STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA CLARA PUBLIC SAFETY NON-SWORN EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF SANTA CLARA, Respondent.	Case No. SF-CE-904-M PERB Decision No. 2476-M March 10, 2016

Appearances: Rains Lucia Stern by Peter A. Hoffmann, Attorney, for Santa Clara Public Safety Non-Sworn Employees Association; Meyers, Nave, Riback, Silver & Wilson by Edward L. Kreisberg and Samantha W. Zutler, Attorneys, for City of Santa Clara.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

BANKS, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Santa Clara Public Safety Non-Sworn Employees Association (Association) from a proposed decision (attached) by a PERB administrative law judge. The complaint alleged that the City of Santa Clara (City) violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB regulations[2] by failing and refusing to meet and confer in good faith during negotiations for a successor agreement in October-December 2011, and by interfering with the rights of employees and the Association by imposing terms and conditions of

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

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

employment affecting Unit 10 members that were more regressive than those negotiated by the City the previous year with the representatives of other bargaining units.

By agreement of the parties and the administrative law judge initially assigned to this case (ALJ1), the matter was to be decided on a stipulated record in lieu of a formal hearing. In support of its allegations, the Association submitted sworn declarations alleging that various City managers and officials had threatened reprisals and made disparaging remarks about the Association to Unit 10 members in the months preceding the parties' 2011 negotiations. The City submitted rebuttal declarations denying these allegations and any inference of animus towards the Association.

After the matter was submitted for decision, it was transferred to a second ALJ (ALJ2), who refused to consider the Association's declarations, reasoning that they contained uncorroborated and unreliable hearsay on disputed facts. ALJ2's proposed decision then dismissed all allegations in the complaint and underlying unfair practice charge.

The Board has reviewed the entire record in this matter, including the pleadings, the stipulated record and exhibits, the parties' declarations and the verified documents attached thereto as exhibits, the Association's exceptions and supporting brief, and the City's response and supporting brief. ALJ2's factual findings, as set forth in the proposed decision, are adequately supported by the stipulated record and we adopt them as the findings of the Board itself.

We do not, however, adopt the proposed decision's conclusions of law. In our view, ALJ2 erred by not considering the Association's declarations or otherwise fully developing the record regarding the allegations of disparaging statements by City managers and officials. We therefore set aside the dismissal of the complaint and underlying unfair practice charge and remand the matter for further proceedings in accordance with the discussion below.

FACTUAL AND PROCEDURAL HISTORY[3]

The Association is the exclusive representative of City employees in Bargaining Unit 10, which includes several non-sworn police department classifications. The City and the Association were parties to a Memorandum of Understanding (MOU), effective from December 14, 2008 through December 24, 2011.

In an effort to balance the City's 2010-11 budget, in Summer 2010, City Manager Jennifer Sparacino (Sparacino) approached the representatives of the City's ten bargaining units for concessions in employee compensation. At the time, two of the City's bargaining units were covered by MOUs that were set to expire in December 2010. Unit 10 was among the remaining eight units whose MOUs would not expire until December 2011 or December 2012.

In subsequent negotiations with each of its bargaining units, the City proposed an across-the-board 5.15 percent reduction in all employees' wages. In addition, for the two units whose agreements would expire in December 2010, it proposed that employees forego any wage increases in upcoming negotiations. For the remaining eight units, including Unit 10, whose agreements were not set to expire until the following year or later, the City proposed that employees forfeit all wage increases due under existing agreements. The City later modified its position by proposing 96 unpaid furlough hours per year, instead of an across-the-board 5.15 percent wage reduction. However, it continued to propose that all bargaining units either not seek wage increases in upcoming negotiations or, for those units who remained under contract until the end of 2011 or 2012, to forego all previously-negotiated increases. The City

[3] We summarize here only the pertinent facts for context. As discussed below, except for the Association's allegations of disparaging and/or coercive statements, the evidence presented was limited to a stipulated record and exhibits. Because neither party has excepted to ALJ2's factual findings, they will not be disturbed and the parties are precluded from excepting to the factual findings in the proposed decision.

estimated that through these proposed concessions, it would achieve approximately $650,000 in cost savings from employees in Unit 10. It also advised the Association that, if not realized through voluntary concessions, the City would lay off employees from Unit 10 to achieve these cost savings.

Of the eight unions under contract until 2011 or 2012, six agreed to forego 4.5 percent salary increases and accept a 4.6 percent reduction in pay through furloughs. The Association was one of the two employee organizations who refused to surrender previously-negotiated wage increases and on or about January 16, 2011, the City laid off six employees from Unit 10.

In September 2011, the parties began negotiations for a two-year successor agreement but were unable to reach agreement, particularly over issues of employee compensation. On December 8, 2011, Attorney Edward Kreisberg (Kreisberg) provided the Association with the City's last, best and final offer (LBFO), which provided for a 12 percent wage reduction over two years for all Unit 10 members. The Association countered with no wage concessions and $177,000 in future savings to be achieved through 72 unpaid furlough hours over the course of the two-year agreement. The City rejected the Association's proposal and on December 20, 2011, authorized implementation of the 12 percent wage reductions included in its LBFO.

On December 12, 2011, the Association filed an unfair practice charge with PERB. On January 4, 2012, the Association filed its first amended charge.

On January 19, 2012, the City filed with PERB a position statement and request for dismissal of the Association's charge. On February 6, 2012, the City filed a corrected position statement and request for dismissal.

On May 4, 2012, PERB's Office of the General Counsel issued a complaint which alleged that the City had failed and refused to meet and confer in good faith during successor

negotiations in late Autumn 2011 and had interfered with the rights of the Association and bargaining unit members by imposing terms and conditions of employment that were more regressive than those obtained by the City from other units through negotiations.

On May 24, 2012, the City answered the complaint by denying the material allegations and raising various affirmative defenses. In particular, the City's answer denied all allegations included in Paragraph 4 of the complaint, including the allegation that "during the period immediately prior to the start of successor negotiations, by and through its managers and supervisors, the City made a number of statements disparaging the [Association] for refusing to engage in mid-term concession bargaining."

On July 3, 2012, the parties met at an informal settlement conference but did not resolve the dispute. On the same day, ALJ1 notified the parties that a formal hearing would begin on October 8, 2012 and continue on October 9 and 10, 2012.

On October 5, 2012, the parties agreed to submit the matter for decision on a written record and cancelled the hearing set to begin on October 8, 2012. Correspondence from ALJ1 memorializing the parties' agreement states that they "will be preparing a proposed schedule for submission of joint stipulated facts and exhibits, declarations and closing arguments to the Administrative Law Judge for his review and approval."

The parties agreed to the following schedule for the submission of evidence and briefs:

- Stipulated facts, exhibits and declarations on October 31, 2012
- Rebuttal declarations on November 9, 2012
- Briefs on November 28, 2012
- Reply briefs on December 7, 2012

After further refinements to the above schedule, on November 9, the parties submitted a list of 61 stipulated facts with 43 exhibits, primarily concerned with meeting dates and bargaining proposals discussed during their negotiations and the pleadings and other documents previously filed with PERB in this matter. None of the stipulated facts or exhibits referenced any of the disparaging or coercive remarks attributed to City managers and officials, as alleged in the charge and complaint. However, included with the stipulated facts and exhibits were sworn declarations by, among others, bargaining unit members Deanna Black, Taylor Carpenter, Melinda Sawin, and Michael Clark (Clark). Each of these declarations alleged that a City manager or official had made remarks whose intended or likely effect was to convey that the Association and/or Unit 10 members would suffer adverse consequences in successor negotiations with the City, because of the Association's refusal to agree to concessions in their previous negotiations. Also included among the documents submitted on November 9, 2012 were declarations by Sparacino, City of Santa Clara Director of Human Resources Elizabeth Brown, City Finance Director Gary Ameling (Ameling), and Kreisberg, who served as Special Labor and Employment Counsel and Chief Negotiator for the City of Santa Clara during its negotiations with the Association.[4]

On November 21, 2012, the parties agreed to place the matter in abeyance pending mediation before PERB scheduled for December 19, 2012. However, they also informed ALJ1 that they would submit rebuttal declarations and opening briefs, which could be used to assist the PERB mediator.

[4] Sparacino's declaration asserts, among other things, that the Association has falsely informed its members that the City gave the Association the choice of layoffs rather than wage concessions in the 2010 mid-term negotiations. Sparacino's and Ameling's declarations also dispute certain assertions, which they attributed to the Association, about the state of the City's finances when the 2011 successor negotiations began.

On November 27, 2012, the City submitted rebuttal declarations by Police Sergeant Gregory D. Hill, Retired Chief of Police Stephen D. Lodge, Assistant Director of Human Resources Tina Murphy, Human Resources Administrative Analyst Vanessa Maitland-Guerra, and City Council Member Patrick E. Kolstad, in which these individuals denied making intentionally or impliedly disparaging or coercive statements to Unit 10 members, as previously alleged by the Association's witnesses.

Also on or about November 27, 2012, the Association submitted its own rebuttal declarations by Clark, Peter Hoffmann, Robert "Lee" Jett, and Timothy Reilly, which disputed the interpretation and some of the underlying facts regarding the 2011 successor negotiations, as previously alleged in the City's declarations. Clark's declaration, for example, disputes assertions by Kreisberg and other City declarants regarding the terms agreed to by other representatives, which were then used as the basis for determining the degree of "parity" proposed in negotiations with the Association. Several of the Association's witnesses also deny that anyone speaking or acting on behalf of the Association made the statements about the City's financial situation, as previously alleged in the City's declarations.

On December 6, 2012, the parties agreed to further extend the deadline for submission of briefs from December 12, 2012 to December 17, 2012.

On or about December 17, 2012, the parties filed opening briefs and on or about January 16, 2013, they filed reply briefs.

With the matter fully submitted, on February 4, 2013, ALJ1 notified the parties that the case had been transferred to ALJ2 who would review the record and prepare a proposed decision. Neither party objected to the transfer.

On June 5, 2013, ALJ2 issued his proposed decision.

On July 15, 2013, the Association filed a statement of exceptions to the proposed decision, a supporting brief and a request for oral argument before the Board itself. The Association states that since the record was closed and the matter submitted for decision, subsequent events have transpired that may influence the Board's ultimate decision on the issues raised by the Association's exceptions and supporting brief and therefore requests that the Board take further evidence into consideration.[5]

On September 4, 2013, the City filed its response and supporting brief.

DISCUSSION

Among the legal and procedural errors asserted by the Association is ALJ2's refusal to consider the Association's declarations, in which bargaining unit members alleged that in the months leading up to the parties' 2011 negotiations for a successor agreement, various City managers and officials made remarks to Unit 10 members that disparaged the Association and/or implied the Association and Unit 10 members would suffer reprisals for the Association's refusal to agree to concessions during the previous negotiations. The City's rebuttal declarations categorically deny these allegations. The proposed decision explained that ALJ2 refused to consider the Association's declarations because the testimony was offered in the form of written declarations rather than "live" testimony subject to cross-examination and credibility

[5] Because we remand for further proceedings, we deny the Association's request for oral argument before the Board itself. We leave to the ALJ on remand to determine the appropriateness of any motion to amend the complaint and/or whether to permit new evidence of events that allegedly transpired while this matter was pending before the Board.

determination, and because of their "disputed nature."[6] The declarations and rebuttal declarations were not part of the stipulated facts and the record contained no other evidence of the disparaging or coercive statements allegedly made by City managers and officials.

The Association argues that ALJ2's decision denied the Association its right to be heard on issues beyond the stipulated record. Alternatively, the Association argues that ALJ2 erred by refusing to consider the Association's declarations, while apparently considering the contents of the City's initial and rebuttal declarations. For its part, the City argues that the parties were permitted to submit written declarations in support of their cases "without any promise or agreement as to their use in the determination of the issues," and that the Association thereby assumed the risk that its declarations would be excluded as objectionable. We agree with the Association that ALJ2 erred in refusing to consider its declarations and question whether the parties should have been permitted to submit a disputed factual issue solely through competing declarations.

ALJ1 was well aware that the Association's allegations of coercive or disparaging statements were disputed, but nonetheless allowed the parties to proceed by way of declarations and rebuttal declarations on disputed facts rather than live testimony. The Association was blindsided by ALJ2's refusal to consider the declarations on two grounds, both of which ALJ1 was already aware, i.e., the evidence was disputed and was presented in sworn declarations in lieu of live testimony. Although ALJ2 was not free to make a factual finding based on

[6] As explained in the proposed decision: "Both parties' declarations contain hearsay uncorroborated by other competent evidence, were specifically prepared for litigation, untested by cross examination, not subject to rebuttal testimony, and presented by witnesses not observed for credibility." At least one of these justifications ("not subject to rebuttal testimony") was incorrect, since, as the proposed decision noted only a few lines earlier: "An initial set of declarations were filed by each side, followed by rebuttal declarations on both sides." (Proposed dec. at p. 23.)

uncorroborated hearsay (PERB Reg. 32176; *Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal.App.4th 945, 959-962; *Hilmar Unified School District* (2004) PERB Decision No. 1725, p. 16), as the presiding Board agent, he had both the power and the duty to "[i]nquire fully into all issues and obtain a complete record upon which the decision can be rendered." (PERB Reg. 32170, subd. (a); see also *State of California (State Personnel Board)* (2002) PERB Decision No. 1491-S, pp. 9-10.) Under the unusual circumstances of this case, excluding the declarations was unfair to the charging party, whose burden it was to prove the allegations of the complaint, and who had reasonably expected that the evidence in the declarations would be evaluated for admissibility, competence and trustworthiness and not categorically rejected because of the format in which it was received, given ALJ1's acquiescence to the arrangement.

While we thus agree with ALJ2 that, in the absence of any credible, reliable and corroborating non-hearsay testimony, the Association's declarations were insufficient to make factual findings in support of the allegations of disparaging or coercive statements made to employees (PERB Reg. 32176; *Scott S. v. Superior Court* (2012) 204 Cal.App.4th 326, 342; *Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 9, review den. April 20, 2015, Case No. B257852), ALJ2 was fully authorized by PERB Regulations 32207 and 32170, subdivision (a),[7] to give notice and convene a formal hearing to obtain live testimony on the factual issues in dispute. We therefore set aside the dismissal and remand to the ALJ to consider

[7] PERB Regulation 32207 states: "The parties may submit stipulated facts where appropriate to the Board agent. No hearing shall be required unless the parties dispute the facts in the case." The three-member panel of the Board deciding this case agree that, under the circumstances, PERB Regulation 32207 authorized ALJ2 to order a hearing to resolve the disputed factual issues regarding the complaint allegations of disparaging statements attributed to City managers and officials. We reserve for another day whether the second sentence of Regulation 32207 *compels* an ALJ to convene a hearing when the facts are disputed.

the declarations and any exceptions to the hearsay rule that might apply and to take any further action authorized by statute or regulation, including holding an evidentiary hearing on the disputed factual issues raised by the parties' declarations.

While the remaining facts, as stated in the parties' stipulated record and set forth in the proposed decision are not in dispute, after considering the declarations and taking any other action necessary to inquire fully into the disputed issues and to develop a complete record, the ALJ may consider whether the declarations and any additional evidence alters any legal conclusions regarding the allegations in the complaint. The ALJ may also consider the Association's exceptions and the City's response to those exceptions, to ensure that the legal conclusions included in the new proposed decision are free of any possible error. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 8, fn.10.)

ORDER

The dismissal of the complaint and underlying unfair practice charge in Case No. SF-CE-904-M is hereby SET ASIDE and the matter REMANDED to the Division of Administrative Law for further proceedings in accordance with this decision.

Chair Martinez and Member Winslow joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA CLARA PUBLIC SAFETY NON-SWORN EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF SANTA CLARA, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-904-M PROPOSED DECISION (June 5, 2013)

Appearances: Rains, Lucia, Stern by Peter Hoffmann, Attorney, for Santa Clara Public Safety Non-Sworn Employees Association; Meyers, Nave, Riback, Silver & Wilson by Edward L. Kreisberg and Samantha W. Zutler, Attorneys, for City of Santa Clara.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Santa Clara Public Safety Non-Sworn Employees Association (PSNSEA) filed an unfair practice charge against the City of Santa Clara (City) under the Meyers-Milias-Brown Act (MMBA or Act)[1] on December 12, 2011. An amended charge was filed on January 4, 2012. On May 4, 2012, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint, alleging that the City: (1) failed to meet and confer in good faith during contract negotiations in the fall of 2011; and (2) interfered with the rights of bargaining unit members by imposing economic concessions that were more regressive than those achieved in mid-term negotiations with other bargaining units after

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

PSNSEA had elected not to make such concessions. This conduct is alleged to violate sections 3503, 3505, and 3506 and PERB Regulation 32603(a), (b), and (c).[2]

On May 24, 2012, the City filed its answer to the complaint, denying the material allegations and raising affirmative defenses.

On July 3, 2012, an informal settlement conference was held, but the matter was not resolved.

On October 31, 2012, the parties submitted a stipulated set of facts in lieu of a formal hearing.

On January 22, 2013, the matter was submitted for decision with the filing of post-hearing briefs.

On February 4, 2013, the case was reassigned from Chief Administrative Law Judge Shawn Cloughesy to Administrative Law Judge Donn Ginoza for issuance of the proposed decision.

FINDINGS OF FACT

PSNSEA is an "employee organization," within the meaning of section 3501(a). The City is a "public agency" within the meaning of section 3501(c).

The parties stipulated to the following facts:

1. PSNSEA is the recognized exclusive employee organization, as that term is defined in Government Code section 3501(b), representing Bargaining Unit 10 ("Unit 10") of the City.

2. Unit 10 is comprised of employees in the classifications of: Communications Dispatcher I; Communications Dispatcher II; Communications Dispatcher III; Senior Communications Dispatcher; Community Service Officer I; Community Service Officer II;

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

Jail Service Officer; Fire Prevention Specialist; Police Records Specialist I; Police Records Specialist IT; and Records Supervisor.

3. The City is a charter city subject to the Meyers-Milias-Brown Act, California Government Code section 3500, et seq.

4. The City and PSNSEA were parties to a Memorandum of Understanding (MOU) with effective dates of December 14, 2008 through December 24, 2011. (Stipulated Exhibit 1.)

5. On June 2, 2010, City Manager Jennifer Sparacino met with each of the City's ten employee bargaining units, including PSNSEA. During the meeting, City Manager Sparacino presented the budget challenges for 2010-11, and in subsequent years, and requested employees' assistance in addressing those challenges.

6. Subsequent to the June 2, 2010 meeting, the City met with all bargaining groups individually to request concessions to help balance the 2010-11 budget.

7. For the 2010 concessionary discussions, the City was represented by Chief Negotiator Eddie Kreisberg ("Kreisberg") and Human Resources Director Liz Brown. Unit 10's representatives included Michael Clark, Lee Jett, and Troy Morgan.

8. On August 19, 2010, City representatives had the first in a series of meetings with PSNSEA representatives to discuss the City's concerns with a FY 2010-11 budget shortfall and projected deficits in subsequent years.

9. Kreisberg advised each of the bargaining units, including PSNSEA, that the City sought reductions in employee compensation in order to balance that year's budget and address the City's projected future financial challenges.

10. At the time these discussions began, eight (8) of the City's ten (10) bargaining units, including PSNSEA, had MOUs with the City that expired in either December 2011 or

December 2012. The MOU between the City and PSNSEA expired in December 2011. Also at the time, the Santa Clara Police Officers Association (POA) and the Santa Clara Police Management Employees Unit had MOUs expiring on December 25, 2010.

11. Kreisberg informed PSNSEA that the City was requesting all employees agree to the same concessions. Those concessions were: (1) all employees in closed contracts would forfeit any wage increase scheduled for the 2010-11 MOU year, and all employees then negotiating contracts would not receive a wage increase for the 2010-11 MOU year; and (2) all employees would accept a 5.15 percent wage decrease.

12. During subsequent discussions with PSNSEA and the other employee groups, the City modified its proposal to: (1) all employees in closed contracts would forfeit any wage increase scheduled for the 2010-11 MOU year, and all employees then negotiating contracts would not receive a wage increase for the 2010-11 MOU year; and (2) all employees would accept 96 furlough hours per year. Kreisberg advised PSNSEA that the requested concessions would equal approximately $650,000 in savings from Unit 10 employees.

13. Kreisberg advised PSNSEA that, if the City was not able to realize these savings through voluntary concessions from Unit 10 members, the City would have to lay off members of PSNSEA in order to reach the required savings from PSNSEA. The City later identified six (6) positions which, if laid off, would achieve this savings.

14. The City and PSNSEA were unable to agree on the requested concessions. The City was also unable to reach agreement with IBEW.

15. The City reached agreement on the requested concessions with six (6) of the City's eight (8) bargaining units with closed contracts. Those bargaining units were: IAFF (Firefighters); Employees' Association; AFSCME; Miscellaneous Unclassified Employees; Engineers; and Fire Management. (Stipulated Exhibits 3-8.)

16. During this same time period, the City concluded negotiations with the POA and Police Management employee groups on successor MOUs. Each MOU included provisions wherein members would take 96 furlough hours, and receive no wage increases, for the 2011 and 2012 MOU years. (Stipulated Exhibits 9, 10.)

17. Each concession agreement was memorialized in either an MOU extension (for the groups in closed contracts), or a new MOU. Each MOU extension included a "contingency requirement," wherein the City agreed that, if the combined total of actual collections for certain revenue sources was $1 million greater than the City's then-current estimates, the City and employee group would meet and confer regarding whether or not the City would agree to reduce the number of furlough hours for the 2012 calendar year. (Stipulated Exhibits 3-8.)

18. The City laid off six PSNSEA members on or about January 16, 2011.

19. On September 7, 2011, City Manager Jennifer Sparacino sent correspondence to representatives of the bargaining units that had agreed to mid-contract concessions, acknowledging that the City had achieved the economic triggers identified in the "Contingency Requirements."

20. On September 29, 2011, Liz Brown directed correspondence to PSNSEA President Michael Clark requesting that the parties commence negotiations for a successor MOU. Brown's letter included the City's initial proposals. (Stipulated Exhibit 2.)

21. PSNSEA provided its initial proposals via letter on October 7, 2011. (Stipulated Exhibit 11.)

22. On October 19, 2011, the parties conducted their first day of negotiations for a successor MOU.

23. At that meeting, the parties provided language for their initial proposals. (Stipulated Exhibits 13, 16.)

24. Included among the City's proposals on October 19, 2011 was an eighteen percent (18 percent) wage decrease, a new pension formula for future hires, and proposals on leave time usage, holiday pay, discretionary health and dental allocations, night differential pay, psychological counseling, overtime, uniform allowance, voluntary employee beneficiary association (VEBA), lay-off policy, and the date for exchanging proposals for negotiations for the next MOU.

25. Kreisberg explained that the reason for the proposed 18 percent wage decrease was that employees in other units did not receive a 4.6 percent salary increase (4.5 percent total compensation) in the 12/10-12/11 MOU year, and had taken 96 hours—approximately 4.6 percent—worth of unpaid furloughs, for a difference of a little over 9 percent. Kreisberg further explained that, absent the proposed wage decrease, this 9 percent difference in take home pay between Unit 10 employees and employees in other units would occur again in the 12/11-12/12 MOU year, for a total difference of 18 percent over the two year period.

26. On November 1, 2011, the parties met for the second time as part of these negotiations; PSNSEA provided a revision to its initial proposals and a formal response to the City's initial proposals. (Stipulated Exhibits 17, 18.)

27. On November 16, 2011, the parties met for the third time as part of these negotiations. At that meeting the City provided PSNSEA with a revised comprehensive proposal. As part of its revised proposal, the City proposed a 12 percent wage reduction. (Stipulated Exhibit 20.)

28. Kreisberg stated that the method by which the City arrived at the 12 percent wage reduction did not lend itself to an exact mathematical calculation, and stated that its proposal was primarily a reduction from 18 percent the City hoped would lead to an agreement. Kreisberg explained that the City has started with the previously proposed

18 percent wage reduction, and reduced its proposal by the approximate 4.6 percent in furloughs that the other units had taken in the 12/10-12/11 MOU year, in recognition that Unit 10 employees had not had time off that corresponded to those unpaid furlough hours. An additional 0.8 percent was recognized as the anticipated reduction of the other units' furlough hours from 96 hours to 80 hours (i.e. a change from 4.6 percent to 3.8 percent) in the 12/11-12/12 MOU year. The remaining 0.6 percent was not directly attributed to any one specific reason.

29. Kreisberg suggested that, even with a 12 percent wage decrease, PSNSEA employees would do better as far as take-home pay than other City employees, during the two year period. The PSNSEA responded, stating that PSNSEA members would work more hours than other employees and receive less pay.

30. During the November 16, 2011 meeting, Kreisberg stated that the City wanted to complete negotiations before the contract expired on December 24, 2011.

31. Kreisberg acknowledged that, during his time as Chief Negotiator, while the City had tried to complete negotiations by the expiration date of the contract, there were instances when that had not occurred, including negotiations with PSNSEA.

32. During the November 16, 2011 meeting, the parties acknowledged that they had only one additional meeting date scheduled (set for November 22, 2011).

33. Hoffmann requested to schedule additional dates, but Kreisberg asked to select additional dates at the following meeting in order to allow sufficient time to see if an arbitration scheduled in an unrelated matter would settle.

34. During the course of negotiations, the City Council agreed to reduce the number of furlough hours for the six bargaining groups who had agreed to mid-contract concessions, and reduced their furloughs from 96 hours to 72 hours. Concurrently, the City Council also

agreed to an equal reduction of furlough hours for the sworn personnel represented by the POA and Police Management, who had agreed to concessions in MOU negotiations, but were not subject to a contingency agreement.

35. On November 22, 2011, the parties met for the fourth time as part of these negotiations.

36. At the beginning of the November 22, 2011 meeting, Hoffmann noted that the parties still did not have any additional meetings scheduled, and requested that the City advise of its availability to meet during the month of December. Kreisberg again cited the potential scheduling conflict with an unrelated arbitration, but stated that he would know by the conclusion of that meeting what his availability would be in the coming weeks.

37. During the November 22nd meeting, Hoffmann advised Kreisberg that PSNSEA would be hosting a general membership meeting on December 5, 2011, in order to advise Unit 10 employees of the status of negotiations.

38. PSNSEA bargaining team members had been informally discussing negotiations with other members throughout the negotiations process. However, December 5, 2011 was the first time PSNSEA held a general membership meeting to discuss the status of the 2011 negotiations.

39. During the November 22, 2011 meeting, Kreisberg again confirmed the basis for the City's proposed 12 percent wage reduction.

40. Kreisberg also informed PSNSEA that the City had reduced the other units' furlough concession by 24 hours, rather than the 16 hour estimate.

41. Kreisberg also confirmed that the employees represented by Unit 2 (POA) would receive the benefit of this furlough reduction, despite the fact that their MOU did not include the same trigger language as MOU extensions that required the City to discuss this

issue. Kreisberg stated that the City determined the POA would receive the same furlough reduction as the rest of the bargaining units that agreed to concessions because the City wished to treat POA members the same as other employees who experienced pay reductions.

42. At the November 22 meeting, PSNSEA presented its "First Comprehensive Proposal." (Stipulated Exhibit 21.)[3]

43. At the conclusion of the November 22, 2011 meeting, Hoffmann again sought the City's availability to schedule additional meeting dates. Kreisberg acknowledged that he was still unaware of the status of his scheduled arbitration, and asked to contact Hoffmann once he determined the status of his conflicting arbitration.

44. On December 6, 2011, Kreisberg notified Hoffmann via e-mail that the City was available to meet December 7, 8, 9, or any day the following week. On the same day, Hoffmann responded, and stated that Unit 10 would not be available until the following week, and preferred to meet the following Friday, December 16, 2011 to accommodate the schedule of one of PSNSEA's bargaining team members. (Stipulated Exhibits 25, 26.)

45. In the evening of December 5, 2011, PSNSEA held a general membership meeting advising its members of the status of negotiations.

46. Between December 5, 2011 and December 21, 2011 Kreisberg and Hoffmann exchanged e-mails and voice-mail messages regarding the status of negotiations, potential meeting dates, impasse, PSNSEA's membership meeting on December 5, Hoffmann's meeting

[3] PSNSEA proposed a conditional adjustment of compensation: a furlough plan of 80 hours in exchange for restoration of three bargaining unit positions and restoration of the staffing levels from 2010. (In its October 25, 2011, position paper to the City Council opposing the City's economic proposals, PSNSEA argued that the City realized approximately $950,000 in savings due to the layoffs and reduced overtime—$300,000 of the total due to paring back of minimum staffing levels.) The union also made a conditional proposal to accept a two-tiered retirement plan for new hires, implementation contingent upon agreement of all other miscellaneous units. It noted two tentative agreements and conditionally withdrew three of its proposals.

with PSNSEA's membership, and Kreisberg discussions with the City Council. Copies of all correspondence can be found at Stipulated Exhibits 22, 25-29, 31-34, and 37.[4]

47. On December 8, 2011, Kreisberg sent correspondence via e-mail to Hoffmann providing the Respondent's last, best and final offer ("LBFO"). (Stipulated Exhibits 27, 28.)[5]

48. Kreisberg further advised of the City's intent to impose the terms set forth in the LBFO at an impasse hearing scheduled for December 20, 2011, should the PSNSEA reject the City's offer.

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[4] Hoffman's December 9, 2011, e-mail to Kreisberg asserts that the parties were not at impasse after four meetings and the submission of two proposals on each side. Hoffman dismissed the City's movement on its wage concession proposal because the initial proposal was "so outrageous, it appears to have been nothing more than an attempt at 'shock and awe'" and because the City failed to correlate the wage reduction proposal to any economic need. Kreisberg's December 12, 2011, e-mail responding to Hoffman's, asserts that the union should recognize the parties are at impasse because of the union's rejection of the City's "bottom line position" on wages, and that the parties had "exhaustively discussed the subject of wages" since the City's initial 18 percent proposal on September 29. These discussions followed the City's "repeated" explanation of the rationale for a wage decrease (of at least 12 percent) based on "treat[ing] employees in PSNSEA fairly as compared to employees in other bargaining units over a two year period (12/10 – 12-12)," the union's rejection of the rationale, and its assertion that it would never agree to a 12 percent decrease even after being told that the City Council had compromised as far as it was willing. Kreisberg stated the City would entertain a new union proposal on December 16 (Stipulated Exhibit 36) while noting that it had waited two months for a union proposal that when received offered a "0 percent change on salary." Attempting to explain its last economic proposal, Kreisberg wrote:

> In simplistic terms, if we assume all employees were making $100 before the current 12/10 – 12/11 MOU year, employees in other units took home $95.40 this MOU year (due to no salary increase and taking furloughs) and will take home $96.20 next year (due to the same salary and continuing furloughs), for a total of $191.20. In contrast, a PSNSEA employee took home $104.60 (due to the salary increase and no furloughs) this MOU year and under the City's salary proposal would take home $92.40 this coming MOU year for a total of $196.65.

[5] Kreisberg noted in correspondence to Hoffman that the City had withdrawn proposals on holidays, uniform allowance, chemical testing, layoff policy, and compensatory time off, and was willing to resolve issues on maximum compensatory time accruals and the scheduling of time-off requests.

49. Unit 10 filed the original Unfair Practice Charge at issue in this matter on December 9, 2011. (Stipulated Exhibit 30.)

50. After further communication between Hoffmann and Kreisberg and in response to Unit 10's expressed concerns that the impasse hearing then scheduled on December 20 would not give PSNSEA sufficient time to discuss the City's proposal with PSNSEA's members, on December 13, 2011, Kreisberg advised via e-mail correspondence that the City Council had agreed to delay the proposed impasse hearing until December 27, 2011. (Stipulated Exhibit 34.)

51. On December 16, 2011, the parties met for the fifth time as part of these negotiations.

52. During the December 16 meeting, Hoffmann informed the City bargaining team that PSNSEA's membership had rejected the City's last, best and final offer. Hoffmann also presented PSNSEA's "Comprehensive Proposal 12-16-11." (Stipulated Exhibit 36.)[6]

53. During the December 16, 2011 meeting, Kreisberg informed PSNSEA that the City Council was scheduling a special closed session on Tuesday, December 20, 2011 to consider PSNSEA's proposal.

[6] The union's proposal dropped its demand for restoration of any of the positions laid off in 2010 as well as the prior staffing levels, but claimed credit for $650,000 in cost savings based on the six bargaining unit positions laid off. It proposed an additional $177,000 by accepting 72 unpaid furlough hours during 2012 and 2013. It removed the contingency for the two-tiered pension plan and offered a new entry level step of the salary schedule. It agreed to City proposals on the use of personal leave and an overtime meal payment. It made a compromise proposal on preferred compensated time off and maintained a previous proposal on alternate work schedules. It acknowledged tentative agreements on maximum accruals of compensated time off and the scheduling of time-off requests. It conditionally withdrew proposals on classification of job responsibilities, sick leave incentives, retirement service credit, grooming and a job title.

54. On December 21, 2011, Kreisberg notified Charging Party via e-mail correspondence that the City Council had rejected PSNSEA's December 16th proposal, in part because it did not agree to any wage decrease. (Stipulated Exhibit 37.)

55. On Tuesday, December 27, 2011, the Santa Clara City Council conducted a public hearing on the impasse. The impasse hearing had been properly noticed and included a staff report from the City Manager to the Council that included the parties' last proposals. (Stipulated Exhibit 38.)

56. At the impasse hearing, PSNSEA requested that the City Council vote to reject the City Manager's recommendation to impose the terms set forth in the City's last, best, and final offer, and in the alternative, vote to: (1) accept the PSNSEA's December 16th proposal; or (2) instruct the parties to resume negotiations; or (3) instruct the parties to engage in mediation: or (4) instruct the parties to engage in non-binding fact-finding.

57. At the close of the December 27 hearing, the City Council voted to impose the terms and conditions set forth in the City's last, best, and final offer. (Stipulated Exhibits 39, 40.)

58. On January 13, 2012, PSNSEA filed its Amended PERB Charge. (Stipulated Exhibit 40.)

59. On January 19, 2012, the City filed its Position Statement and Request for Dismissal of PSNSEA's charge. (Stipulated Exhibit 41.)

60. On May 4, 2012, PERB issued a Complaint in this matter. (Stipulated Exhibit 42.)

61. On May 23, 2012, the City filed its Answer to the Complaint in this matter. (Stipulated Exhibit 43.)

A total of 43 stipulated exhibits were entered in the record, but are not described herein except to the extent noted above.

ISSUES

(1) Did the City engage in surface bargaining in negotiations with PSNSEA for the successor MOU to the one expiring on December 24, 2011?

(2) Did the City discriminate against PSNSEA and its bargaining unit members by imposing economic concessions which it had previously been unable to achieve during the term of the previous MOU?

CONCLUSIONS OF LAW

Surface Bargaining

The first theory of the complaint is that the City violated its duty to meet and confer in good faith based the totality-of-the-circumstances test. (See *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25.) The totality-of-the-circumstances test applies in cases of surface bargaining, where one of the parties "goes through the motions of negotiations" but displays a lack of "genuine desire to reach agreement." (*City & County of San Francisco* (2007) PERB Decision No. 1890-M, pp. 10-12; *Muroc Unified School District* (1978) PERB Decision No. 80, p. 13; *Oakland Unified School District* (1982) PERB Decision No. 275, pp. 15-16.)

PERB has identified a number of indicia of surface bargaining, including: (1) entering negotiations with a "take-it-or-leave-it" attitude (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. (2d Cir. 1969) 418 F.2d 736); (2) unwillingness to schedule meetings (*Oakland Unified School District* (1983) PERB Decision No. 326); (3) failure to exchange reasonable proposals and reconcile differences (*Gonzales Union High School District* (1985) PERB Decision No. 480); (4) making predictably unacceptable proposals (*San Bernardino City*

Unified School District (1998) PERB Decision No. 1270 (*San Bernardino*)); (5) conditioning agreement on economic matters upon prior agreement on non-economic matters (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S); (6) reneging on tentative agreements of the parties (*Charter Oak Unified School District* (1991) PERB Decision No. 873); (7) refusing to provide information (*Stockton Unified School District* (1980) PERB Decision No. 143); and (8) regressive bargaining (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51).

Surface bargaining cases often require PERB to distinguish between unlawful bad faith bargaining and lawful "hard bargaining," which involves the adamant maintenance of a legitimate position. (*Oakland Unified School District, supra,* PERB Decision No. 275; *NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229; compare *NLRB v. A-1 King Size Sandwiches, Inc.* (11th Cir. 1984) 732 F.2d 872, 874.)

The complaint identifies the indicia as: (1) recalcitrance in scheduling meetings, (2) imposing an artificial deadline on negotiations, (3) refusing to entertain concessions from the union unless they contained salary reductions, and (4) through its managers and supervisors making statements disparaging PSNSEA for refusing to engage in mid-term concession bargaining. In its post-hearing briefing, PSNSEA adds claims that the City failed to demonstrate a genuine desire to reach agreement for the successor MOU and made a predictably unacceptable proposal in the form of the 18 percent wage reduction, later reduced to 12 percent.

The City responds by claiming that it declared impasse after four unproductive sessions centered on the City's proposal for a wage decrease, because further meetings would have been futile in light of PSNSEA's refusal to consider a wage decrease of any magnitude.

The surface bargaining allegations will be addressed in the order presented by PSNSEA in its post-hearing brief.

A. Predictably Unacceptable Proposals

PSNSEA relies on *San Bernardino, supra,* PERB Decision No. 1270 for guidance on what constitutes a predictably unacceptable proposal. In that case, the employer proposed to remove a two-decades-old contract provision on union security as well as provisions related to changes in assigned time and calendar adjustments. PERB concluded the proposals were predictably unacceptable because the employer's chief negotiator failed to explain at the hearing how the proposals on union rights related to the bargaining objectives defined for him by his principal or any other concerns of the employer. Removal of the union security provision was particularly offensive because it threatened the viability of the union. The City maintains that the cited case is distinguishable from this case.

The argument can certainly be made that an 18 percent wage decrease constitutes a predictably unacceptable proposal in normal circumstances. But the years in question here were not normal in terms of the financial health of California's cities and counties. The impact of the Great Recession of 2008 is unprecedented in modern times. Its effects on public employers are still being felt today. During this period employers typically weathered the initial effects by eliminating non-essential expenditures, freezing vacant positions, tapping reserves, reducing staff through layoffs, imposing temporary furloughs, and offering early retirement incentives. Often these measures preceded demands for wage concessions. The economic downturn had particularly adverse effects in terms of the employer's pension obligations as enhanced benefits granted earlier in the decade were coupled with significant erosion of pension fund holdings as a result of losses in the financial markets. (See, e.g., J. Holtzman, *Declarations of Fiscal Emergency: A Viable Option as Cities and Counties Fight*

to Maintain Essential Services, California Public Employee Relations Journal, No. 204.) Where contracts included wage increases, the escalating pension obligations were particularly burdensome. (Stipulated Exhibit 14.) Documents in the record reveal that the City's finances are consistent with many other MMBA employers. Here, two years into the recession and after granting raises in both those years to its employees, the City sought and obtained significant mid-term salary concessions from the vast majority of its unions in order to shore up its financial statements and address deficits projected in the future. The City's desire to spread the concessions equitably across the bargaining units and the circumstance of obtaining mid-term concessions adequately explains the magnitude of the proposal made to PSNSEA in the 2011 negotiations.

PSNSEA claims that City's proposal was unsupported by a legitimate economic justification based on a "multi-million dollar improvement in economic circumstances" after 2010 and because of monies saved through the City's layoff of the six bargaining unit positions. Without a more fully developed record it is not possible to conclude that the City's salary concession proposal was pretextual in terms of its economic situation. The record does suggest that there were additional savings that can be attributed to Unit 10 as a result of the layoffs. However, without disclosing the entire budget and the extent to which savings were achieved elsewhere, a true comparison of the scope of Unit 10's concessions cannot be undertaken. Further, only a modest rebound in the City's overall financial condition would not necessarily obviate the need for additional austerity measures on the City's part. Also, the fact that the City had achieved near unanimous wage parity would have created a powerful incentive to preserve that structure by achieving participation from the holdout unions. The fact that the City granted a modification to the furlough requirement for police officers despite the absence of the contingency language in the other MOUs, rather than suggesting favoritism

toward those units agreeing to concessions, demonstrates the City was consistent in pursuing its goal of achieving wage parity.

This case is distinguishable from *San Bernardino, supra*, PERB Decision No. 1270. PSNSEA identifies only one proposal that was suspect and does not claim that the City failed to provide a rationale for multiple subjects. As to the salary decrease proposal, the City was forthright and clear in explaining a rationale, one that was grounded in actual circumstances. There were tentative agreements and movement on the other subjects in the negotiations. Evidence is lacking that the City exhibited animus toward the bargaining process based on the nature of its proposals.

B. Lack of Genuine Intent / Refusal To Entertain Proposals

Lack of genuine intent is typically understood to be the ultimate issue in a surface bargaining test, not a particular indicium of bad faith. Nevertheless, PSNSEA couches this argument in terms of the City's "take-it-or-leave-it" attitude (*General Electric Co., supra*, 150 NLRB 192, 194), as well as the City's refusal to entertain PSNSEA proposals designed to address the City's bargaining objectives. PSNSEA asserts that the City "demonstrated an unwavering intent to quickly impose concessions that were significantly more regressive than the terms and conditions negotiated with bargaining units that had accepted mid-contract concession agreements in 2010, by *retroactively* compounding the concessions offered by those other bargaining units," (original italics) and by "disregarding the union's two proposals, despite the fact that each provided salary reductions equal to the ongoing concessions provided by the City's other bargaining units." In addition, none of the other units offered a "long-term solution to labor costs in a manner that PSNSEA offered (i.e., by expanding the salary step-schedule—an effective 5 percent wage reduction for each new employee or the first five or more years of their employment."

The argument that the City's proposal was significantly more regressive than the concessions obtained from the other units rests on the premise that equitable treatment required the City to give PSNSEA full credit based on the savings from the layoffs. Throughout the negotiations PSNSEA insisted that the savings of the layoffs amounting to $650,000 achieved all of the savings the City would have obtained from the proposed mid-term concessions. The City never explicitly refuted this argument during the negotiations. Instead it focused on the issue of internal wage parity and the additional take home pay the unit members had received and would continue to receive without concessions on salary. On the other hand, PSNSEA has identified nothing in the record refuting the City's analysis of the relative take-home pay status of the Unit 10 employees vis-à-vis other represented employees. PSNSEA also asserts that the City's parity justification is disingenuous because other units had received relatively greater wage increases over the span of years prior to the demand for economic concessions. This point is disputed by the City. In an e-mail responding to an information request, the City presented a comparative history of the wage increases of all the units over the past decade. The City's representative concluded that Unit 10 had the highest average salary and total compensation increases among the miscellaneous bargaining units. (Stipulated Exhibit 19.) The record here fairly establishes that the inability to achieve a contract stemmed from the lack of agreement on both sides for the framework for a resolution of dispute over wage rates rather than a take-it-or-leave-attitude on the part of the City.

The record also fails to demonstrate that the City refused to entertain PSNSEA's proposals. Following PSNSEA's initial proposal, as amended on November 1, the City responded with its November 16 comprehensive proposal that reduced the initial 18 percent salary concession demand to 12 percent. At the November 22 meeting, the City extended the same reduction in the planned furlough to PSNSEA that had been granted to the other units.

PSNSEA's second comprehensive proposal on December 16, 2011 was not rejected unilaterally by Kreisberg, but presented to the City Council for its consideration on December 20.

What PSNSEA really seems to argue is that the City could not have legitimately refused to accept its proposals, or at least seen them as moving the parties toward settlement. But, as to the City's principal goals of rolling back a salary increase that others had not received and would continue not to receive, and recouping the increases Unit 10 employees had received, PSNSEA's response was a firm rejection of these goals and a counterproposal for furlough days going forward that would generate a relatively small savings of $117,000.[7] This speaks again to the philosophical difference over the issue of internal wage parity that separated the parties from the beginning. None of this minimizes the magnitude of the concessions in absolute terms, particularly the City's demand that the past "overpayment" be recouped in the space of one two-year MOU.[8] But PSNSEA never signaled a willingness to accept the concept of recoupment in any form, much less contingent upon a longer period of recovery.

The City, through Kreisberg's December 12, 2011, e-mail to Hoffman, did provide the union with an explanation for the City's rejection of PSNSEA's two wage proposals. It was based on the union's categorical rejection of any reduction in salaries to achieve internal wage

[7] PSNSEA asserts that the City "grossly misrepresents" the facts when it claims the union was unwilling to compromise on the wage concession, citing its offer of a 3.5 percent wage decrease. Presumably this refers to its own furlough plan. Still, there was never any concession offered on the salary rate, which carries with it greater obligations to the City in terms of retirement benefits and greater benefits to the employees, or on the recoupment proposal.

[8] To PSNSEA's credit, the 18 percent opening proposal appears to compound the recoupment in that the one-year overpayment of 9 percent would be recovered in the first year of the two year contract but continue into the second year as well. Recoupment of the 9 percent overpayment spread over a two-year term would amount to a 13.5 percent decrease each year (9.0 plus 4.5 percent (i.e., one-half of 9.0 percent)).

parity. Nothing in the record indicates that Kreisberg's communication of the City Council's bottom-line position was not genuine in light of the City's principal goal in the bargaining. Because the parties began from divergent starting points with little or no common ground by which to achieve a compromise, the City cannot be solely blamed for the lack of movement toward an accommodation of the parties' diametrically opposed positions.[9] The union's proposal to add a lower step on the salary schedule would likely have yielded negligible savings due to the City's inability to hire significant numbers of new employees.

C. Recalcitrance in Scheduling Meetings

Between September 29, 2011, when the City forwarded its initial bargaining proposal, and December 27, 2011, when the City Council determined the parties were at impasse, the parties met for five negotiating sessions. These sessions occurred on October 19, November 1, November 16, and November 22, 2011. The City offered to meet on December 7, 8, or 9 or any day the following week. PSNSEA stated its preference for December 16. The City transmitted its last, best and final offer by e-mail on December 8, triggering PSNSEA's filing of the unfair practice charge. The parties met on December 16, at which time PSNSEA presented its second comprehensive proposal.

PSNSEA contends the City rejected "repeated requests . . . to schedule timely negotiations meetings and continue negotiations in light of the significant change in circumstances resulting from PSNSEA's December 16th comprehensive proposal." The record does not substantiate this claim. It contains no evidence that multiple requests for meetings were rejected. On one occasion, at the November 16 meeting, Kreisberg postponed setting

[9] PSNSEA asserts that an analysis of its second counterproposal demonstrates that it made "significant" compromises on "every single item" included in the City's last, best, and final offer. While the proposal does show movement on many items, the movement on the issue of the wage concession cannot be considered so significant as to suggest a prospect of reciprocal movement on the part of the City.

new dates citing a potential conflict with the arbitration hearing. While it is true that the delay in scheduling multiple future meeting dates at the end of November might have been suspicious in comparison to typical successor contract negotiations given the small number of sessions to that date, nothing else in the chronology carries this theory forward. The City's failure to offer more dates prior to December 21 is more logically the result of PSNSEA's rejection of the City's last, best and final offer at the December 16 meeting, than the feigned inconvenience of scheduling during the holiday period or a lack of desire to engage the union. Kreisberg was not anticipating further authority from his principals. Based on the manner in which it argues this point in its post-hearing brief, PSNSEA is really asserting the impropriety of the City's decision to present its last, best and final offer and proceed to an impasse hearing when its concessions were significant enough to preclude impasse. This question is analyzed in the next section.

D. Imposing an Artificial Deadline on Negotiations

PSNSEA contends that the City was motivated, not by a sincere desire to resolve differences at the bargaining table, but by the desire to conclude negotiations, impose the desired economic concessions, and prematurely declare impasse prior to January 1, 2012, when Assembly Bill No. 646 would have taken effect mandating factfinding upon request of the union and eventual production of a public document revealing the state of the parties' negotiations.

In response, the City relies on PERB Regulation 32793(c), setting forth factors PERB employs in determining the existence of impasse: (1) the number and length of negotiating sessions between the parties, (2) the time period over which negotiations have occurred, (3) the extent to which the parties have made and discussed counterproposals to each other, (4) the extent to which the parties have reached tentative agreement on issues during negotiations,

(5) the extent to which unresolved issues remain, and (6) other relevant data. The City asserts that evidence of the parties "meaningful" attempts to reach agreement is ultimately the most important factor. And it relies on *California State University* (1990) PERB Decision No. 799-H, which noted that the possibility of further concessions on minor issues may be inconsequential if the parties are deadlocked on one or several major issues.

As noted above, the bargaining history, especially a comparison of the parties' proposals, establishes that the parties became deadlocked on the major issue of the effective wage rate for employees. Notwithstanding the relatively few bargaining sessions, there was a principled difference between the parties over the importance and/or necessity of internal wage parity. PSNSEA would have understood from the failed mid-term negotiations in the previous year and the context of the current negotiations that this was the City's most important issue. The lack of potential further movement towards a resolution is reflected in the union's second proposal. This comprehensive proposal lists several tentative agreements, the withdrawal of several of its previous proposals, and a conciliatory position on a number of minor subjects. It confirms that the non-salary issues remaining on the table were of relatively small magnitude in comparison to the wage concession issue. Despite the absence of evidence of the precise number of hours of negotiations, these factors can explain why only five negotiating sessions over three months may have been sufficient for the parties to reach impasse. The parties moved closer to each other or resolved all of the remaining issues except salary, as to which they remained far apart. The evidence supports the City's view that there was little prospect of further movement on the wages issue that was needed to lead toward a resolution of the negotiations.

It is common for parties not to complete negotiations prior to the expiration of the preceding agreement. It is also common for an employer seeking concessions to set a goal for

the completion of negotiations in order to maintain the pace of negotiations where the union is unlikely to be motivated to complete bargaining given the lack of prospects for improvements to its contract. Though the coincidence of the AB 646 requirement does raise some additional suspicion about the City's goal to conclude negotiations before the end of the year, based on all the relevant circumstances, fear of proceeding to factfinding does not appear to constitute a significant incentive for the City to avoid good faith negotiations over the terms in dispute. The timing and existence of a legitimate basis for the City to believe the parties had reached impasse defeats the claim of bad faith.

The complaint's allegation that the City refused to entertain concessions from the union unless they contained salary reductions is simply a restatement of PSNSEA's argument of premature declaration of impasse and needs no further analysis.

E. Disparaging Statements

Nothing in the stipulated record refers to the alleged disparaging statements. These statements, which suggested that management employees bore animus toward PSNSEA because of the union's refusal to make concessions in 2010, were included in declarations filed by PSNSEA. Without any promise or agreement as to their use in the determination of the issues, the parties were permitted to submit written declarations in support of their cases despite also agreeing to have the case decided on a stipulated record. An initial set of declarations were filed by each side, followed by rebuttal declarations on both sides. PSNSEA's declarations will not be considered given the absence of live testimony and their disputed nature. Both parties' declarations contain hearsay uncorroborated by other competent evidence, were specifically prepared for litigation, untested by cross examination, not subject to rebuttal testimony, and presented by witnesses not observed for credibility.

F. Totality of the Circumstances

The City came to the successor negotiations with a firmly held goal of achieving economic concessions it believed were necessary to achieve internal wage parity. These concessions were undoubtedly harsh—perhaps even unprecedented for employees in PSNSEA's unit—and the union may have been entitled to view the amount demanded as excessive. However, rather than being motivated by whim or caprice, the City's bargaining objectives did contribute to repairing its weakened financial condition and its wage proposal was measured by an external standard (i.e., the amount of concessions obtained from the other units during the previous year and projected for the following years). The City's conduct in the negotiations and its adamant stand on principle was consistent with lawful hard bargaining. PSNSEA has failed to carry its burden of proving the indicia of bad faith necessary to demonstrate a violation under the totality-of-the-circumstances test.

Discrimination

PSNSEA contends that the City discriminated against its bargaining unit under the theory of *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*City of Campbell*). *City of Campbell* adopted the theory from *NLRB v. Great Dane Trailers, Inc.* (1967) 388 U.S. 26 (*Great Dane Trailers*). In *Great Dane Trailers*, the employer was found to have committed an unfair labor practice of discrimination under section 8(a)(3)[10] when it granted vacation benefits to non-union employees who did not strike, but withheld them from union employees who did strike without any explanation for its disparate treatment of the two groups. In *City of Campbell* the employer fixed the date of retroactive compensation enhancements to a date less favorable for the plaintiff than to that provided to other employees.

[10] 29 U.S.C. sec. 158(a)(3).

In this case, the complaint alleges protected activity, followed by the imposition of the economic concessions, and describes the violation as interference. In *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S (*State of California*), PERB revisited the tests applied in discrimination and interference cases. PERB noted the similarity between the tests for discrimination and interference in case law of both PERB and the National Labor Relations Board. PERB's decision followed the guidance of *Great Dane Trailers* and *City of Campbell*. PERB explained that for cases of group discrimination the prima facie test would be the *Great Dane Trailers-Campbell* test, rather than the test of *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), which applies to discrimination or retaliation for discriminatory acts (adverse actions) imposed on employees. (*State of California, supra,* PERB Decision No. 2106a-S, pp. 5-13.) The test for group discrimination looks first to see whether there has been disparate treatment along lines that would discourage union participation. (*Id.* at p. 14; *City of Campbell*, *supra*, 131 Cal.App.3d 416.) If the employer's action is inherently destructive of employee rights, discriminatory intent is presumed; otherwise, the union must establish such intent and the employer may present a business justification in order to demonstrate that to be the real motivation for its action. (*State of California, supra,* PERB Decision No. 2106a-S, p. 7; *Great Dane Trailers, supra,* 388 U.S. 26, 34.)

In addition to *Great Dane Trailers* and *City of Campbell*, PSNEA relies on *Los Angeles County Employees Assn. v. County of Los Angeles* (1985) 168 Cal.App.3d 683. In that case several of the employer's unions had entered into coalition bargaining over fringe benefits while bargaining separately over wages. The county granted a health insurance contribution to only those unions that had completed bargaining on wages while withholding it for all others.

The court found significant the fact that the county deviated from its prior practice of implementing fringe benefit enhancements to all of the units at the same time.

The City argues that this line of cases is distinguishable because its action here was in fact an attempt to achieve uniform treatment of all its unions, not to disadvantage the PSNSEA unit. The City's analysis focuses only on the take-home pay but ignores the savings from layoffs which PSNSEA claims offset the cost of the wage increase.

The *City of Campbell* theory is inapplicable to this case, but not because the City treated the PSNSEA unit similarly to the other units. If the labor costs savings from the layoffs are added to the salary concessions the treatment may in fact have been unequal. Without a complete record and exploration of all of the costs saved unit-by-unit, a definitive analysis cannot be undertaken. Rather, the flaw in the union's case is that the wage reduction and furloughs were imposed after the completion of good faith negotiations. PSNSEA seeks to apply a *Novato*-type analysis to make the case that the City retaliated against its unit based on the exercise of protected activities, namely, the successful resistance of mid-term concessions. (See *State of California*, *supra*, PERB Decision No. 2106a-S.) The analysis is inapplicable to this type of case for two reasons. First, although bargaining is clearly an act which is protected by the statute, such an outcome would mean that an employer's failure to achieve its goals in bargaining one year would prevent it from seeking to achieve those goals in subsequent negotiations for fear of a retaliation charge based on the union's "success" in the previous negotiations. Second, unlike retaliation cases, which have an adverse action element, the employer's presentation of a proposal for economic concessions in bargaining is only that: a proposal. It may unilaterally implement only because it has fulfilled its duty to meet and confer in good faith. Fulfillment of that duty distinguishes this case from the cases relied upon by PSNSEA.

Since the *Novato*-type analysis of retaliatory nexus is inappropriate in the context of bargaining, each negotiation must be considered on its own merits in terms of the duty to meet and confer in good faith. As the City correctly points out, the labor boards do not sit in judgment of the substance of bargaining proposals unless they are directly probative of intent to engage in bad faith bargaining. (See *Placentia Fire Fighters v. City of Placentia, supra,* 57 Cal.App.3d 9, 23, quoting *NLRB v. Herman Sausage Co., supra,* 275 F.2d 229, 231-232.) Pertinent to this case, PERB has held that an employer's attempt to achieve wage parity among its units is a legitimate bargaining objective. (*Banning Unified School District* (1985) PERB Decision No. 536, p. 6.)

Therefore, PSNSEA has also failed to demonstrate that the City unlawfully discriminated against Unit 10 by proposing to reduce take-home pay rates and implementing those concessions following the impasse in 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-904-M, *Santa Clara Public Safety Non-Sworn Employees Association v. City of Santa Clara*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the 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
FAX: (916) 327-7960

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 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, subd. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

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