

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



COUNTY OF TRINITY,

Charging Party,

v.

UNITED PUBLIC EMPLOYEES OF
CALIFORNIA, LOCAL 792,

Respondent.

Case No. SA-CO-125-M

PERB Decision No. 2480-M

April 25, 2016

Appearance: Prentice, Long & Epperson LLP by Jason S. Epperson, Attorney, for County of Trinity.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the County of Trinity (County) of a dismissal (attached) of its unfair practice charge by the Office of the General Counsel. The charge, as amended, alleges that the United Public Employees of California, Local 792 (UPEC), which represents the Trinity County General Unit (GU), violated the Meyers-Milias-Brown Act (MMBA),¹ by engaging in an unlawful strike. The Office of the General Counsel dismissed the charge for failure to state a prima facie case. The County timely filed an appeal. UPEC filed no opposition.

The Board itself has reviewed this matter in full, including the charge and amended charge, the warning and dismissal letters, and the appeal. The warning and dismissal letters

¹ The MMBA is codified at Government Code section 3500 et seq. All further undesignated statutory references are to the Government Code.

describe the charge allegations accurately and analyze the factual allegations of the charge in a well-reasoned manner consistent with applicable law. Accordingly, we affirm the dismissal of the unfair practice charge and adopt the warning and dismissal letters as the decision of the Board itself.

SUMMARY OF FACTUAL ALLEGATIONS

The factual allegations are undisputed, and are briefly summarized here for discussion purposes. The parties' 2014 successor agreement² negotiations ended in impasse. In December 2014, GU employees engaged in a strike, the lawfulness of which is not contested by the County. On January 14, 2015, a UPEC representative, Steve Allen (Allen), sent an e-mail message to the County's negotiator requesting confirmation of the County's interest in participating in a meeting with the GU and Skilled Trades Unit (STU) negotiations teams. Between January 14 and February 10, 2015, the parties exchanged approximately three to four e-mail messages in an effort to set a date for the two meetings, and settled on February 26, 2015, for both meetings. The STU meeting went forward and led to a tentative agreement on terms and conditions of employment between the County and the STU.

The GU meeting did not, however, go forward on February 26, 2015, as initially agreed to by the parties. Instead, on February 21, 2015, Allen informed the County's negotiator that the meeting would have to be rescheduled for a later date and "for now the GU is still at impasse for the 2014 negotiations." The GU gave the County official strike notice on February 27, 2015. In response to the strike notice, the County's negotiator informed UPEC that it considered the parties to be in the midst of negotiations and that any such strike would be an unfair practice under PERB decisional law. The strike began on March 2, 2015 and was

² The GU memorandum of agreement expired on January 31, 2014.

authorized to last through March 7, 2015. On March 10, 2015, the County filed the instant unfair practice charge alleging that the strike constituted an unfair practice.

DISCUSSION

The County does not dispute that the parties reached a bona fide impasse in their 2014 successor agreement negotiations, thus suspending the duty to bargain. The central issue is whether the bargaining impasse was subsequently broken by UPEC's initial contact to set up a meeting and the ensuing exchanges between the parties. If impasse was subsequently broken, the bargaining obligation revives. (*Los Angeles Unified School District* (2013) PERB Decision No. 2326 (*Los Angeles*), p. 13, fn. 13, citing *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 899 (*Modesto City*).) A strike that occurs prior to completion of statutory impasse procedures creates a rebuttable presumption that the union has breached its duty to bargain in good faith. (*Regents of the University of California* (2010) PERB Decision No. 2094-H (*Regents*), citing *Sacramento City Unified School District* (1987) PERB Order No. IR-49 and *Westminster School District* (1982) PERB Decision No. 277.)³

If impasse was not subsequently broken, the parties remain at impasse and their bargaining obligations continue in a state of temporary suspension. (*Charles D. Bonanno Linen Service, Inc.* (1979) 243 NLRB 1093, 1093-1094 [impasse creates a temporary hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force"].) Unlike a pre-impasse strike, with exceptions not applicable here, a post-impasse strike does not implicate an unfair practice. (*Fremont Unified School District* (1990) PERB Order No. IR-54; *San Ramon Valley Unified School District* (1984) PERB

³ The presumption of illegality is rebuttable by proof that the strike was provoked by the employer's unfair practices and that the employee organization in fact negotiated and/or participated in impasse procedures in good faith. Absent such proof, the presumption stands, and a violation is established. (*Regents, supra*, PERB Decision No. 2094-H.)

Order No. IR-46; *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 22.)

A bona fide impasse in bargaining occurs where “the parties have considered each other’s proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile.” (*Mt. San Antonio Community College District* (1981) PERB Order Ad-124, p. 5.) If impasse procedures are exhausted without breaking the deadlock, parties may decline requests to bargain and the employer may “take unilateral action to implement the last offer the union has rejected.” (*Modesto City, supra*, 136 Cal.App.3d 881, 900, citing *NLRB v. Katz* (1962) 369 U.S. 736, 745.) The terms and conditions so implemented must be “reasonably comprehended within the preimpasse proposals.” (*Modesto City, supra*, at p. 900.)

Impasse suspends the parties’ obligation to bargain only until “changed circumstances” demonstrate that an agreement may be possible. Offers by either party to make concessions sufficient to break the impasse revive the duty to bargain. (*Los Angeles, supra*, PERB Decision No. 2326, p. 13, fn. 13, citing *Modesto City, supra*, 136 Cal.App.3d 881, 899.)

Under PERB decisional law, the making of “concessions” is key to finding a change in circumstances sufficient to revive the duty to bargain. The Board in *Regents of the University of California* (1996) PERB Decision No. 1157-H described changed circumstances as involving “a significant concession by either party.” The Board in *Rowland Unified School District* (1994) PERB Decision No. 1053 stated that the employer’s duty to bargain arose only where the union’s proposals contained “a concession from its earlier position which demonstrates that circumstances have changed and agreement may be possible.” As further commented on in *Zerger, California Public Sector Labor Relations*, § 10.07[4], p. 10-55, citing *State of California (Department of*

Personnel Administration) (2010) PERB Decision No. 2102-S: “Speculation about possible concessions is insufficient to revive bargaining. There must be substantial evidence that a party is committed to a new bargaining position.”

We reiterate what the Office of the General Counsel heretofore explained that a handful of non-substantive e-mail exchanges exploring the parties’ interest in and availability for a meeting does not rise to the level of changed circumstances sufficient to revive the bargaining obligation. (See also *Transp. Co. of Texas* (1969) 175 NLRB 763, 767 [requests for meetings do not in themselves constitute concessions or demonstrate a prospect of compromise].) There is no evidence that either party made a substantial concession from an earlier position and was genuinely committed to a new bargaining position. As a matter of settled law, the parties were still at impasse at the time of the second strike in March 2015. For this reason, the County’s unfair practice charge fails.

On appeal, the County makes four arguments in an effort to persuade the Board to reverse the dismissal.⁴ None has merit. First, the County argues that UPEC’s “negotiated agreement” to meet with the County constitutes changed circumstances such that striking was prohibited. As explained above, a handful of e-mail messages initiated by UPEC to set up a meeting does not constitute changed circumstances sufficient to revive the bargaining

⁴ The County finds fault in the transfer of this case from PERB’s Sacramento Regional Office to its San Francisco Regional Office in Oakland. Cases are transferred from one regional office to another as a routine matter of administrative convenience based on workload and staffing considerations. The County also finds fault with the longer time it took PERB to issue the dismissal of the County’s charge against UPEC as compared to the time it took PERB to issue a complaint in a related charge filed by UPEC against the County. This variance is a function of numerous possible factors including the significantly different processes involved in issuance of a complaint and issuance of a dismissal, workload considerations, and the ever constant prioritization and reprioritization of competing demands on PERB’s resources. The County would be wrong to extrapolate from the transfer of the case or the timing of the dismissal any disfavor on PERB’s part toward the County or its position in this matter.

obligation. Neither party's bargaining position had changed. Without a concession embedded in a new bargaining position, the parties were still at impasse notwithstanding their effort to set up an initial meeting. The County claims that the dismissal gives parties who are engaged in negotiations carte blanche to break commitments to meet without consequence. Dilatory conduct in the scheduling and attending of negotiation sessions may be evidence of a party's subjective bad faith under the totality of circumstances standard applicable in surface bargaining cases. (*Oakland Unified School District* (1983) PERB Decision No. 326.) Here, the parties had not resumed negotiations since reaching impasse in 2014, and therefore no such standard applies to the parties' conduct.

Second, in response to the warning letter, the County amended its charge to allege that UPEC had "communicated a willingness to consider concessions which were not on the table in the earlier negotiations."⁵ The County points to this language in urging reversal of the dismissal, but there are two problems with the County's argument. A willingness to consider concessions is not a concession. Moreover, the County offers no facts to support this conclusory allegation. The County even concedes that "these new facts are not fully detailed."

⁵ In a letter to Allen dated February 20, 2015, the County negotiator raised an issue regarding "LIUNA." Although this discussion is contained in a paragraph relating to the STU, it is not clear that the "LIUNA" issue does not also relate to the GU. Allen's e-mail response dated February 21, 2015, does not clarify that point, but does shed some light on the nature of the County's concern. LIUNA appears to refer to an industrial pension trust fund. It also appears that the trust fund had expressed a concern with language regarding LIUNA included in a prior memorandum of understanding, which concern the County interpreted as affecting the employees' ability to make contributions and therefore its ability to offer compensation increases. Allen explained that the trust fund had no problem with the parties' retirement plan so long as employee contributions were made via a pre-tax salary deduction, and that he could supply corrective language to address the trust fund's concern, which the trust fund had found acceptable elsewhere.

The LIUNA issue is the only substantive matter raised in the course of the parties' e-mail exchanges. Neither the County's letter nor Allen's response constitutes a concession or commitment to a new bargaining position for purposes of this discussion.

It is the charging party's burden to include all material facts necessary to establish a prima facie case. (*Los Angeles Unified School District* (1984) PERB Decision No. 473.) While factual charge allegations are deemed to be true at the charge processing and investigation stage of PERB proceedings, factually unsupported conclusory allegations enjoy no such advantage. (*Charter Oak Unified School District* (1991) PERB Decision No. 873, p. 13.) PERB's investigation of an unfair practice charge is for the purpose of making a determination whether the facts as alleged in the charge state a prima facie case and that the charging party is capable of providing admissible evidence at a formal hearing in support of the allegations. (*Kings In-Home Support Services Public Authority* (2009) PERB Decision No. 2009-M.) Here, the initial charge fails to state a prima facie case. And the above-quoted allegation added by the County as an amendment to the charge in response to the warning letter does not aid its cause. The allegation about UPEC's willingness to consider concessions is a factually unsupported legal conclusion, which PERB cannot accept as true.

Third, the County argues that factual disputes should not be resolved at the charge processing and investigation stage of PERB proceedings, but at a formal hearing after issuance of a complaint. UPEC did not file a position statement in response to the charge or the first amended charge, nor did it file an opposition to the appeal. UPEC has not participated in these proceedings. The Office of the General Counsel made no factual determinations in favor of UPEC. It accepted all of the County's *factual* allegations as true. For charge processing and investigation purposes, there are no disputed factual issues, let alone a prima facie case, meriting issuance of a complaint for disposition by an administrative law judge at a formal evidentiary hearing.

Last, the County urges that the Board find UPEC’s tactics unlawful under a totality of circumstances standard. As explained above, the parties were at impasse, and not engaged in negotiations, at the time of the second strike. The totality of circumstances standard, which applies in surface bargaining cases, does not apply here.

We affirm the dismissal because our precedent commands such an outcome based on sound public policy and settled principles of law. We note, however, that the MMBA was enacted “to promote full communication between public employers and their employees” and “to promote the improvement of ... employer-employee relations.” (MMBA, § 3500, subd. (a).) While UPEC’s conduct does not rise to the level of an unfair practice, it also does not serve to promote full communication or to improve employer-employee relations, the twin goals envisioned by the MMBA. It has the potential to undermine trust and damage the bargaining relationship.

At the same time, the County was not without options. Because the parties were at impasse, the County had the option to refuse UPEC’s request to meet, respond to the request with a concession substantial enough to revive the bargaining obligation or unilaterally impose its last, best and final offer. By insisting that the duty to bargain was revived by UPEC’s invitation to meet, the County foreclosed its options.

We affirm the dismissal of the charge.

ORDER

The unfair practice charge in Case No. SA-CO-125-M is hereby **DISMISSED**
WITHOUT LEAVE TO AMEND.

Members Winslow and Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-0111
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December 29, 2015

David A. Prentice, Attorney
Prentice, Long & Epperson
5424 N. Palm Avenue, Suite 108
Fresno, CA 93704

Re: *County of Trinity v. United Public Employees of California, Local 792*
Unfair Practice Charge No. SA-CO-125-M
DISMISSAL LETTER

Dear Mr. Prentice:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 10, 2015. The County of Trinity (County or Charging Party) alleges that the Trinity County General Unit (GU) which is represented by the United Public Employees of California, Local 792 (UPEC or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)¹ by engaging in a strike that commenced on March 2, 2015.

Charging Party was informed in the attached Warning Letter dated November 12, 2015, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it on or before November 25, 2015, the charge would be dismissed.

On November 24, 2015, Charging Party filed a timely first amended charge. The first amended charge includes additional arguments but little to no additional facts. The first amended charge still fails to state a prima facie case that the GU's strike violated the MMBA.

Facts as Alleged

The County and the GU agreed to a Memorandum of Understanding (MOU) that was effective from February 1, 2013 to January 31, 2014. Article IX, section 3 of this MOU provides the following "No Strike Clause":

[UPEC] agrees that under no circumstances will [UPEC]
recommend, encourage, cause or permit its members to initiate,

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

participate in, nor will any member of the bargaining unit take part in, any strike, sit-down, stay-in, sick-out, slow-down, nor to picket in such a manner as to block the entrances to County buildings, nor to picket with signs dealing with matters agreed to in the current [MOU] in any office or department of the Employer, nor to curtail any operation of the County during the period in which the Parties are meeting and conferring on a successive [MOU], until such time as impasse has been declared and mediation attempts have failed In the event of any work stoppage, during the term of this Agreement or prior to the declaration of impasse and the failure of mediation attempts, by any member of the bargaining unit, the Employer shall not be required to negotiate on the merits of any dispute which may have given rise to such work stoppage until the work stoppage has ceased.

The County and UPEC negotiated for a new MOU during 2014. On an unspecified date in 2014, the negotiations ended in impasse. In December 2014, GU bargaining members engaged in a strike.²

On January 14, 2015, UPEC representative Steve Allen (Allen) sent an electronic mail (e-mail) message to the County's negotiator, David Ritchie, with the subject "Restarting Negotiations." UPEC asked if the County was willing to agree to a meeting with the GU and the Skilled Trades Unit.

On February 5, 2015, David Prentice (Prentice), the County's new negotiator responded to the e-mail and asked Allen to call him.

The parties initially agreed to meet on February 27, 2015. However, through an e-mail message exchange, the parties agreed that the County would meet with the GU at 1:00 p.m. on February 26, 2015, and with the Skilled Trades Unit at 3:00 p.m. on the same day.

On February 10, 2015, Allen sent an e-mail message to the County asking for confirmation that bargaining unit members would be granted release time for the meetings.

On February 20, 2015, Prentice sent an e-mail message to Allen with an attached letter. The letter included an assertion that UPEC was requesting excessive release time. The letter also stated that Prentice "would like to concentrate on establishing mutually acceptable ground rules, as well as receive some proposal ideas from the units."

² The unfair practice charge does not allege that the December 2014 strike constituted a violation of the MMBA.

On February 21, 2015, Allen responded in an e-mail message which confirmed the Skilled Trades Unit's upcoming meeting with the County.³ However, the e-mail message stated the following about the GU:

The GU membership is not ready to agree that the 2014 negotiations cycle is complete. We are discussing our options including whether we are continuing the impasse in 2014, starting over for 2015 or some combination of the two . . . We will sort this out relatively soon but for now the GU is still at impasse for the 2014 negotiations. In the meantime I am compelled to ask that we reschedule the meeting on the 26th to occur at a later date.

On February 27, 2015, UPEC sent an e-mail message notifying the County that the GU would strike between March 2, 2007 and March 7, 2015.

On February 27, 2015, Prentice replied to the strike notice, stating that the County considered the strike an unfair practice, because the County was in negotiations with the GU. The e-mail message stated that the GU must negotiate with the County until impasse procedures are complete.

Discussion

As noted in the Warning Letter, the MMBA does not prohibit the right to strike. (*County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564, 576; *City of San Jose* (2013) PERB Decision No. 2341-M.) However, a strike that occurs before the completion of statutory impasse procedures creates a "rebuttable presumption" that the union has breached its duty to bargain in good faith. (*Regents of the University of California* (2010) PERB Decision No. 2094-H [citing *Sacramento City Unified School District* (1987) PERB Order No. IR-49 and *Westminster School District* (1982) PERB Decision No. 277].) Impasse suspends the parties' obligation to bargain until changed circumstances indicate that an agreement may be possible. (*Rowland Unified School District* (1994) PERB Decision No. 1053.)

Here, the parties reached impasse in 2014. In January and February 2015, the parties engaged in e-mail conversations and phone discussions where they scheduled a time to meet and discussed release time issues. However, as the Warning Letter noted, merely discussing a renewal of negotiations does not revive the parties' duty to bargain after impasse. (See *Orange Unified School District* (2000) PERB Decision No. 1416 ["the duty to bargain is revived when one party proposes a concession from its earlier bargaining position which indicates that agreement may be possible"].) The Warning Letter pointed out that the County had not alleged that either party submitted a proposal, let alone submitted a proposal that contained a

³ The Skilled Trades Unit's members later approved a tentative agreement with the County.

significant concession. The Warning Letter concluded that the County had not alleged sufficient facts to show there was a change in circumstance that revived the parties' duty to bargain. Thus, the County had failed to state a prima facie case that the GU engaged in an illegal pre-impasse strike.

The first amended charge asserts that: (1) the GU's "request for new negotiations conveyed a clear change in circumstances" and (2) "no change of circumstances are necessary if negotiations are started anew." Charging Party cites *Pub. Employment Relations Bd. v. Modesto City Sch. Dist.* (1982) 136 Cal.App.3d 881 (*Modesto*)⁴ in support of its argument. As Charging Party notes, in *Modesto*, the court of appeal stated "impasse is a fragile state of affairs and may be broken by a change in circumstances[.]" (*Id.* at p. 899.) However, the court of appeal in *Modesto* did not hold that discussing a renewal of negotiations amounts to a change in circumstance. (*Ibid.*)

As the Warning Letter stated, PERB has found that concessions by a party may be sufficient to break impasse. (*Regents of the University of California* (1996) PERB Decision No. 1157-H ["Th[e] duty (to negotiate) remains dormant unless revived by some changed circumstance, such as a significant concession by either party"]; *Rowland Unified School District, supra*, PERB Decision No. 1053 ["[t]he (employer's) duty to resume negotiations following good faith completion of impasse arises only if the (union's) proposals contained a concession from its earlier position which demonstrates that circumstances have changed and agreement may be possible"]; *Modesto City Schools* (1983) PERB Decision No. 291 ["Among the circumstances which will restore the obligation to negotiation is a concession or series of concessions by one of the parties"].) Charging Party has offered no authority to show that discussing a renewal of negotiations—without actually meeting or exchanging proposals or concessions—constitutes a changed circumstance. Nor has Charging Party offered authority to support its argument that "no change of circumstances are necessary if negotiations are started anew." Accordingly, Charging Party has failed to state a prima facie case that the GU engaged in an illegal pre-impasse strike.

The Warning Letter also stated that a post-impasse strike may constitute an unfair practice if it is intermittent or taken without any notice. (*Fremont Unified School District* (1990) PERB Order No. IR-54; *San Ramon Valley Unified School District* (1984) PERB Order No. IR-46.) The Warning Letter noted that Charging Party acknowledged that UPEC provided notice of the strike, and that Charging Party did not allege that the strike was intermittent. The first amended charge contains no additional facts that would indicate that the GU's strike was an illegal post-impasse strike.

⁴ The first amended charge cites *Modesto City Schools* (1983) PERB Decision No. 291 not *Pub. Employment Relations Bd. v. Modesto City Sch. Dist.* (1982) 136 Cal.App.3d 881. However, this appears to be a mistake because the language cited is from the latter decision not the former.

The No Strike Clause

The Warning Letter noted that a waiver of rights may be established only by clear and unmistakable evidence. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74; *Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693, 708.) The Warning Letter also noted that a waiver of the right to strike does not survive the expiration of an MOU. (*Litton Financial Printing Division v. NLRB* (1991) 501 U.S. 190; *Los Angeles County Association of Environmental Health Specialists v. County of Los Angeles* (2002) 102 Cal.App.4th 1112.)

The Warning Letter also noted that the “No Strike Clause” of the expired MOU states that UPEC will not strike “until such time as impasse has been declared and mediation attempts have failed[.]” The Warning Letter concluded that even if this “No Strike Clause” contains a clear and unmistakable waiver, Charging Party had not sufficiently alleged that the GU’s strike occurred before impasse was declared and mediation attempts failed. Charging Party has not submitted additional facts regarding this issue. Accordingly, Charging Party has failed to show that the “No Strike Clause” of the expired MOU prohibited the GU from striking on March 2, 2015.

For these reasons, Charging Party has not stated a prima facie case that the GU’s strike violated the MMBA.

Right to Appeal

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

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

The Board’s address is:

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

FAX: (916) 327-7960

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

Service

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

Extension of Time

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

Final Date

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

Sincerely,

J. FELIX DE LA TORRE
General Counsel

By _____
Jessica Kim
Regional Attorney

Attachment: Warning Letter

cc: Christopher D. Darker, Business Manager/Secretary-Treasurer

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
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November 12, 2015

David A. Prentice, Attorney
Prentice, Long & Epperson
5424 N. Palm Avenue, Suite 108
Fresno, CA 93704

Re: *County of Trinity v. United Public Employees of California, Local 792*
Unfair Practice Charge No. SA-CO-125-M
WARNING LETTER

Dear Mr. Prentice:

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Facts Alleged

The County and the GU agreed to a Memorandum of Understanding (MOU) that was effective from February 1, 2013 to January 31, 2014. Article IX, section 3 of this MOU provides the following "No Strike Clause":

[UPEC] agrees that under no circumstances will [UPEC] recommend, encourage, cause or permit its members to initiate, participate in, nor will any member of the bargaining unit take part in, any strike, sit-down, stay-in, sick-out, slow-down, nor to picket in such a manner as to block the entrances to County buildings, nor to picket with signs dealing with matters agreed to in the current [MOU] in any office or department of the Employer, nor to curtail any operation of the County during the period in which the Parties are meeting and conferring on a successive [MOU], until such time as impasse has been declared and mediation attempts have failed In the event of any work stoppage, during the term of this Agreement or prior to the declaration of impasse and the failure of mediation attempts, by

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any member of the bargaining unit, the Employer shall not be required to negotiate on the merits of any dispute which may have given rise to such work stoppage until the work stoppage has ceased.

The County and UPEC negotiated for a new MOU during 2014. On an unspecified date in 2014, the negotiations ended in impasse. In December 2014, GU bargaining members engaged in a strike.²

On January 14, 2015, UPEC representative Steve Allen (Allen) sent an e-mail message to the County's negotiator, David Ritchie, with the subject "Restarting Negotiations." UPEC asked if the County was willing to agree to a meeting with the GU and the Skilled Trades Unit.

On February 5, 2015, David Prentice (Prentice), the County's new negotiator responded to the e-mail and asked Allen to call him.

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The GU membership is not ready to agree that the 2014 negotiations cycle is complete. We are discussing our options including whether we are continuing the impasse in 2014, starting over for 2015 or some combination of the two. . . . We will sort this out relatively soon but for now the GU is still at impasse for the 2014 negotiations. In the meantime I am compelled to ask that we reschedule the meeting on the 26th to occur at a later date.

² The unfair practice charge does not allege that the December 2014 strike constituted a violation of the MMBA.

³ The Skilled Trades Unit's members later approved a tentative agreement with the County.

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On February 27, 2015, Prentice replied to the strike notice, stating that the County considered the strike an unfair practice, because the County was in negotiations with the GU. The e-mail message stated that the GU must negotiate with the County until impasse procedures are complete.

Discussion

The March 2, 2015 Strike

“[W]hile not absolute, the right to strike falls within the statutorily-protected right of public-sector employees to participate in union activities.” (*Fresno County In-Home Supportive Services Public Authority*, supra, PERB Decision No. 2418-M.) The MMBA does not prohibit the right to strike. (*County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564, 576; *City of San Jose* (2013) PERB Decision No. 2341-M.)

However, under some circumstances, a strike may constitute an unfair practice. PERB has held that a strike that occurs before the completion of statutory impasse procedures creates a “rebuttable presumption” that the union has breached its duty to bargain in good faith. (*Regents of the University of California* (2010) PERB Decision No. 2094-H [citing *Sacramento City Unified School District* (1987) PERB Order No. IR-49 and *Westminster School District* (1982) PERB Decision No. 277].) The presumption may be rebutted if the union shows that the strike was provoked by the employer’s unfair practices. (*Ibid.*)

A bona fide impasse in negotiations is reached after the parties have engaged in good faith bargaining and “nonetheless, reached a point in their negotiations where continued [negotiations] would be futile.” (*City of Selma* (2014) PERB Decision No. 2380-M, citing *Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124.) Impasse suspends the parties’ obligation to bargain until changed circumstances indicate that an agreement may be possible. (*Rowland Unified School District* (1994) PERB Decision No. 1053.) Impasse can be broken when concessions in bargaining positions sufficient to revive the possibility of fruitful discussions create changed circumstances that revive the duty to bargain. (*City of Santa Rosa* (2013) PERB Decision No. 2308-M.)

Here, the County has not alleged sufficient facts to show that GU’s March 2, 2015 strike was an illegal pre-impasse strike. The County acknowledges that the parties reached impasse in 2014. The County has not alleged any facts to show that changed circumstances occurred that revived the duty to bargain. (*City of Santa Rosa*, supra, PERB Decision No. 2308-M.) After impasse, the duty to bargain is only renewed when changed circumstances, such as a concession by one of the parties, breaks the impasse. (*Ibid.*; *Regents of the University of California* (1996) PERB Decision No. 1157-H [“Th[e] duty [to negotiate] remains dormant unless revived by some changed circumstance, such as a significant concession by either party”]; *Rowland Unified School District*, supra, PERB Decision No. 1053 [“[t]he [employer’s] duty to resume negotiations following good faith completion of impasse arises

only if the [union's] proposals contained a concession from its earlier position which demonstrates that circumstances have changed and agreement may be possible"]; *Modesto City Schools, supra*, PERB Decision No. 291 ["Among the circumstances which will restore the obligation to negotiation is a concession or series of concessions by one of the parties"].)

In January and February 2015, the parties engaged in e-mail conversations and phone discussions where they scheduled a time to meet and discussed release time issues. However, merely discussing a renewal of negotiations does not revive the parties' duty to bargain after impasse. (See *Orange Unified School District* (2000) PERB Decision No. 1416 ["the duty to bargain is revived when one party proposes a concession from its earlier bargaining position which indicates that agreement may be possible"].) The County does not allege that either party submitted a proposal, yet alone submitted a proposal that contained a significant concession. The County does not allege any other facts that demonstrate a change in circumstance. Because the County has not alleged sufficient facts to show there was a change in circumstance that revived the parties' duty to bargain, it has not stated a prima facie case that the GU engaged in an illegal pre-impasse strike.

A post-impasse strike may constitute an unfair practice if it is intermittent or taken without any notice. (*Fremont Unified School District* (1990) PERB Order No. IR-54; *San Ramon Valley Unified School District* (1984) PERB Order No. IR-46.) However, the County acknowledges that UPEC provided notice of the March 2, 2015 strike, and the County does not allege the strike was intermittent.

The No Strike Clause

Because a waiver of rights is disfavored, it may be established only by clear and unmistakable evidence. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74; *Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693, 708.) A waiver will not be lightly inferred and any doubt or ambiguity is resolved against the party asserting waiver. (*City of Escondido* (2013) PERB Decision No. 2311-M, p. 13; *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639* (1960) 362 U.S. 274, 282.) Waiver may be established either by agreement or by conduct. (*Amador Valley Joint Union High School District, supra*, PERB Decision No. 74.) A waiver of the right to strike does not survive the expiration of a MOU. (*Litton Financial Printing Division v. NLRB* (1991) 501 U.S. 190; *Los Angeles County Association of Environmental Health Specialists v. County of Los Angeles* (2002) 102 Cal.App.4th 1112.)

The "No Strike Clause" of the expired MOU states that UPEC will not strike, "until such time as impasse has been declared and mediation attempts have failed . . ." Here, the County acknowledges that the parties declared impasse on an unspecified date in 2014. The County does not state whether a mediation occurred after the 2014 declaration of impasse, and if it did occur, whether the mediation failed. In addition, as discussed above, the County has not shown that the parties' duty to bargain was revived after the 2014 declaration of impasse. Thus, even if the "No Strike Clause" contains a clear and unmistakable waiver, the County has not sufficiently alleged that the March 2, 2015 strike occurred before impasse was declared and

mediation attempts failed. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M.)

Conclusion

For these reasons the charge, as presently written, does not state a prima facie case.⁴ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before November 25, 2015,⁵ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Jessica Kim
Regional Attorney

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⁴ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make “a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing.” (*Ibid.*)

⁵ A document is “filed” on the date the document is **actually received** by PERB, including if transmitted via facsimile or electronic mail. (PERB Regulation 32135.)