit exceeds $7 million or more in any fiscal year.[5]

Also of consequence, City Resolution 5981, which was adopted in 1991, provides for a prevailing wage policy under contracts for designated City projects and services. Section IV(D) of Resolution 5981 states:

> In instances where a contracting out proposal is being considered for work currently performed by City employees, the rate of pay for contracted services must be greater or equal to the current rate of pay and benefits. Advance notice of 120 days must be given to the collective bargaining agent with a call for public hearings on the issue. This advance notice is subject to a meet and confer process with the City's represented employees.

[5] As identified at hearing, "RDA" refers to the Redevelopment Agency.

On January 5, 2012, in anticipation of the impending dissolution of Redevelopment Agencies in California,[6] City Manager Thomas Williams (Williams) met with the Unions to discuss the loss of RDA funds and its effect on the City's finances. At this meeting, Williams disclosed that the City had made Requests for Proposals (RFPs) for park maintenance work, street maintenance and street landscaping. The January 5, 2012, meeting was attended by the presidents of MEA and MSA as well as other Union members.

On February 3, 2012, Williams sent a memorandum to the Mayor and City Council informing them of the financial impact of the loss of RDA funds and making several recommendations to reduce the City's budget deficit. Included in William's recommendation was the reorganization of the City's public works department by eliminating supervisorial positions, transferring supervision of public works to the City engineering department, and contracting out street, park, and tree and landscaping maintenance. (Respondent's Exh., B, pp. 1-2.) Williams projected that these changes to public works would result in savings of $769,375 for the remainder of the 2011-2012 fiscal year[7] and an annual savings of over $2 million thereafter. (*Id.* at p. 2.)

On February 7, 2012, Williams presented his RDA report and recommendations at a City Council meeting. Several Union members, including then MSA President Stephan Smith (Smith), were in attendance. The City Council voted to continue Williams' recommendations for a period not to exceed three months to allow for a forensic audit and to allow City employees time to present alternative proposals. (Respondent's Exh., C, pp. 8-9.) The City

[6] Redevelopment Agencies were officially dissolved on February 1, 2012. (California Department of Finance Redevelopment Agency Dissolution Website <http://www.dof.ca.gov/redevelopment> [as of May 21, 2015].)

[7] The City's 2011-2012 fiscal year ended on June 30, 2012.

Council also authorized the use of reserve funds to handle the immediate budget problems and set a date of May 8, 2012, as the effective date to take action on Williams' proposals.

On February 8, 2012, Williams sent an e-mail regarding his budget reduction plan to Smith and several other Union members. The e-mail stated that the City had "no choice but to eliminate $9.2 million from the general fund" and that he would like the Unions to provide him with their plan for eliminating $9.2 million from the general fund. (Charging Party Exh., 3, p. 1.) Williams called for a meeting the next day "so we can discuss the best way to proceed and any information you may need in the preparation of your budget strategy." (*Ibid.*)

On February 9, 2012, Williams met with at least six public works employees who had attended the previous night's City Council meeting, including Smith, and who were invited by Williams to a meeting regarding an alternative budget reduction plan from the Unions. At the meeting, Williams informed the employees that the City had a $12 million structural deficit, had lost $7 million from the dissolution of RDA, and needed to cut $9.2 million from the general fund. Williams also asked the Unions for their ideas on a budget proposal. Smith informed Williams and other attendees that the Unions had designed a Corp Yard Task Force (CYTF) which would make recommendations to reduce the City's deficit. Smith's notes from the meeting, as well as his testimony at hearing (Reporter's Transcript (RT) 57:21-25), indicate that all attending agreed that the February 9, 2012, meeting was not a meet and confer session. (Charging Party Exh., 3, p. 1.) However, Williams' testimony indicated that he did consider the February 9, 2012, meeting a meet and confer session. (RT 87:14-16.)

On February 10, 2012, Smith requested copies of RFPs, bid results and copies of all existing maintenance contracts from Greg Armendariz (Armendariz).[8] On February 16, 2012,

[8] Armendariz was identified at hearing as the City public works director at the time in controversy. (RT 19:17-18.) Williams had told Smith at the February 9, 2012, meeting to make information requests to Armendariz.

Smith asked Armendariz for the methodology the City used to determine its cost savings from the layoffs and contracting out of the street, park, and tree and landscape maintenance department work.

On March 2, 2012, City Human Resources Director, Carmen Valdez (Valdez), sent Smith a bargaining request. Valdez's request stated:

> Due to the severe economic situation facing the City, particularly in light of the termination of all Redevelopment Agency funding, the City requests that IAFF[9] agree to open labor negotiations. The purpose of this proposal is to discuss the current MOU and the possibility of making adjustments that will provide assistance toward resolving the City's severe budget crisis while preserving City jobs and services.

(Respondent Exh., F, p. 1.)

On March 5, 2012, Smith wrote to Williams via e-mail informing him that the CYTF would soon present Williams with its list of recommendations to reduce the City's budget deficit. Smith also informed Williams that the Unions' efforts had been hindered by difficulties in obtaining information regarding: (1) the costs of contracting out the Unions' bargaining unit work; (2) official bid proposals received by the City for the contracting out; and (3) the City's methodology used to determine the cost savings that Williams reported to the City Council. Smith's e-mail also stated:

> We have a reasonable basis to believe that your recommendations, as proposed to the City Council, could result in a fully formulated proposal to outsource multiple bargaining unit jobs, thereby significantly altering working conditions for numerous bargaining unit employees, including and up to termination of their employment. *We therefore request to bargain over any proposed change in working conditions.*

[9] IAFF is not identified in the record. IAFF is generally understood to mean the International Association of Fire Fighters. In its unfair practice charge, MSA describes itself as "an affiliate of United Public Employees of California/Laborers International Union of North America (LIUNA) 792." At hearing, Smith identified the March 2, 2012, memorandum he received from Valdez as the City's request to reopen the MSA contract. We assume, therefore, that IAFF is a typographical error.

(Charging Party's Exh., 1, pp. 1-2, emphasis added.) Ultimately, the parties did not meet and confer over the contracting out of bargaining unit work or the layoffs of bargaining unit members.

On April 3, 2012, the CYTF presented its recommendations to the City Council. The recommendation did not include layoffs and claimed to save the City over $1.3 million. The City Council moved to refer the CYTF's recommendation to Williams and the director of public works for analysis and requested a response in two weeks.

On April 17, 2012, Williams presented his response to the City Council. Williams advised the City Council that the CYTF recommendations were unacceptable, because they were dependent on retirements which the City had no effective means to control. Williams determined that the CYTF recommendations would result in deferred maintenance, overtime costs and a reduction in City services and urged the City Council to reject the CYTF recommendations and adopt the budget plan he presented to the City Council on February 7, 2012. The City Council approved Williams' budget plan and authorized him to begin implementing those cost reductions.

PROPOSED DECISION

The ALJ identified the issue before her as "whether the City was required to provide 120 days' notice of its decision to conduct layoffs and outsource bargaining unit work and whether the 'no layoff' clause in the MOU constitutes a waiver authorizing the City to take unilateral action after the triggering events occurred." (Proposed Dec., pp. 14-15.)

After reviewing the elements of a prima facie case for unilateral change violations of MMBA section 3505, the ALJ concluded that a prima facie case had been established, including that the contracting out of the Unions' bargaining unit work was a matter within

scope of representation because the City's acknowledged motivation in contracting out that work was its desire to save money and reduce its budget deficit.

Preliminarily, the ALJ noted that the advance notice provision of the parties' MOU requires "reasonable written notice" before the City may make changes to a matter within scope of representation. The Unions had taken the position that such "reasonable notice" was the 120 days mandated by City Resolution 5981. The ALJ determined that on February 7, 2012, when Williams presented his budget proposal to the City Council, the Unions had actual notice of the City's plan to contract out bargaining unit work, and that the City Council adopted Williams' proposal on April 17, 2012. Since April 17, 2012, was fewer than 120 days from February 7, 2012, the ALJ determined that the City had failed to give the Unions reasonable notice of its plan to contract out bargaining unit work.

The ALJ next addressed the City's affirmative defense that the Unions had waived their right to bargain over the decision to contract out bargaining unit work. After stating that "any waiver of a right to bargain over a negotiable contracting out decision must be 'clear and unmistakable'," the ALJ noted that PERB follows the California Civil Code standards for contract interpretation. (Proposed Dec., p. 19; citing *Barstow Unified School District* (1996) PERB Decision No. 1138.) Examining the language of Section 7.01.4 of the parties' MOU, the ALJ determined that:

> the provision appears to contain both a limitation on a managerial right to implement layoffs as well as a limited waiver of the right to bargain over a decision to subcontract bargaining unit work.

(Proposed Dec., p. 21.)

An MSA bargaining proposal to include language explicitly giving MSA the option to cancel previous concessions never made it into Section 7.01.4. Therefore, the ALJ rejected the Unions' assertion that Section 7.01.4 was negotiated in exchange for previous concessions by

the Unions. Instead the ALJ found the City's financial data and testimony regarding the loss of RDA necessitated further cuts beyond the concessions previously made by MSA. The ALJ concluded that Section 7.01.04 "was not in exchange for earlier concessions—it was in contemplation of future cuts." (Proposed Dec., p. 21.)

The ALJ determined that in negotiating Section 7.01.4, the parties considered alternatives to layoffs and contracting out including permanent wage decreases. The ALJ found that the negotiations over Section 7.01.4 demonstrated that the parties understood that the loss of RDA would necessitate savings that "would have to come from employees' salaries." (Proposed Dec., p. 22.) The ALJ concluded that Section 7.01.4 constituted both a restriction on the City's managerial right to layoff unless the City lost RDA or had a general fund deficit of $7 million and a limited waiver of MSA's right to meet and confer over the decision to contract out bargaining unit in the event the City lost RDA or had a general fund deficit of $7 million. The ALJ concluded that the City had lost RDA and suffered a general fund deficit of $7 million or more prior to January of 2012 and therefore:

> the City did not have a renewed duty to meet and confer over a decision to outsource bargaining unit work and layoff bargaining unit employees prior to its April 17, 2012, adoption of the City Manager's recommendation.

(*Ibid.*)

The ALJ also considered the City's claim that the Unions waived by inaction their right to bargain over the City's decision to contract out. The ALJ determined that the Unions had failed to make a demand to meet and confer over the City's proposal to contract out bargaining unit work after learning about the proposal at the February 7, 2012, City Council meeting. The ALJ noted that the Unions took the position that the meetings conducted between the Unions and the City regarding the CYTF were not meet and confer sessions and determined that the Unions had failed to use the time between the February 7, 2012, notice of the City's proposal

to contract out bargaining unit work and the April 17, 2012, adoption of the proposal by the City Council to conduct negotiations. The ALJ thus concluded that

> the Unions' conduct for the six weeks following the City's announced proposal evidences a waiver of any right it may have had to demand negotiations.

(Proposed Dec., p. 24.) The ALJ then dismissed the complaint and underlying unfair practice charge.

EXCEPTIONS, CROSS-EXCEPTION AND MOTION TO STRIKE

MSA takes twelve (12) exceptions to the ALJ's proposed decision: eight (8) exceptions of fact and four (4) exceptions of law. MSA's factual exceptions are presented as omissions of fact by the ALJ rather than erroneous findings. Of these factual exceptions four (4) concern City Resolution 5981 its import and interpretation, three (3) concern the March 2, and March 5, 2012, e-mails from Valdez and Smith, and one (1) concerns the City's evidence of the impact of the loss of RDA.

MSA's exceptions of law concern: (1) the applicability of City Resolution 5981 to MOU Section 7.01.4; (2) whether the March 5, 2012, e-mail from Smith to Williams contains a bargaining demand; (3) whether the record contains evidence of a general fund deficit of $7 million or impact on bargaining unit work from the loss of RDA; and (4) whether the ALJ failed to construe MOU Section 7.01.4 as an agreement to reopen negotiations on the subject of contracting out and layoffs.

The City takes one (1) cross-exception regarding the ALJ's determination that it failed to provide 120 days' notice of its proposal to contract out bargaining unit work. The City otherwise urges us to affirm the proposed decision.

The City has also filed a Motion to Strike Sections II through IV of MSA's "Brief in Reply to City's Cross-Exception and Response" (MSA's Reply). The City maintains that

PERB Regulation 32310 allowed MSA only to respond to the City's cross-exception which it did in Section V of MSA's Reply. According to the City, Sections II through IV of MSA's Reply thus constitute an impermissible reply brief "did not raise any new issues, discuss any new case law, or formulate any new defenses," but instead merely presented additional argument and authority for points raised in MSA's own exceptions. (*City of Modesto* (2008) PERB Decision No. 1994-M; *Los Angeles Unified School District/Los Angeles Community College District* (1984) PERB Decision No. 408 (*Los Angeles*).)

MSA urges that we deny the motion to strike. MSA contends that PERB Regulation 32310 contains no prohibition on a party correcting omissions or providing context to the other party's exception, and that Sections II through IV of its reply provide foundation for Section V of its reply addressing the City's cross-exception.

DISCUSSION

Standard of Review

The Board defers to the ALJ's findings of fact that incorporate credibility determinations, but otherwise reviews an ALJ decision de novo. The Board may draw different or even opposite inferences from the factual record than did the ALJ and may reverse the conclusion of law legal determinations of the ALJ. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337; *Woodland Joint Unified School District* (1990) PERB Decision No. 808a; *Santa Clara Unified School District* (1979) PERB Decision No. 104.)

We first take up the City's motion to strike portions of MSA's Reply to the City's cross exception. We shall then discuss the merits, addressing MSA's exceptions and the City's cross-exception within the following framework: the prima facie case, waiver by contract, waiver by inaction and the notice requirement.

Motion to Strike

PERB Regulation 32310 states:

> Within 20 days following the date of service of the statement of exceptions, any party may file with the Board itself an original and five copies of a response to the statement of exceptions and a supporting brief. The response shall be filed with the Board itself in the headquarters office. The response may contain a statement of any exceptions the responding party wishes to take to the recommended decision. Any such statement of exceptions shall comply in form with the requirements of Section 32300. A response to such exceptions may be filed within 20 days. Such response shall comply in form with the provisions of this Section. Service and proof of service of these documents pursuant to Section 32140 are required.

As previously noted by the Board, PERB regulations neither expressly permit nor preclude the submission of reply briefs and, therefore, "it would appear that the acceptance of such filings is discretionary with the Board." (*Los Angeles*, *supra*, PERB Decision No. 408, p. 4.) In addition, in *Los Angeles* the Board held that:

> Where the response raises new issues, discusses new case law or formulates new defenses to allegations, the Board might well be persuaded to permit the complainant to submit a reply in order to aid the Board in its review of the underlying dispute.

(*Id.* at p. 5.) The issue is whether the Board may only allow reply briefs under such circumstances, as the City would have us rule, or whether the Board has greater discretion in determining whether it will allow the filing of a reply brief that exceeds a clearly permissible response to a cross-exception and also encompasses a surreply to the respondent's response.

We decline to construe *Los Angeles*, *supra*, PERB Decision No. 408 as narrowly as the City urges. *Los Angeles* recognizes that PERB's regulations neither permit nor preclude reply briefs and the acceptance of such briefs is discretionary with the Board. We conclude that *Los Angeles* provides illustrations, not limitations, for the Board to exercise such discretion. We therefore deny the City's Motion to Strike Sections II through IV of MSA's Reply.

However, in this instance, because Sections II through IV of MSA's Reply contain information that is most appropriately contained in a party's own statement of exceptions,[10] and because much of the content of MSA's Reply in Sections II through IV is duplicative of the assertions raised in MSA's own statement of exceptions, we find this material of little assistance to the Board's consideration of the parties' underlying dispute.

We turn now to the merits.

The Prima Facie Case

MMBA section 3505 obliges a public agency to meet and confer in good faith with representatives of recognized employee organizations concerning matters within the scope of representation. MMBA section 3506.5(c) states that it is unlawful for a public agency to refuse or fail to meet and confer in good faith with a recognized employee organization.

In *County of Santa Clara* (2013) PERB Decision No. 2321-M (*Santa Clara*), the Board held that:

> To prove up a unilateral change, the charging party must establish that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.

(*Santa Clara*, *supra,* PERB Decision No. 2321-M, p. 13; citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262.) We review these elements.

[10] Section II contains a review of the applicable legal principles regarding waiver of collective bargaining rights; Section III argues that MOU Section 7.01.4 did not contain an explicit waiver of City Resolution 5981; Section IV argues that MSA made a bargaining demand in its March 5, 2012, e-mail to Williams.

1. Action to Change Policy

The complaint issued by the Office of the General Counsel alleged that prior to April 17, 2012, it was the City's policy to provide reasonable notice before contracting out bargaining unit work and pursuant to City Resolution 5981, reasonable notice consisted of 120 days. On April 17, 2012, the City Council adopted Williams' recommendations regarding layoffs of MSA bargaining unit members and the outsourcing of MSA bargaining unit work. The ALJ determined that MSA had actual notice of Williams' plan to conduct layoffs and outsource bargaining unit work at the February 7, 2012, City Council meeting. February 7, to April 17, 2012, is approximately 70 days. Therefore, assuming April 17, 2012, is the proper date for calculating when the City changed its policy, MSA has proved the first prong of its prima facie case.

In its cross-exception, the City does not dispute the 120-day notice requirement. Rather, it disputes April 17, 2012, as the date it changed its policy. The City argues that the ALJ should have calculated the notice requirement from the date it implemented the change in policy. According to the City, it did not contract out bargaining unit work until July 1, 2012, which was 145 days after February 7, 2012.[11] Thus, the City contends, it provided more notice than was required under City Resolution 5981 and therefore did not change its policy of providing 120 days' notice before contracting out MSA bargaining unit work.

A change in policy occurs on the date a firm decision is made even if the decision is not scheduled to take effect immediately, or even if it is never implemented. (*City of Sacramento*

[11] In its exceptions, the City only refers to the contracting out of MEA bargaining unit work. In documents filed before the Office of the General Counsel and the ALJ, the City contends that it did not contract out any MSA bargaining unit work and that the supervisory functions performed by MSA bargaining unit members were transferred to a different division of the department of public works. However, this contention was not raised before the Board either initially or after MEA withdrew its exceptions; therefore, we have treated this matter as one where MSA bargaining unit work may have been contracted out.

(2013) PERB Decision No. 2351-M; *see also State of California (Department of Personnel Administration)* (1996) PERB Decision No. 1145-S [A unilateral change occurs when an official action is taken, not on a subsequent date when the action becomes effective].) The City Council's adoption of Williams' recommendation to outsource bargaining unit work constitutes the City's firm decision to contract out. (*Anaheim Union High School District* (1982) PERB Decision No. 201 [A governing board resolution affecting terms and conditions of employment constitutes official action even though it has a deferred effective date].) Therefore we agree with the ALJ that the City made a firm decision to change its policy on April 17, 2012. We also conclude that the ALJ properly calculated the notice period between the date MSA first received notice of the plan to outsource (February 7, 2012) and the date the City reached a firm decision by adopting the plan to outsource (April 17, 2012). The City's cross-exception, therefore, lacks merit.

2. On a Matter within the Scope of Representation

As noted by the ALJ, not all decisions to outsource are within scope of representation. Although "a decision to 'subcontract'" work may constitute a managerial decision "at the core of entrepreneurial control" and be based on factors not amenable to negotiation (*Ventura County Community College District* (2003) PERB Decision No. 1547, p. 19 (*Ventura*); citing *Fibreboard Paper Products Corp. v. National Labor Relations Board* (1964) 379 U.S. 203), decisions to outsource which are based on labor costs, viz., "overall enterprise costs," are within scope of representation because the union has control over some enterprise costs ("labor costs") and may make concessions through the bargaining process that "may substantially mitigate the concerns underlying the employer's decision, thereby convincing the employer to rescind its decision." (*Ibid.* quoting *Otis Elevator Company* (1984) 269 NLRB 891, 901; *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 659

(*Farrell*) [permanent transfer of work away from a bargaining unit has a significant effect on wages, hours, and working conditions and, therefore, is subject to the mandatory bargaining requirements of the MMBA].) Thus, outsourcing decisions based on enterprise ("labor") costs are "peculiarly suitable for resolution through the collective bargaining framework." (*Ventura, supra,* PERB Decision No. 1547, p. 19, quoting *First National Maintenance Corp. v. National Labor Relations Board* (1981) 452 U.S. 666, 680.)

As the ALJ noted, the City acknowledged that its budget deficit was the primary if not sole reason for deciding to outsource MSA bargaining unit work. The ALJ properly concluded that the City's decision to outsource was a matter within scope of representation. Therefore, MSA proved the second prong of its prima facie case.

3. Taken without Giving the Unions the Opportunity to Bargain over the Change

Whether MSA was given an opportunity to bargain is a more difficult issue. At hearing, Williams testified that he considered the meetings with the CYTF to be meet and confer sessions. Smith testified not only that the Unions did not consider these meetings to be meet and confer sessions, but that the City agreed that they were not meet and confer.

MMBA section 3505 states:

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

There is no dispute that Williams sent an e-mail on February 8, 2012, asking the Unions to meet with him on February 9, 2012, to discuss alternatives to William's plan to conduct layoffs and outsource bargaining unit work to reduce the City's general fund deficit. There is no dispute that the Unions designed the CYTF to develop an alternative budget reduction plan. The issue is whether the meetings between Williams and the CYTF constitute bargaining.

The hearing record does not contain sufficient details to determine that the meetings between CYTF and Williams constituted bargaining. Neither of the Unions' two witnesses participated in the CYTF and Williams provided little insight into the substance of the City's meetings with the CYTF.[12] It is not even clear from the record that the City and the CYTF met at all between the February 9, 2012, meeting and the CYTF's alternate budget proposal on April 3, 2012. The hearing record does indicate that MEA, at least, made a conscious effort to avoid having union officials or bargaining team members on the CYTF to avoid giving the impression that they were engaging in contract negotiations with the City. (RT 60:25 – 61:5.) Smith testified that he did not consider the meetings between the City and CYTF to be meet and confer sessions because the parties were not bargaining, the Unions were merely presenting an alternative budget plan. (RT 20:1-7.)

Moreover, as of February 9, 2012, MSA had not received a formal proposal from the City regarding a change in working conditions. There is no evidence that the City scheduled

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[12] The City's evidence was insubstantial, limited to Williams' testimony as follows:

> Q Did you consider that February 9th meeting to be a meet and confer session?
>
> A Yes.

(RT 87:14-16.) Although he did testify about "constant" and "frequent" discussions about layoffs and outsourcing in "every meeting, every discussion, every informal discussion," it is unclear whether Williams was referring to subsequent meetings with the CYTF or with other unidentified parties. (RT 92:8-19.)

further meetings with the CYTF, even if it could be considered the representative of MEA and MSA. CYTF's budget proposal was presented to the City Council, not the City's bargaining team. Moreover, the fact that the City requested bargaining on March 2, 2012, seems to belie the fact that bargaining was already in progress. Thus we conclude that the February 9, 2012, meeting—and any other meeting between CYTF and City officials to the extent there were any—was not a meet and confer session.

With regard to the March 2, 2012, request to reopen the MOU from Valdez and the March 5, 2012, bargaining demand from Smith, there is no dispute that no bargaining took place pursuant to those two communications. The record is also devoid of any evidence that either party refused to bargain.

In its response to MSA's exceptions, the City contends that Smith's e-mail did not constitute a demand to bargain, because it does not acknowledge that the City had made a proposal on contracting out. The City contends that rather than being a demand to bargain over an existing proposal, Smith's March 5, 2012, e-mail indicates a desire to meet and confer over a future proposal to outsource.

We do not find the City's argument persuasive. As of March 5, 2012, Williams recommendations had not been adopted by the City Council, thus they were still prospective in nature. Moreover, the CTYF was working on an alternative to Williams' recommendation which could have obviated the need for layoffs and contracting out. Therefore, it is reasonable to view Williams' contracting out recommendation as not final and not yet "fully formulated."

We conclude that Smith's March 5, 2012, e-mail contains a sufficiently clear demand to bargain over the contracting out of bargaining unit work. Moreover, since the City Council adopted Williams' outsourcing and layoffs recommendation just six weeks after Smith's request, and it did so before the parties had bargained or reached impasse, we conclude that the

City changed its policy regarding outsourcing without giving MSA the opportunity to bargain over the change. Thus, MSA has proved the third prong of the unilateral charge test.

4. Having a Generalized Effect or Continuing Impact

The evidence shows that MSA bargaining unit members were laid off and/or their work was transferred to another division within the department of public works or outsourced to a third-party employer. Thus the City's change in policy had both a generalized effect and continuing impact upon street, tree and park maintenance supervisors who were laid off and their duties either outsourced to outside employers or transferred to other employees within the department of public works. (*Farrell, supra*, 41 Cal.3d 651, 659.) Thus, MSA has proven the fourth prong of the unilateral change test and demonstrated a prima facie case of an unlawful unilateral change by the City.

Defenses

The City raised defenses of waiver by contract and waiver by inaction. A recognized employee organization may waive its MMBA right to meet and confer. However, waiver is disfavored and must be clear and unmistakable. An employer raising a waiver defense must establish that: (1) it provided the employee organization clear and unequivocal notice that it would act on a matter, and (2) the employee organization clearly, unmistakably and intentionally relinquished its right to meet and confer in good faith. (*Santa Clara, supra,* PERB Decision No. 2321-M.)

1. Waiver by Contract

The ALJ concluded that MSA had contractually waived its right to bargain over the decision to implement the outsourcing of bargaining unit work by Section 7.01.4 of the parties' MOU. The ALJ made this determination based on her interpretation of the contract language and the parties' bargaining history.

MSA contends that a waiver of its bargaining rights must be expressly contained in Section 7.01.4. MSA argues that under the Civil Code a contract must be taken as a whole with effect given to every part.[13] According to MSA, Section 7.01.4 must be read in light of MOU Section 1.01 which, in relevant part, states that the MOU "is subject to all ordinances, resolutions, and personnel rules of the City, except as expressly provided to the contrary by this Memorandum of Understanding." Since Section 7.01.4 does not expressly exempt that provision from City Resolution 5981, the no layoffs/no contracting out provision must be subject to the restrictions contained in the City Resolution 5981.

The City, on the other hand, contends that making Section 7.01.4 subject to City Resolution 5981 would render Section 7.01.4 meaningless and without effect. The City would remain subject to a pre-existing bargaining obligation concerning contracting out and would have surrendered its right to implement layoffs with nothing in return. According to the City, rather than following Civil Code section 1641, such an interpretation would violate it.

We concur with the ALJ that based on the language of the provision and the parties' bargaining history, Section 7.01.4 contains both a restriction on the City's managerial right to conduct layoffs and a limited waiver of the MSA's right to meet and confer over the decision to contract out bargaining unit work. The waiver of MSA's right to bargain is limited by the occurrence of one of the triggering events identified in Section 7.01.4, the City's loss of RDA or a general fund deficit of $7 million. Since there is no dispute that the City lost RDA funding in 2012, we conclude that the City was entitled to implement layoffs and contracting out of MSA bargaining unit work subject only to reasonable notice.

MSA contends that the ALJ erred because there was no evidence that the loss of RDA had any impact on the City's ability to provide street, park and tree maintenance: the services

[13] The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. (Civ. Code, § 1641.)

performed by MSA's bargaining unit members. However, by its plain terms, Section 7.01.4 does not require such a demonstration; it only requires the loss of RDA or a demonstration by the City that it had a deficit in its general fund of $7 million. Thus, even if the City's budget projection was insufficient evidence that a $7 million existed in the general fund, the loss of RDA—which is not in dispute—was sufficient to trigger the contracting out provision. Therefore MSA's exception that the ALJ erroneously relied on the City's budget projections to conclude that the "triggering events" for Section 7.01.4 lacks merit.

The ALJ's determination that MSA contractually waived its right to bargain over the decision to implement the contracting out of MSA bargaining unit work is affirmed. Therefore MSA's exception that the ALJ erred in determining that the union contractually waived its right to bargain over the decision to outsource also lacks merit.

2. Waiver by Inaction

As an alternative to waiver by contract, the ALJ also determined that MSA waived its right to bargain by inaction. As we have concluded, Smith made a bargaining demand in its March 5, 2012, e-mail to Williams. Any waiver of a right to bargain over a negotiable contracting out decision must be clear and unmistakable. (*Long Beach Community College District* (2003) PERB Decision No. 1568.) Therefore, MSA's March 5, 2012, bargaining demand obviates a determination that the union waived its right to bargain by inaction.

We reverse the ALJ's determination that MSA waived its right to meet and confer over the contracting out of bargaining unit work by inaction. Therefore, we grant MSA's exception which claimed that it did not waive its right to bargain the decision to outsource by inaction. However, since we affirm the ALJ's determination that MSA did contractually waive its right to bargain, this determination does not change the outcome of the case.

Notice Requirement

The ALJ determined that the City did not provide MSA with 120 days' notice of its decision to implement contracting out. The City took exception to the ALJ's determination on the basis that the ALJ should have used the date of implementation of the outsourcing rather than the date of adoption by the City Council. As we have stated above, we reject the City's contention and affirm the ALJ's determination that the City changed its policy when it failed to provide MSA with 120 days' notice of its decision to outsource bargaining unit work. However, because we have also determined that the City had an affirmative defense to its unilateral change, the City's failure to provide 120 days' notice does not change the outcome of the case.

CONCLUSION

In summary, we affirm the ALJ's determinations in the proposed decision that MSA contractually waived its right to bargain over the decision to outsource bargaining unit work and that the City failed to provide MSA with adequate notice of its decision to outsource bargaining unit work. We also reverse the ALJ's determination that MSA waived by inaction its right to bargain the decision to outsource bargaining unit work. However, since we conclude that the City had an affirmative defense via contractual waiver, this determination does not change the outcome of the case.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-958-M are hereby DISMISSED.

Members Banks and Gregersen joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MILPITAS EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF MILPITAS, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-956-M
MILPITAS SUPERVISORS' ASSOCIATION, Charging Party, v. CITY OF MILPITAS, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-958-M PROPOSED DECISION (August 30, 2013)

Appearances: United Public Employees of California by David G. Ritchie, Attorney, for Milpitas Employees Association and Milpitas Supervisors' Association; Renne Sloan Holtzman Sakai by Erich Shiners, Attorney, for City of Milpitas.

Before Alicia Clement, Administrative Law Judge.

PROCEDURAL HISTORY

On April 30, 2012, the Milpitas Employees Association (MEA) filed an unfair practice charge alleging that the City of Milpitas (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing the Memorandum of Agreement (MOA) with regard to outsourcing bargaining unit work. Also on April 30, 2012, the Milpitas Supervisors' Association (MSA) filed an identical charge against the City arising from the same conduct.[2]

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

[2] Collectively, MEA and MSA will be referred to as the Unions.

PERB issued complaints on both charges on August 3, 2012. A single informal settlement conference was held on September 12, 2012, for both charges, but neither charge settled. The charges were consolidated for formal hearing on February 20, 2013.

On February 20, 2013, counsel for the Unions made a motion to amend the complaint to include an alleged breach of the duty to meet and confer in good faith over the decision to contract out[3] bargaining unit work, and to exclude consideration of any failure to meet and confer over the effects of that decision, including the subsequent layoffs of bargaining unit employees. Counsel for the Unions argued in his opening statement, "This case is really about what steps need to occur in order for a city to provide notice and an opportunity to employee associations when they've decided to take action, particularly in connection with contracting out, something that impacts upon employees' fundamental wages, hours, and working conditions in a significant way." The motion to amend was granted over the City's objections.

AMENDMENT TO THE COMPLAINT

The complaint that PERB issued on August 3, 2012, asserted a violation of the duty to meet and confer in good faith based on a unilateral change to section 5.01 of the parties' MOAs, as well as a unilateral change to City Resolution 5981, Section IV. The Unions moved at the hearing to amend the complaints to include the issue of whether the City violated the statute when it failed to meet and confer over the decision to outsource bargaining unit work.

PERB Regulation 32648[4] permits a party to move to amend a complaint at the hearing. In determining the appropriateness of the amendment, the Board agent shall consider the

[3] The parties appear to use the phrases "outsourcing" and "contracting out" interchangeably.

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

possibility of prejudice to the respondent. The City argues that the motion was improperly granted because the Board agent failed to consider the possibility of prejudice to the respondent in making the ruling.

An amendment is appropriate where (1) the facts are intimately related to the complaint; (2) the conduct in question was part of the same course of conduct as alleged in the complaint; and (3) the issue was fully litigated and the parties had an opportunity to examine and cross-examine witnesses. (*San Diego Unified School District* (1991) PERB Decision No. 885.) Amending a complaint to reflect the allegations in the original unfair practice charge does not substantially affect the rights of the parties. (*Ibid.*)

Review of the charges filed on April 30, 2012, demonstrates that the Unions alleged a failure to meet and confer over the decision to outsource bargaining unit work as well as the failure to provide sufficient notice of its decision.[5] Accordingly, it is clear that the City had notice of the Unions' allegations. In its May 23, 2012, response to the charge, the City argued that section 7.01.4 of the MOAs authorized it to outsource bargaining unit work in the event that the City lost its redevelopment funds or its budget deficit exceeded $7 million. Given that both triggering events occurred in the early part of 2012, the City argued that it was not required to meet and confer prior to making its decision.

The City presented evidence that it gave notice of its proposal to outsource bargaining unit work; that the City was ready, willing and able to meet and confer with the Unions over the issue; that the Unions never demanded to meet and confer; and that the parties engaged in conduct which, while the parties expressly agreed would not be considered a meet and confer,

[5] The complaint that issued on August 3, 2012, did not address the alleged failure to meet and confer over the decision to outsource bargaining unit work. Nor was this allegation the subject of warning and dismissal letters.

involved the exchange of ideas and proposals to close the budget gap without the necessity of outsourcing bargaining unit work. Accordingly, the City presented facts addressing each of the elements of an alleged failure to meet and confer over a change to a subject within the scope of representation.

In addition to the fact that it clearly had notice of the Unions' allegation that the City had a duty to meet and confer over the decision to outsource bargaining unit work, the City has not presented any facts demonstrating that it was, in fact, prejudiced by the amendment. Accordingly, the amendment of the complaint to include the additional legal theory of a breach of the duty to meet and confer over the decision to outsource bargaining unit work conformed the complaint to the charge and did not result in any prejudice to the City, as the facts giving rise to the alleged change to the notice policy arose from the same basic facts as the alleged failure to meet and confer over the decision to outsource bargaining unit, all of which was presented at hearing.

FINDINGS OF FACT

The Unions are exclusive representatives within the meaning of PERB Regulation 32016(b) of an appropriate unit of employees. The City is a public agency within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a).

The MEA and MSA have separate MOAs with the City. There are a number of similarities between the two MOAs, including the fact that both MOAs are valid from January 1, 2011 through December 31, 2012; both MOAs appear to have been adopted on or around June 2011; and both MOAs contain the following relevant provisions:

SECTION 5.00[6] – ADVANCE NOTICE

> 5.01 Except in cases of emergency as provided in this section, the City shall give reasonable written notice to each recognized employee organization affected by an ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation including actions taken under City Rights that affect wages, hours and other terms and conditions of employment proposed to be adopted by the City and shall give such recognized employee organizations the opportunity to meet with City representatives.

SECTION 7.00 – LAYOFF

> 7.01.4 No layoffs or new outsourcing of [Union] positions during the term of this contract, except if the State eliminates any portion of RDA[7] impacting the City and/or the General Fund's deficit exceeds $7 million or more in any fiscal year.

According to the Unions, the "no layoff, no out sourcing" clause, as section 7.01.4 is called, was negotiated in exchange for other concessions, including wage reductions and changes to the retirement benefits. The "no layoff, no out sourcing" clause first appeared in a sideletter in the prior MOA. When the parties negotiated the MOA that is at issue here, the language of section 7.01.4 was included in the body of both MOAs.

Former MSA Union President Stephan "Steve" Smith (Smith) (now retired) testified that during negotiations over the 2011 successor agreement, the language of section 7.01.4 was incorporated as additional protection for the Unions against layoffs and outsourcing during the term of the contract. Smith testified that if either of the triggering events occurred—

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[6] Both complaints allege a breach of the duty to meet and confer in good faith based on a unilateral change to the policy in section 5.01 of the MOA. Only the MEA/City MOA contains a section 5.01. However, the language in section 5.01 of the MEA MOA is identical to the language at section 5.00 of the MSA MOA. Any reference to section 5.01 of the MSA MOA is deemed a typographical error and should be understood to allege a breach of section 5.00.

[7] This acronym was identified at the hearing as "Redevelopment Agency."

elimination of any portion of Redevelopment Agency (RDA) or General Fund deficits of greater than $7 million—the City would be required to meet and confer with the Unions prior to implementing layoffs and outsourcing.

City Manager Tom Williams (Williams) testified that this language was first proposed by the City in 2009 in anticipation of the loss of RDA funds from the State. Because RDA funds represented a significant source of annual revenue, the permanent loss of these funds would create an on-going deficit unless corresponding permanent spending cuts were made. Williams testified that when this language was included in the MOA, the parties had been discussing ways to address the loss of RDA funds if and when that event occurred. One of the alternatives discussed by the parties at the negotiating table was to reduce the hourly rate of employees in the Department of Public Works (DPW) to $28 per hour. This would have constituted a significant decrease for some bargaining unit members who were making as much as $54 per hour. The Unions rejected this proposal, among others, and ultimately, section 7.01.4 was included in both MOAs.

In an April 2011 bargaining proposal, MSA acknowledges that the level of RDA funding does not apply or impact the MSA unit. However, MSA proposed that if the triggering events cited in section 7.01.4 occur, and the City exercised this option to conduct layoffs and outsource bargaining unit work, the union would have an option to "cancel its concessions." This language was not included in the MOA.

The City also has a "Prevailing Wage" ordinance, adopted in 1991, as City Resolution 5981. Resolution 5981 contains the following language:

> Section IV. Enforcement
>
> D. In instances where a contracting out proposal is being considered for work currently performed by City employees, the

> rate of pay for contracted services must be greater or equal to the current rate of pay and benefits. Advance notice of 120 days must be given to the collective bargaining agent with a call for public hearing on the issue. This advance notice is subject to a meet and confer process with the City's represented employees.

(Emphasis added.)

Smith testified at hearing that he understood the City policy regarding subcontracting to include Resolution 5981, so that the City would not be permitted to subcontract bargaining unit work unless the subcontracted employees were paid the same wages and benefits as City employees, and also that the City was required to give the Unions 120 days' notice before doing so.

Williams called a meeting on January 5, 2012, with both Unions to discuss the impending loss of RDA funds and the effect it would have on the City's 2012-2013 budget. In attendance at the meeting were then-MSA President Smith, MEA President Robert DeLong (DeLong), and other Union members. At this time, the City had already made a Request for Proposals (RFP) for park maintenance work, street maintenance and street landscape maintenance. This information was disclosed to all those present at the January 5 meeting.

On February 3, 2012, Williams drafted a memorandum that was sent to the Mayor and City Council, informing them of the City's ongoing structural deficit of $12 million, and proposing steps to address it. The reorganization of the DPW comprised the largest volume of annualized savings to address the City's ongoing deficit. Included in the reorganization was the proposal to eliminate five supervisor positions, and to contract out street maintenance, park maintenance and tree and landscape maintenance. The proposal contained a cost break-down of the savings that could be achieved through the end of the 2011-2012 fiscal year if layoffs and outsourcing were implemented immediately ($769,375) as well as the annual savings that

could be achieved if layoffs and outsourcing were implemented for the 2012-2013 fiscal year ($2,085,000).

During a City Council meeting on February 7, 2012, Williams presented his proposal to the Council. The February 7, 2012 City Council meeting was attended by Smith and MSA bargaining team member Paul Mullett (Mullett). Both Smith and Mullett spoke at this meeting, urging the City Council to permit the Unions to provide alternatives to layoffs and outsourcing before a firm decision was made. In response to these requests, the City Council continued the City Manager's recommendations for a period not to exceed three months, which it deemed sufficient time to conduct a forensic audit and in order to allow City employees time to come forward with proposals. The Council decided to utilize reserved funds in order to continue to employ DPW employees through the end of the fiscal year and proposed May 8, 2012 as the effective date for it to take action on the proposal presented by the City Manager.

On February 8, 2012, Williams sent an e-mail message to Smith, DeLong and other Union members, notifying them that the State had eliminated RDA funds, and the City would be forced to cut $9.2 million from its General Fund. Williams informed Smith and the other recipients of the e-mail that he would be calling a meeting on February 9 for the purpose of discussing "the best way to proceed and any information [the Unions] may need in the preparation of [their] budget strategy."

A sign-in sheet from the February 9, 2012 meeting shows that six DPW employees were present, including Smith and DeLong. Smith's notes from the February 9, 2012 meeting reflect that all parties present agreed that the meeting was not a meet and confer session. Smith testified that formal negotiations between the parties are customarily initiated by the City in the form of a written proposal from the City's Human Resources Director or the City

Manager to the presidents of the Unions. Upon receipt of a formal proposal, Smith testified that he would poll MSA members prior to crafting a counter-proposal. Often, he would also make requests for additional information in order to ensure that the City's proposal was understood.

During the February 9 meeting, the Unions raised concerns about the cost of the City's public safety services like police and fire protection. Williams recalls addressing the Unions' question whether the City had considered outsourcing public safety. At the time, the City had outstanding RFPs for public safety services, and Smith acknowledges that he was aware of the outstanding RFPs for DPW work at this time. The parties also discussed the possibility of the City Council making a declaration of public emergency in order to trigger a lower threshold for the adoption of an increase in sales tax.

In the City's notes from the February 9 meeting, Williams asks the Unions for their ideas on a budget proposal to address the $9.2 million deficit. Smith responded that the Unions were forming a task force for this purpose. Smith also presented the City with a request for 21 separate items of information. The City's notes indicated that the inquiries were either addressed during the meeting or the City promised to provide the information in the future. There is no mention in the City's notes as to whether the meeting was considered a bargaining session. However, Williams testified that he considered the meeting to be a "meet and confer" session.

The City's written notes from the meeting contain a transcript of 21 separate questions, including the City's answers thereto. These inquiries include whether savings could be achieved through outsourcing of work outside of the DPW, like public safety and non-core services like payroll. Inquiry number 8 states, "In the next few months can the City help

employees find other employment and letters of recommendation?" to which the City responded in the affirmative.

The outcome of the meeting was that the City and the Unions agreed to create a "Corp Yard Task Force" to explore additional alternatives to the City's budget proposal. The origin of this concept is unclear and both parties claim that the idea of the task force was their own. Nevertheless, the Unions determined who would be on the Corp Yard Task Force, which was made up of MSA and MEA members, including Smith.

In an e-mail message dated February 10, 2012, Smith made a request to Greg Armendariz (Armendariz) for copies of the RFPs and bid results for contracting out "Parks, Street Landscape, and Streets." Smith also requested copies of all existing maintenance contracts.

On February 16, 2012, Smith sent an e-mail message to Armendariz and others, requesting the methodology used to determine the cost savings the City was attributing to layoffs of the entire streets and street landscape divisions and contracting out of that work.

On March 2, 2012, Human Resources Director Carmen Valdez sent a memorandum to Smith, requesting that MSA reopen the current MOA in order to address the loss of RDA funds. Smith testified that he had received this request, but could not remember when and did not remember whether it contained any reference to outsourcing. According to Smith, the parties never met to discuss these items outside of the Task Force meetings.

During a City Council meeting on March 20, 2012, the City Manager presented another update on the budget and proposed cost reductions. The focus of this meeting included proposed cuts to non-public safety services as well as proposed cuts to non-public works services.

During an April 3, 2012 City Council meeting, the Corp Yard Task Force presented its findings and recommendations in a power point presentation. Ultimately, the plan presented by the Task Force would amount to $1,382,702 in savings. This would be achieved through attrition, the elimination of existing contracts with outside entities, and Union concessions in longevity and standby pay. The Task Force's recommendations did not include layoffs of existing DPW employees. The City Council moved to refer the recommendation to the City Manager and the Director of Public Works to analyze the proposal and provide a response at the next City Council meeting in two weeks.

In a response presentation from the City Manager at the April 17, 2012 City Council meeting, the City Manager noted that the City's current service delivery model was that 90 percent of services were provided in-house, while only 10 percent of services were provided through contract labor. Personnel costs comprised over 75 percent of the City's $12 million deficit. Attrition was not an acceptable means for the City to achieve savings because of its uncertainty—the City had no ability to control the effective dates of retirements; nor could it guarantee retirements prior to their effective dates. Transferring DPW employees to fill Inspector positions would achieve some savings, but the City's estimated savings through this course of events were 30 percent lower than the savings projected by the Unions. According to the City, elimination of the existing service contracts would cost the City money, as in-house DPW employees' hourly rates of pay were much higher than those of the contracted workers, and the City would have to add nighttime shifts to the current in-house employees' schedules in order to complete the work currently performed by contracted workers. In sum, the City determined that adoption of the proposal put forward by the Task Force would result in deferred maintenance, overtime costs, and a reduction in the level of overall service.

Ultimately, the City Manager urged the Council to reject the recommendation of the Task Force and to adopt the City Manager's plan to implement $2.1 million in cuts to the DPW budget for the 2012-2013 fiscal year.

On April 17, 2012, the Milpitas City Council approved the City Manager's proposed cost reductions and authorized him to commence implementation of those cost reductions. Smith did not have any specific recollection of the April 17, 2012 meeting. However, he asserted that, prior to the April 17, 2012 meeting, the Unions never received an invitation to bargain specifically over the issue of contracting out, or an actual proposal from the City that detailed their desire to contract out. When Smith was asked in cross examination to explain the difference between a proposal and a recommendation, he stated that a recommendation is simply an opportunity to get the City Council's input and ideas, whereas a proposal is made after the City Council adopts a recommendation or directs the City Manager to proceed with a recommendation.

ISSUE

Whether the City violated MMBA section 3505 by failing to meet and confer in good faith over the decision to outsource bargaining unit work and whether it violated the MMBA by failing to provide notice of its intent to outsource MEA bargaining unit work, as specified in section 5.01 of the parties' MOA, and City Resolution 5981.

POSITIONS OF THE PARTIES

The Unions

The Unions assert that section 7.01.4 of the MOAs was negotiated as a limitation on further cuts to the DPW employees unless and until the City lost RDA funds or its budget deficit exceeded $7 million. If either of those triggering events occurred, the City would then

be required to make a formal proposal to the Unions and meet and confer prior to implementing layoffs and/or outsourcing bargaining unit work. Additionally, the City would have to comply with its own Resolution 5981 which imposed public notice and a 120-day waiting period. The City's April 17, 2012 decision to adopt a proposal which included both outsourcing and layoffs of bargaining unit positions prior to making a formal proposal to Unions and without observing the procedural requirements of Regulation 5981 constitutes an unlawful unilateral change.

The City

The City argues that the language of section 7.01.4 of the MOAs operates as a waiver of the right to meet and confer over the decision to layoff bargaining unit members or outsource bargaining unit work if either of the triggering events described in that section occurred. The City argues in the alternative that it gave notice to the Unions in "early February" of its intent to layoff and outsource bargaining unit work and the Unions waived any right to demand negotiations over the decision by failing to timely make the demand. Accordingly, the City's adoption of the proposal on April 17, 2012 to outsource DPW work and layoff DPW supervisors was not an unlawful unilateral change.

CONCLUSIONS OF LAW

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer breached or altered the parties' written agreement or its own established past

practice; (2) the change was implemented without the employer fulfilling its duty to negotiate with the exclusive representative, including providing adequate notice; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Grant Joint Union High School District* (1982) PERB Decision No. 196; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

Not all subcontracting decisions are within the scope of representation. (*Ventura County Community College District* (2003) PERB Decision No. 1547 (*Ventura*).) Where an employer's decision to subcontract constitutes a managerial decision based on factors not amenable to negotiations, the matter may be deemed outside the scope of representation. (*Ibid.*) However, where the decision to subcontract is related to overall enterprise costs, it is within the scope of representation regardless of whether the decision can be characterized as a decision "at the core of entrepreneurial control." (*Ibid*, citing *Fibreboard Paper Prods. Corp. v. NLRB* (1964) 379 U.S. 203, 223.)

The City acknowledges in this case that the primary, if not sole motivating factor in its decision to outsource job duties in the DPW was to address the City's budget deficit. Thus, the City's decision to outsource DPW jobs to save money was a decision within the scope of representation as defined by the statute. The essential issue in this case is primarily whether the City was required to provide 120 days' notice of its decision to conduct layoffs and

outsource bargaining unit work and whether the "no layoff" clause in the MOA constitutes a waiver authorizing the City to take unilateral action after the triggering events occurred.

1. Did the City fail to give the Unions reasonable notice of its proposal to layoff bargaining unit members and outsource bargaining unit work?

Section 5.01 of the Unions' MOA states that,

> 5.01 Except in cases of emergency as provided in this section, the City shall give reasonable written notice to each recognized employee organization affected by an ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation including actions taken under City Rights that affect wages, hours and other terms and conditions of employment proposed to be adopted by the City and shall give such recognized employee organizations the opportunity to meet with City representatives.

The language in the MOA appears to be a simplified version of the language of the MMBA's notice provision.[8] Given the similarity of the two provisions, it is proper to apply interpretations of section 3504.5 of the MMBA to the parties' language in section 5.01 of the MOA. (See *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 (*City of Vallejo*).) Furthermore, when interpreting the MMBA, it is appropriate to take guidance from cases

[8] Section 3504.5(a) of the MMBA states,

> (a) Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions.

interpreting the National Labor Relations Act[9] and California labor relations statutes with parallel provisions. (*Ibid.*)

In *Stockton Police Officers' Assn. v. City of Stockton* (1988) 206 Cal.App.3d 62 (*City of Stockton*), the employer sent a letter to the exclusive representative notifying the representative that its contract for counseling services was going to expire soon and it was interested in changing the level of counseling services provided to bargaining unit members. The employer sought "input" from the union prior to negotiating a new level of counseling services. Three months after the employer notified the union of its desire to change the level of services provided, it negotiated a new contract for counseling services with a third party, resulting in a change in the level of benefits received by bargaining unit members. The exclusive representative made no demand to bargain during the three months immediately following the employer's notice. Nevertheless, three months after the new contract had been negotiated, and approximately six months after the employer had first notified the union, the union demanded to meet and confer over the change in the level of counseling services to bargaining unit members. The employer refused to meet and confer with the union at that time.

In ruling upon the issue of whether the employer's refusal to bargain violated the MMBA, the court held that the statutory notice requirement does not mandate more than simple notice of a desire to change a condition of employment. (*City of Stockton*, *supra*, 206 Cal.App.3d 62.) There is no duty for the employer to solicit input from the union. (*Ibid.*) Furthermore, the duty to provide reasonable written notice exists only prior to the employer's arrival at a determination of policy or course of action. (*Id.* at p. 66.) Indeed, the court held

[9] The NLRA is codified at 29 U.S.C. section 151 et seq.

that "[t]he statute does not require the City to meet and confer after properly noticed policy has been adopted without any such request from the employee organization seeking to bargain." (*Ibid.*)

When interpreting the Educational Employment Relations Act (EERA),[10] PERB has held that what constitutes "reasonable" notice prior to an employer's change to working conditions necessarily depends upon the individual circumstances of each case. (*Victor Valley Union High School District* (1986) PERB Decision No. 565 (*Victor Valley*).) Even so, the Board held that notice must be made to an official of the employee organization who has authority to act on behalf of the organization, in a manner that clearly informs the recipient of the proposed change, and sufficiently in advance of a firm decision to allow the exclusive representative to decide whether to make a demand to negotiate. (*Ibid.*) Even in the absence of formal notice, proof that an authorized official of the exclusive representative had actual knowledge of the proposed change will suffice. (*Ibid.*)

In this case, the City Manager recommended on February 3, 2012, that the DPW be reorganized and a substantial portion of the work from that department be contracted out. The City Manager then presented these recommendations to the City Council at a publicly noticed meeting on February 7, 2012. The minutes from this meeting make it clear that the City Council had not reached a decision at this time. Both Union Presidents attended the February 7, 2012 City Council meeting and both made public comments in response to the City Manager's proposal to outsource the DPW work. In response to the concerns raised by both Union Presidents, the City Council agreed to stay its decision until May 8, 2012, and to permit the Unions to present alternatives to the proposed cuts. Subsequent to the meeting,

[10] EERA is codified at section 3540 et seq.

representatives of both Unions sought additional meetings with the City Manager for the purpose of proposing alternatives to the outsourcing plan presented at the City Council meeting. Under the circumstances, I find that the Unions had actual knowledge of the City's proposal to outsource bargaining unit work on February 7, 2012. (*Victor Valley*, *supra*, PERB Decision No. 565.)

As noted above, however, Resolution 5981 states, in relevant part:

> Advance notice of 120 days must be given to the collective bargaining agent with a call for public hearing on the issue. This advance notice is subject to a meet and confer process with the City's represented employees.

The Unions argue that what constitutes "reasonable" notice in the context of layoffs and outsourcing is defined by the City's Resolution 5981. Notwithstanding the findings above, the City adopted the proposal on April 17, 2012, fewer than 120 days after the Unions had notice of the proposal—an apparent violation of Resolution 5981 and, by extension, the requirement in the MOA that notice be "reasonable."

2. Did the Unions waive their right to meet and confer over the decision to layoff bargaining unit members and outsource bargaining unit work?

The statutory proscription against precipitous unilateral decision-making by the employer applies only to those decisions regarding matters within the scope of representation. Where an employer makes a decision regarding matters outside the scope of representation, it may unilaterally decide to implement changes. (*City of Vallejo*, *supra*, 12 Cal.3d 608, 621.) In other words, if the parties do not have a duty to meet and confer over the subject matter of the decision, the employer does not need to provide the exclusive representative with any notice prior to reaching a firm decision to make a change.

a. Waiver By Contract

The Board has held that a union may waive its right to bargain about the contracting out of unit work by agreeing in advance that the employer may unilaterally undertake such action. (*Barstow Unified School District* (1996) PERB Decision No. 1138 (*Barstow*); see also, *Island Creek Coal Co.* (1988) 289 NLRB 851, enfd. (D.C. Cir. 1989) 879 F.2d 939; *American Stores Packing Co.* (1986) 277 NLRB 1656.) However, such a contractual waiver will not be construed solely from a broadly based management-rights clause. (*San Jacinto Unified School District* (1994) PERB Decision No. 1078.) To the contrary, any waiver of a right to bargain over a negotiable contracting out decision must be "clear and unmistakable." (*Amador Valley Joint Unified School District* (1978) PERB Decision No. 74; see also, *Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693, 708.). The "clear and unmistakable" standard is a high one and mandated by the Board's previous findings that there is a strong public policy against finding waivers based on inferences. (*Los Angeles Community College District* (1982) PERB Decision No. 252; *Palo Verde Unified School District* (1983) PERB Decision No. 321; see *Daniel Construction Company, Inc.* (1979) 239 NLRB 1335, 1336.)

When determining whether contract language constitutes a waiver of the right to bargain, PERB looks to the California Civil Code for guidance in interpreting contract language. (*Barstow, supra*, PERB Decision No. 1138.) Not only is the parties' intention to be ascertained from the language of the contract where it is clearly worded, but the whole contract is to be taken together in order to give effect to every part. (See Civil Code, §§ 1638 and 1641, respectively.) When contract language is ambiguous, the Board may examine bargaining history to determine the parties' true intentions. (*Barstow.*)

A waiver of an exclusive representative's right to bargain will never be lightly inferred. (*Oakland Unified School District* (1982) PERB Decision No. 236.) In cases where the alleged waiver is exceptional in "breadth and severity," the "clear and unmistakable" standard must be stringently applied. (*San Marcos Unified School District* (2003) PERB Decision No. 1508 (*San Marcos*).) The burden of proof for establishing an affirmative defense of waiver rests exclusively with the respondent. (*Placentia Unified School District* (1986) PERB Decision No. 595.)

The language in the "No Layoff" clause appears, on its face, to limit the City's right to implement layoffs or to outsource bargaining unit positions except under certain circumstances.

> No layoffs or new outsourcing of [Union] positions during the term of this contract, except if the State eliminates any portion of RDA impacting the City and/or the General Fund's deficit exceeds $7 million or more in any fiscal year.

Because a decision to conduct layoffs is generally within the management prerogative (*City of Vallejo, supra,* 12 Cal.3d 608), this provision would appear to impose restrictions on the City's ability to lawfully implement layoffs. Conversely, the decision to subcontract bargaining unit work must generally be negotiated prior to implementation (*Ventura, supra,* PERB Decision No. 1547), such that the provision merely restates the parties' existing statutory rights and duties with regard to outsourcing. In this case, the restriction that there will be no new outsourcing of Union positions during the term of the contract must be read with the qualifying phrase, "except if the State eliminates any portion of RDA impacting the City and/or the General Fund's deficit exceeds $7 million or more in any fiscal year." When read together, these two phrases appear to permit outsourcing of bargaining unit positions only under the exceptions described. Thus, the provision appears to contain both a limitation on a

managerial right to implement layoffs as well as a limited waiver of the right to bargain over a decision to subcontract bargaining unit work.

The Unions argue that they would never have agreed to waive negotiating rights over the subject of outsourcing. Rather, the Unions argue that the "No Layoff" clause was negotiated in exchange for other concessions by the Unions. This argument is undermined by the fact that in April 2011, when the parties were still negotiating the 2011-2012 MOA, MSA sought to make this understanding explicit with an option for MSA to "cancel its concessions" in the event of a layoff or outsourcing during the term of the MOA. Ultimately, this proposal was not adopted.

Further supporting the City's interpretation of the "No Layoff" clause is the financial data both before and during the term of the 2011 MOA. The City provided extensive testimony and data demonstrating that even before RDA was eliminated, the City was in serious financial straits. The earlier concessions were intended to address fiscal shortfalls the City was experiencing independently of any future loss of RDA. According to the City, even after concession bargaining with the Unions, additional cuts would be necessary in the event that the State eliminated RDA. The "No Layoff" clause was not in exchange for earlier concessions—it was in contemplation of future cuts.

According to the City, it first proposed the "No Layoff" clause in 2009 in anticipation of the loss of RDA and the permanent reduction in City funds as a result. The provision was later incorporated into the MOA in order to address the same prospective concern. During successor negotiations, the parties explored a number of alternatives to layoffs and outsourcing. Permanent wage reductions were ultimately rejected in lieu of provision 7.01.4. In other words, during successor negotiations for the 2011 MOA, the parties met and conferred

regarding the decision to outsource bargaining unit work by exploring alternatives and other possible savings.

It is significant that in this case, when the parties were negotiating the inclusion of section 7.01.4 in the MOA, they considered and rejected an overall wage decrease for DPW employees as an alternative to layoffs and outsourcing. This fact tends to demonstrate that the parties understood that savings would have to come from employees' salaries in order to address a loss of RDA. It also demonstrates that the parties negotiated possible alternatives to layoffs at a time when the possibility of layoffs was not imminent, and when the parties would have been better able to balance the cost of the provision against other working conditions—a circumstance that would appear more advantageous than if the parties waited until a contract was in place and their options were more limited.

Ultimately, I must find that the language in section 7.01.4 constitutes a restriction on the City's right to conduct layoffs unless the triggering events occurred, as well as a limited waiver of the Union's right to meet and confer over outsourcing of bargaining unit work in the event that the triggering events occurred. This conclusion is based not only on the language of the provision, but on the parties' bargaining history. Given that both triggering events occurred prior to January 2012, I find that the City did not have a renewed duty to meet and confer over a decision to outsource bargaining unit work and layoff bargaining unit employees prior to its April 17, 2012, adoption of the City Manager's recommendation.

b. Waiver By Inaction

Notwithstanding the above, the City argues that, even if the "No Layoff" clause does not contain a waiver, the Unions failed to demand any negotiations over outsourcing, constituting a waiver by inaction. PERB long ago adopted the general rule that the party

asserting a waiver by inaction must provide evidence of demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the other party. (*Sutter Union High School District* (1981) PERB Decision No. 175.) Once it can be shown that notice was given, if the charging party fails to request to bargain regarding the issue, that is considered a waiver by inaction. (*Sylvan Union Elementary School District* (1992) PERB Decision No. 919.[11])

In *San Mateo County Community College District* (1979) PERB Decision No. 94 (*San Mateo*), the employer's formal motion to pass increased benefits costs to employees was altered to reflect the employer's readiness to absorb the costs for an additional 90 days, and the union agreed to the 90-day period and knew of the need for a speedy decision but failed to demand negotiations. There, the Board stated that "[e]mployee organizations may not shield themselves behind a restraint on unilateral employer actions as a way of avoiding a measure of responsibility for mitigating or resolving financial dilemmas confronting a public employer." (*Ibid.*)

Here, the Unions' actions in the days and weeks immediately following the February 7, 2012 proposal are inconsistent with its assertion that the City failed to give reasonable notice. The purpose of reasonable notice is so that the parties can engage in good faith negotiations prior to a firm decision being made. The Unions knew on February 7, 2012, that the City was proposing to outsource DPW work, but made no demand to meet and confer over the issue. As with the *San Mateo* case, here the City formally announced its intention to delay a final decision on the proposal for a period of 120 days, during which it would continue to absorb the cost of its postponement. The Unions were present when the City announced its intention to

[11] PERB's recent decision *County of Santa Clara* (2013) PERB Decision No. 2321-M overruled *Sylvan* on other grounds.

delay its decision by 120 days with the effect that it would continue to grow the deficit in the interim period. The Unions were aware that the City set a deadline of the coming fiscal year for a final decision and implementation, but failed to demand negotiations throughout the weeks immediately following the City's February 7, 2012 proposal. Instead, the Unions met with the City Manager and other City representatives on many occasions, assiduously maintaining that these meetings were not to be considered meet and confer sessions.

The Unions' failure to use the 120-day period for negotiations and instead invoking the 120-day period to prevent the City from implementing changes previously noticed, is also inconsistent with the concept of good faith negotiations articulated by the Board in *San Mateo*, *supra*, PERB Decision No. 94. Thus, even assuming the City had a duty to meet and confer with the Unions over its proposal to layoff DPW employees and outsource their work after the triggering events of loss of RDA and a General Fund deficit greater than $7 million, the Unions' conduct for the six weeks following the City's announced proposal evidences a waiver of any right it may have had to demand negotiations.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. SF-CE-956-M, *Milpitas Employees Association v. City of Milpitas*, and Case No. SF-CE-958-M, *Milpitas Supervisors' Association v. City of Milpitas*, are hereby dismissed.

Right of Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the

Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet, or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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