

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



SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 1021,

Charging Party,

v.

CITY OF SAN RAMON,

Respondent.

Case No. SF-CE-855-M

PERB Decision No. 2571-M

June 20, 2018

Appearances: Weinberg, Roger and Rosenfeld, by Kerianne R. Steele, Attorney, for Service Employees International Union Local 1021; Liebert, Cassidy, Whitmore, by Arlin Kachalia, Attorney, for City of San Ramon.

Before Banks, Winslow, and Krantz Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the attached proposed decision by an administrative law judge (ALJ). The ALJ concluded that Respondent City of San Ramon (City) violated the Meyers-Milias-Brown Act (MMBA)<sup>1</sup> sections 3503, 3505, and 3506 and PERB Regulations<sup>2</sup> 32603, subdivisions (a), (b), (c), and (g) by: (1) declaring impasse without satisfying its obligation to meet and confer in good faith with Charging Party Service Employees International Union Local 1021 (SEIU); (2) unilaterally imposing the City's last, best, and final offer (LBFO) even though the parties were not at a bona fide impasse following good faith

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<sup>1</sup> The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all statutory references herein are to the Government Code.

<sup>2</sup> PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

negotiations; (3) unilaterally imposing new terms and conditions of employment, including a reopener provision allowing the City, but not SEIU, to demand bargaining, for a specified period of time; and (4) failing to resume negotiations in good faith when SEIU made new proposals amounting to changed circumstances. Both the City and SEIU except to the proposed decision.<sup>3</sup>

We have reviewed the entire administrative record and have considered the parties' exceptions and responses in light of applicable law.<sup>4</sup> The record supports the ALJ's factual findings with one exception, which we correct below. The ALJ's conclusions of law are well reasoned and consistent with applicable law with minor exceptions, which we correct. We affirm the proposed decision and adopt it as the decision of the Board itself, subject to the following discussion.

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<sup>3</sup> SEIU requested oral argument pursuant to PERB Regulation 32315. The Board denies requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*City of Modesto* (2008) PERB Decision No. 1994-M, pp. 8-9.) This case satisfies all of the above criteria. We therefore deny SEIU's request for oral argument.

<sup>4</sup> Each party asks us to reject a document filed by the other, but we decline to do so. SEIU contends that the Board should not consider the City's Reply in Support of its Statement of Exceptions. PERB Regulations neither expressly permit nor preclude reply briefs. The Board has long held that it will accept a reply brief if it aids the Board in its decision-making, particularly where a response has raised new issues, discussed new case law, or formulated a new defense. (*City of Milpitas* (2015) PERB Decision No. 2443-M, pp. 13-14.) We find that the City's reply brief satisfies this standard. The City, for its part, objects that SEIU's opposition to the City's exceptions, in addition to responding to each exception, incorporates by reference SEIU's post-hearing brief to the ALJ. The Board has held that merely incorporating an earlier brief by reference is not sufficiently specific to explain a party's exceptions. (*San Diego Community College District* (1983) PERB Decision No. 368, p. 13.) A party responding to exceptions should also be specific in its arguments and cannot assume the Board will parse a previous brief that it chooses to incorporate by reference. SEIU, however, provided specific responses to the City's exceptions and did not violate any PERB Regulation.

## BACKGROUND

There is no need to repeat here the ALJ's procedural history and extensive factual findings. We summarize the background for context only.

SEIU and the City were parties to a four-year memorandum of understanding (MOU) covering approximately 50 maintenance employees. The MOU initially ran through December 31, 2010, but in June 2010 the parties extended the MOU through June 30, 2011. In their extension agreement, the parties froze merit-based pay raises until the new expiration date.

In 2011, the parties commenced negotiations for a new MOU. Prior to starting negotiations, the City announced that it was considering new cost-saving employment terms for represented and unrepresented employees alike.<sup>5</sup> On April 29, 2011,<sup>6</sup> the City made a comprehensive proposal incorporating these cost savings measures.<sup>7</sup> SEIU responded on May 10, and two weeks later SEIU requested that the City provide a counteroffer. The City, however, insisted that SEIU first respond more fully to all City proposals.

On June 6, SEIU made a proposal regarding non-economic issues. The City stated that unless SEIU was willing to sign a side letter extending the merit pay freeze past June 30, the City would present an LBFO at the next session.

On June 15, SEIU presented a comprehensive proposal and conceded to the City's demand to extend the merit pay freeze. However, the parties never agreed on additional details

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<sup>5</sup> These terms included: (1) continuation of the merit pay freeze through June 30, 2012; (2) up to 12 furlough days (estimated at 4.5 percent of salary); (3) an increase of one percent in employee retirement contributions (up from one percent); (4) a two-tier retirement plan with a lower formula for new hires; and (5) a retirement incentive program.

<sup>6</sup> Unless otherwise noted, all dates hereafter refer to 2011.

<sup>7</sup> The parties met three times prior to April 29, and the parties disagree to what extent those meetings were bargaining sessions. As discussed below, we find that dispute to be immaterial to the outcome, and we therefore decline to resolve it.

that the City had included in its draft side letter extending the merit pay freeze, and the City proceeded to present its LBFO. The LBFO contained all but one of the significant new cost-saving employment terms that the City had sought throughout negotiations; the City dropped its demand to create a new, less costly retirement tier.

SEIU countered by e-mail on June 16. Two days later, the City Council (Council) rejected SEIU's counteroffer and established June 28 as a deadline for either reaching a tentative agreement or taking "final action" to resolve the impasse. The City notified SEIU that it must accept the LBFO, or otherwise the parties would be at impasse and the City would take final action. SEIU responded that bargaining should continue, and SEIU asked the City for its fiscal targets. The City determined that SEIU's effort to meet the City's fiscal needs was too late and/or moot, given that the Council had decided to maintain its LBFO.

On June 28, the Council announced that the parties were at impasse and voted to implement the City's LBFO effective July 1.<sup>8</sup> The Council also adopted the same economic terms for its unrepresented employees. Two days later, SEIU wrote to the City indicating that SEIU was prepared to present substantial movement on four critical issues separating the parties. The City responded that "negotiations are complete" but that the City would nonetheless meet with SEIU "in the interests of good labor relations." The City then implemented its LBFO effective July 1.

The parties met on July 8, and SEIU presented its new concessions. After some discussion, the City's negotiator stated that SEIU could agree to the City's LBFO so the parties could declare victory, or he would "pick up his marbles and go home." Despite this ultimatum,

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<sup>8</sup> The City's employee relations ordinance did not require the parties to engage in post-impasse procedures, nor did the parties agree to do so in this case. Moreover, all pertinent events in this case occurred before the California Legislature added to the MMBA the post-impasse procedures that are now codified at section 3505.4 et seq.

the parties met several more times during July, August, and September. On September 13, the City presented SEIU's latest proposal to the Council, but the Council rejected it.

### DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, to the extent that a proposed decision adequately addresses issues raised by certain exceptions, the Board need not further analyze those exceptions. (*City of Calexico* (2017) PERB Decision No. 2541-M, pp. 1-2.) The Board also need not address alleged errors that would not impact the outcome. (*Los Angeles Unified School District* (2015) PERB Decision No. 2432, p. 2; *Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4.)

Several of the City's exceptions challenge findings that, at their crux, are based on the ALJ's credibility determinations. While the Board is free to draw contrary inferences from the evidence, it generally defers to an ALJ's credibility determination absent evidence to support overturning such a conclusion. (*Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2093-H, p. 3.) Based on our review of the record in this matter, we decline the City's request that we overturn multiple factual findings that turn on credibility determinations, including the ALJ's well-supported findings as to statements that the parties made to one another during their negotiations.

The City also asserts that the ALJ relied too heavily on the City's bargaining notes. In determining how much weight to afford bargaining notes, an ALJ must consider all relevant factors, including but not limited to the notes' quality, their consistency with other evidence, and whether the notes were taken contemporaneously. (*Salinas Valley Memorial Healthcare System* (2015) PERB Decision No. 2433-M, adopting proposed decision at p. 10.) While bargaining notes are merely one form of evidence and can be overcome by credible conflicting

evidence, the ALJ considered all relevant factors in determining the appropriate weight the City's bargaining notes should bear.

We turn now to the central issues raised in the parties' exceptions.

I. Bargaining Conduct Prior to and Including the City's Impasse Declaration

The City's employee relations ordinance defines "impasse" as a point at which the parties differences "remain so substantial and prolonged that further meeting and conferring would be futile." This definition comports with PERB precedent and therefore sets the relevant standard for this dispute. (*County of Riverside* (2014) PERB Decision No. 2360-M (*Riverside*), p. 12.)

The City's primary contention is that the ALJ erred by finding that the City declared impasse before the parties had reached a bona fide impasse following good faith negotiations. If the City were correct that the parties had reached a bona fide, good faith impasse, the City would have been privileged to implement changes in terms and conditions of employment reasonably comprehended in its LBFO. (*El Dorado County Superior Court* (2017) PERB Decision No. 2523-C, p. 11.) SEIU asserts that the parties were not at impasse, and SEIU alternatively contends that any impasse resulted from the City's allegedly bad faith conduct.

Because the City raises impasse as a defense to a unilateral change, the City must demonstrate that the parties were at impasse in their negotiations. (*North Star Steel Co.* (1991) 305 NLRB 45.) Even if the gap between the parties' positions was sufficiently substantial and prolonged, however, that would not end our inquiry. An employer may declare impasse only if it has bargained in good faith throughout negotiations, from "inception through exhaustion of statutory or other applicable impasse resolution procedures," and its "conduct is free of unfair labor practices." (*City of San Jose* (2013) PERB Decision No. 2341-M (*San Jose*), p. 40.)

Absent compliance with these principles, an employer’s impasse declaration is evidence of bad faith, irrespective of whether the employer goes on to change terms and conditions of employment. (*Riverside, supra*, PERB Decision No. 2360-M, p. 12.)<sup>9</sup>

To comply with the duty to meet and confer in good faith found in MMBA section 3505, each party must “seriously ‘attempt to resolve differences and reach a common ground.’” (*Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, 61-62; *Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M, p. 11.) To determine whether a party has negotiated with the requisite subjective intention of reaching an agreement, the Board considers all evidence relevant to intent, including the parties’ conduct away from the bargaining table. (*San Jose, supra*, PERB Decision No. 2341-M, pp. 22-23.) The “ultimate question” is whether the respondent’s conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*Id.* at p. 19.) A single indicator of bad faith, if egregious, can be a sufficient basis for finding that a negotiating party has failed to bargain in good faith. (*Ibid.*)

On appeal, the City addresses not only the primary bad faith bargaining indicia that the ALJ analyzed—allegations that the City adopted a “take-it-or-leave-it” approach and rushed to impasse—but also a further issue that the ALJ did not expressly consider: whether the City engaged in lawful “hard bargaining.” The City attempts to raise this issue as a shield, asserting that all of its conduct falls into the category of lawful hard bargaining.

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<sup>9</sup> If an employer declares impasse without reaching a bona fide impasse after good faith negotiations, but the employer neither changes employment terms nor refuses to continue bargaining, the Board considers that evidence under the totality of conduct test. (*Riverside, supra*, PERB Decision No. 2360-M, p. 12.) In contrast, if the employer in those circumstances refuses to bargain further or proceeds to change employment terms, that constitutes further evidence of bad faith under the totality test, and it also constitutes a per se violation. (*Id.* at p. 11.)

### A. Unlawful Inflexibility Versus Lawful Hard Bargaining

It is often a difficult task to distinguish between lawful hard bargaining versus bad faith adherence to an inflexible position. (*Riverside, supra*, PERB Decision No. 2360-M, p. 13 [noting the fine line between an impasse due to lawful hard bargaining and one that results from unlawful bad faith].) A party exhibits bad faith if it fails to provide an adequate explanation for its inflexible position. (*County of San Luis Obispo* (2015) PERB Decision No. 2427-M, p. 29; *San Bernardino City Unified School District* (1998) PERB Decision No. 1270, adopting proposed decision at pp. 85-86.) However, if a party's inflexible position is fairly maintained and rationally supported, such facts do not amount to bad faith, absent other evidence. (*Oakland Unified School District* (1982) PERB Decision No. 275, p. 16.)

The ALJ did not determine whether the City's positions were fairly maintained and rationally supported. Even assuming that the City did satisfy this standard, however, the City's alleged hard bargaining could not shield it from liability if the record supports the ALJ's findings that the City short-circuited meaningful discussions by adopting a take-it-or-leave-it attitude and rushing to impasse.<sup>10</sup> In these circumstances, there is no cause for the Board to depart from the ALJ's analysis and resolve whether the City's positions were fairly maintained and rationally supported.

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<sup>10</sup> The City alternatively invites us to analyze the instant case under *County of Solano* (2014) PERB Decision No. 2402-M, wherein the Board rejected a union's novel theory that an employer's across-the-board demands amounted to unlawfully imposed "coalition bargaining." While the Board found no violation in *County of Solano*, it has noted that an employer comes "perilously close" to bad faith when it insists that it will not under any circumstances agree to different terms for different employee groups. (*Regents of the University of California* (1983) PERB Decision No. 356-H, p. 21.) Just as the ALJ's analysis does not turn on the fine distinction between hard bargaining and bad faith inflexibility, so too, the outcome here is not contingent on resolving the tensions found in the aforementioned precedent.

## B. Adopting A Take-It-or-Leave-It Attitude

The proposed decision found, at pages 38-45, that the City adopted a “take-it-or-leave it” attitude, which is an indicator of bad faith. (*City of Santa Clara* (2016) PERB Decision No. 2476-M, p. 12.) While deferring to the ALJ’s credibility determinations, we have examined the record to consider whether the City adopted a take-it-or-leave-it attitude, or, conversely, the parties failed to reach agreement despite good faith attempts to find a mutual path forward. (*Id.* at p. 18.) We similarly have reviewed the record to consider whether it supports the ALJ’s finding that “the City consistently demonstrated a willingness to provide only a ‘perfunctory review’ of SEIU’s proposals.” (Proposed decision, p. 42.)<sup>11</sup>

The record supports these findings. The City repeatedly presented its position as an ultimatum, telling SEIU that it had a choice of either accepting the City’s proposal or arriving at impasse. The City also showed a predetermination to negotiate or impose its own proposals without carefully and mutually reviewing the counterproposals, issues, and concessions that SEIU presented. Via this conduct, the City short-circuited meaningful discussion of substantive issues and thereby forestalled opportunities to explore a path toward agreement. (*Riverside, supra*, PERB Decision No. 2360-M, p. 14 [noting that good faith bargaining necessarily entails willingness to engage in “meaningful discussions”].) The proposed decision is well supported in its finding that the City declared impasse based not on “the City’s assessment of the parties’ actual differences, but on the fact that it had not achieved capitulation to all of its economic demands.” (Proposed decision, p. 43.)

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<sup>11</sup> While evidence of a “perfunctory review” may be considered as a separate bad faith indicator, the ALJ did not err in choosing to consider that evidence together with the related allegation that the City adopted a take-it-or-leave-it approach.

### C. Rushing to Impasse

A party demonstrates bad faith when it rushes to impasse, or if its impasse declaration is “premature, unfounded, or insincere.” (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M (*Fresno*), p. 53.) The proposed decision determined that the City rushed to impasse, and that “the sequence and evolution of bargaining in this case is remarkably close to what transpired in *City of Selma* [(2014)] PERB Decision No. 2380-M, where the employer desired to implement concession terms of uniform application to separate units coinciding with the budget process.” (Proposed decision, p. 39.) As discussed below, in reaching this conclusion the ALJ correctly applied precedent to the facts of this case.

The Board’s decision in *City of Selma, supra*, PERB Decision No. 2380-M (*Selma*), followed the analysis in *Riverside, supra*, PERB Decision No. 2360-M, wherein the Board reviewed precedent regarding an employer’s attempt to rush bargaining to meet a budget timeframe. This precedent generally rejects an employer’s contention that an upcoming budget deadline constitutes exigent circumstances allowing the employer to accelerate negotiations unilaterally. (*Id.* at p. 20 [reviewing and applying precedent, and finding no exigent circumstances, despite impact of the Great Recession and employer’s argument that new fiscal year would further weaken its economic position due to a pre-scheduled wage increase taking effect].) Thus, an employer choosing to hold a budget vote before completing negotiations and any required post-impasse procedures must refrain from voting on concessions that have not

yet been fully ratified by all bargaining parties. (*Selma, supra*, PERB Decision No. 2380-M, pp. 21-22; *Riverside, supra*, PERB Decision No. 2360-M, pp. 20-21.)<sup>12</sup>

The record supports the ALJ's finding that the City's bargaining conduct was designed to conclude negotiations and adopt new cost-saving measures by the onset of the City's new budget cycle. The City was so committed to this plan that it told SEIU it would provide an LBFO by the end of the fiscal year unless SEIU agreed to an interim side letter extending the merit pay freeze. Then, when the parties could not agree on all aspects of the proposed side letter, the City carried through on its threat and declared impasse at the end of the fiscal year. The City's rush to impasse here was even more pronounced than in *Selma*, where the employer delayed its budget vote by several weeks to allow more time for negotiations. (*Selma, supra*, PERB Decision No. 2380-M, p. 8.)

The City emphasizes in its exceptions that the parties met and conferred on three dates prior to April 29, and the City contends that by failing to label these three meetings as bargaining sessions, the ALJ did not appreciate the full extent of the parties' negotiations. SEIU counters that the parties had not yet finalized their bargaining teams prior to April and that the initial three meetings did not constitute bargaining. This dispute is immaterial in the present circumstances. The "ultimate determination of good or bad faith turns, not on a formula for the number of meetings that must occur or the number of proposals that must be exchanged before a bona fide impasse exists, but on the effect of a party's conduct on the course of negotiations." (*San Jose*,

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<sup>12</sup> This principle has its origins in precedent that substantially predates *Riverside, supra*, PERB Decision No. 2360-M and *Selma, supra*, PERB Decision No. 2380-M. (See, e.g., *Dublin Professional Firefighters Local 1885 v. Valley Community Services District* (1975) 45 Cal.App.3d 116, 118 [While section 3505 of the MMBA provides that parties shall endeavor to reach agreement prior to a public agency's adoption of its final budget for the ensuing year, the statute's use of non-mandatory language renders it "only hortatory" and contrasts starkly with the statute's other, obligatory mandates, such as the duty to continue bargaining for a reasonable and adequate amount of time to allow for good faith negotiations].)

*supra*, PERB Decision No. 2341-M, p. 42.) The ALJ considered what took place at the parties' three meetings prior to April 29, and the proposed decision correctly found that the City's conduct at those meetings was consistent with the bad faith conduct the City evidenced throughout 2011.

The City also asserts that the parties' unsuccessful discussions during July through September, post-implementation, demonstrate that the parties were too far apart to warrant further negotiations before the City declared impasse and imposed its LBFO. However, even aside from our conclusion, *post*, that the City further short-circuited good faith negotiations via statements it made after SEIU made significant concessions in early July, the City's argument is not tenable. An employer's unilateral change to employment terms "makes impossible the give and take that are the essence of labor relations." (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823.) For that reason, even if the City had bargained in good faith during July through September, we could not accept the inference that the City asks us to draw from the parties' failure to reach agreement after the City imposed new terms.

## II. The Content of The LBFO Terms The City Imposed

The proposed decision found that the City violated the MMBA by imposing the following language as part of its LBFO:

### Section 22 Term and Effect

This Memorandum of Understanding shall remain in full force and effect from July 1, 2011 through June 30, 2012. During the term of this Agreement, the City may initiate negotiations concerning the impacts of management rights decisions, amendments to this Agreement necessitated by a change in law and/or legal judgment or a concern about the City's budget or any other negotiable subject.

While the ALJ correctly found this language to constitute an unlawfully-imposed waiver of the right to bargain, the proposed decision predated our decision in *Fresno, supra*, PERB Decision No. 2418-M. For that reason, the proposed decision is no longer accurate in stating that “PERB has not addressed what constitutes unilateral implementation of an MOU in violation of [section 3505.7],” and it does not recognize the manner in which *Fresno* broadened an employer’s obligations when imposing new terms after reaching a bona fide good faith impasse. We therefore supplement pages 44-45 of the proposed decision with the following discussion.

In *Fresno, supra*, PERB Decision No. 2418-M, p. 40, the Board harmonized MMBA section 3505.7 with other labor relations statutes and clarified employers’ duty to refrain from unilaterally imposing a waiver of the right to bargain. The Board held that an employer “cannot impose proposals affecting matters that can only be established by consent,” and, to avoid confusion, must “segregate or excise from its imposed terms language purporting to ‘establish a memorandum of understanding’ or other agreement, as well as language that is reasonably susceptible to such an interpretation.” (*Id.* at p. 40.)

In this case, the City violated these principles by purporting to impose an MOU, by imposing a durational term, and by imposing a reopener provision that was available, on its face, only to the City. Because we write with the benefit of *Fresno, supra*, PERB Decision No. 2418-M, and the ALJ did not, we adjust several of the ALJ’s findings. First, the proposed decision found that the “City Council’s resolution does not state in words the intention to implement an MOU.” (Proposed decision, p. 45.) We do not adopt this finding, as the Council’s resolution explicitly adopted the City’s entire LBFO, including the language of Section 22 set forth *ante*. Moreover, to the extent that there is ambiguity as to whether the City

“implemented an MOU,” we find that the City failed to excise from its imposition language that is susceptible to an unlawful interpretation. (*Fresno, supra*, PERB Decision No. 2418-M, p. 40.)<sup>13</sup>

The City also violated its duty to bargain in good faith by imposing a durational term, because unilaterally imposing new terms for a set duration places an obstacle in the path of good faith bargaining. (*Roosevelt Memorial Medical Center* (2006) 348 NLRB 1116, 1117; see also *City of Santa Rosa* (2013) PERB Decision No. 2308-M, p. 5 [discussing legislative purpose behind MMBA section 3505.7].) Imposing a duration for new terms is also inconsistent with an employer’s affirmative duty to excise from its imposition any language susceptible to an unlawful interpretation. (*Fresno, supra*, PERB Decision No. 2418-M, p. 40.) We supplement the proposed decision and hold that (1) *Fresno* amended the principles set forth in *Rowland Unified School District* (1994) PERB Decision No. 1053 and *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S, and (2) specifically, an employer cannot impose new terms for a set duration.

The City asserts in its exceptions that it never interpreted its imposed terms as limiting SEIU’s statutory right to meet and confer. However, our precedents treat this allegation as a per se violation for which the employer’s motive or intent is irrelevant. (*Fresno, supra*, PERB Decision No. 2418-M, pp. 2-3, 15, 37-40.) The City’s argument is therefore not well taken.

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<sup>13</sup> We also do not adopt the proposed decision’s factual finding, at page 45, that the City “ignored” SEIU’s “proposal for reopeners limited to the merit pay freeze.” There is insufficient record evidence to support this finding. In any event, the City’s violation was in unilaterally imposing a waiver of the right to bargain, and that conclusion remains the same irrespective of whether SEIU proposed a more limited reopener.

### III. Bargaining Conduct After The City Imposed Its LBFO

Even if parties have reached a bona fide impasse after completing negotiations in good faith, an impasse “can be terminated by nearly any change in bargaining-related circumstances” that is sufficient to suggest that “attempts to adjust differences may no longer be futile.” (*PERB v. Modesto City Schools District* (1982) 136 Cal.App.3d 881, 899.) “Most obviously, an impasse will be broken when one party announces a retreat from some of its negotiating demands.” (*Ibid.*) Once impasse is broken, “the duty to bargain revives.” (*Ibid.*)

The ALJ found that after the City imposed its LBFO, SEIU made concessions that were sufficient to constitute changed circumstances requiring the City to bargain in good faith. The ALJ also found that the City did not do so. The record supports these findings. The City responded to SEIU’s request for further bargaining by stating that “negotiations are complete” and that it would meet with SEIU “in the interests of good labor relations.” When they met, SEIU presented new concessions, but the City’s negotiator again presented the City’s position as an ultimatum, telling SEIU to accept the LBFO or he would “pick up his marbles and go home.”

The City argues on appeal that the ALJ did not credit the City sufficiently for its subsequent meetings with SEIU during the summer and fall of 2011. We find no merit to this exception, as the City’s conduct prevented meaningful good faith negotiations during that timeframe. Three independent rationales each support this conclusion: (1) the City failed to withdraw its damaging assertion that negotiations were closed and that it was agreeing to meet merely for the sake of good labor relations; (2) the City continued to adopt a “take-it-or-leave-it” attitude; and (3) the City had unlawfully imposed the very terms under discussion, thereby forcing SEIU to start from a position of having to talk the City back to the status quo. (*San Mateo County Community College District* (1979) PERB Decision No. 94, p. 15.)

We therefore affirm the ALJ's conclusion that the City did not engage in good faith negotiations in the summer and fall of 2011, after imposing its LBFO.<sup>14</sup>

### ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, we find that the City of San Ramon (City) violated MMBA sections 3503, 3505, 3505.7, and 3506, and PERB Regulation 32603, subdivisions (a), (b), (c), and (g), by:

- (1) declaring that the parties were at impasse without satisfying its obligation to meet and confer in good faith with the Service Employees International Union Local 1021 (SEIU);
- (2) unilaterally imposing the City's last, best, and final offer even though the parties were not at a bona fide impasse following good faith negotiations; (3) unilaterally imposing purported contractual terms for a specified period of time, including a reopener provision allowing the City, but not SEIU, to demand bargaining during the purported contractual term; and
- (4) failing to resume negotiations in good faith when SEIU made new proposals amounting to changed circumstances.

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<sup>14</sup> The ALJ found this set of facts to constitute an unalleged violation that could properly be considered under PERB precedent. We decline to decide SEIU's cross-exception arguing that the Complaint had adequately pleaded this theory by alleging that the City "made statements to the effect that it 'had no duty to negotiate' with [SEIU], given [the City's] implementation of its Last, Best, and Final Offer." We need not decide this exception, as it has no impact on the outcome. (*Los Angeles Unified School District, supra*, PERB Decision No. 2432, p. 2; *Regents of the University of California, supra*, PERB Decision No. 891-H, p. 4.) The City, for its part, excepts to the ALJ's decision to consider this allegation, claiming that the City was prejudiced because it was not on notice that it was required to defend against a "changed circumstances" allegation. We have reviewed the record and find that the City had adequate notice and an opportunity to defend itself. In its opening statement, the City began defending itself against the claim that SEIU's post-impasse concessions led to a renewed bargaining duty. Thereafter, counsel for both parties examined the City's chief negotiator regarding these facts. The City does not assert that the ALJ's unalleged violation analysis contains any other errors. We have nonetheless independently reviewed the record, and we find that the ALJ's determination is consistent with precedent governing unalleged violations. (*Fresno County Superior Court* (2008) PERB Decision No. 1942-C, p. 14.)

Pursuant to MMBA section 3509, subdivision (b), it is hereby ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith by either declaring that the parties are at impasse without satisfying its obligation to meet and confer in good faith, or unilaterally imposing its last, best, and final offer when no bona fide good faith impasse exists.

2. Unilaterally imposing purported contractual terms for a specified period of time, including a reopener provision allowing the City, but not SEIU, to demand bargaining during the purported contractual term.

3. Failing to resume negotiations in good faith following the breaking of impasse as a result of changed circumstances.

4. Denying SEIU its right to represent bargaining unit employees in their employment relations with the City.

5. Interfering with the right of bargaining unit employees to be represented by the employee organization of their choosing.

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

1. Rescind imposition of the last, best and final offer that the City imposed on or about June 28, 2011, and return to the status quo as it existed before imposition, until such time as the parties complete a successor MOU or reach a bona fide impasse following good faith negotiations.

2. Make all affected employees whole for loss of wages or benefits due to the City's violations of the MMBA, including interest at 7 percent per annum.

3. With regard to the make-whole remedy and the order to return to the status quo, this Order shall be stayed for 45 days to provide the parties an opportunity to meet and confer over a mutually acceptable remedy. In the event no agreement is reached within 45 days and the parties have not mutually agreed to an extension of time within which to do so, SEIU shall notify the General Counsel of PERB, or the General Counsel's designee, so that compliance proceedings may be initiated.

4. Within ten (10) workdays of the service of a final decision in this matter, post copies of the Notice, attached hereto as an Appendix, at all work locations where notices to employees in the City are customarily posted. The Notice must be signed by an authorized agent of the City, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to the physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with its employees in the bargaining unit represented by SEIU. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The City shall provide reports in writing, as directed by the General Counsel or her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU.

Members Banks and Winslow joined in this Decision.



**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California**

After a hearing in Unfair Practice Case No. SF-CE-855-M, *Service Employees International Union Local 1021 v. City of San Ramon*, in which the parties had the right to participate, the Public Employment Relations Board (PERB) has found that the City of San Ramon (hereinafter "City" or "We") violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3505.7, and 3506, as well as subdivisions (a), (b), (c), and (g) of PERB Regulation 32603 (Cal. Code of Regs., tit. 8, § 31001, et seq.) by:

(1) prematurely declaring that the parties were at impasse without satisfying its obligation to meet and confer in good faith with the Service Employees International Union Local 1021 (SEIU); (2) unilaterally imposing a last, best, and final offer even though the parties were not at a bona fide impasse following good faith negotiations; (3) unilaterally imposing purported contractual terms for a specified time, including a reopener provision allowing the City, but not SEIU, to demand bargaining during the purported contractual term; and (4) failing to resume negotiations in good faith when SEIU made new proposals amounting to changed circumstances.

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

**A. CEASE AND DESIST FROM:**

1. Failing to meet and confer in good faith by either declaring that the parties are at impasse without satisfying its obligation to meet and confer in good faith, or unilaterally imposing a last, best, and final offer when no bona fide good faith impasse exists.

2. Unilaterally imposing purported contractual terms for a specified period of time, including a reopener provision allowing the City, but not SEIU, to demand bargaining during the purported contractual term.

3. Failing to resume negotiations in good faith following the breaking of impasse as a result of changed circumstances.

4. Denying SEIU its right to represent bargaining unit employees in their employment relations with the City.

5. Interfering with the right of bargaining unit employees to be represented by the employee organization of their choosing.

(continued on next page)

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**THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.**



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

1. Rescind imposition of the last, best, and final offer that the City imposed on or about June 28, 2011, and return to the status quo as it existed before imposition, until such time as the parties complete a successor MOU or reach a bona fide impasse following good faith negotiations.

2. Make all affected employees whole for any and all losses of wages or benefits due to the City's violations of the MMBA, including interest at 7 percent per annum.

Dated: \_\_\_\_\_

CITY OF SAN RAMON

By: \_\_\_\_\_  
Authorized Agent





STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 1021,

Charging Party,

v.

CITY OF SAN RAMON,

Respondent.

UNFAIR PRACTICE  
CASE NO. SF-CE-855-M

PROPOSED DECISION  
(January 28, 2015)

Appearances: Weinberg, Roger & Rosenfeld, by Kerianne R. Steele, Attorney, for Service Employees International Union Local 1021; Liebert Cassidy Whitmore, by Jack W. Hughes and Arlin B. Kachalia, Attorneys, for City of San Ramon.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

This case alleges a public employer implementing the terms of its last, best, and final offer without completing negotiations; implementing a one-year term memorandum of understanding with reopening provisions favoring the public employer; and engaging in surface bargaining in violation of the Meyers-Milias-Brown Act. The public employer denies any unfair practice.

PROCEDURAL HISTORY

Service Employees International Union Local 1021 (SEIU) filed an unfair practice charge and an amended charge against the City of San Ramon (City) under the Meyers-Milias-Brown Act (MMBA or Act)<sup>1</sup> on June 24, and September 19, 2011, respectively. On April 13, 2012, the Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint alleging that the City failed to meet and confer in good faith by

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<sup>1</sup> The MMBA is codified at Government Code section 3500 et seq. Hereafter all statutory references are to the Government Code unless otherwise indicated.

(1) implementing the terms of its last, best, and final offer without having completed negotiations; (2) implementing a memorandum of understanding (MOU) for a term of one year with reopener provisions favoring the City; and (3) engaging in surface bargaining. This conduct was alleged to have violated MMBA sections 3503, 3505, and 3506, and PERB Regulation 32603, subdivisions (a), (b), and (c).<sup>2</sup> The alleged premature implementation of the last, best, and final offer was also alleged to be inconsistent with a local rule in violation of section 3503, 3505, 3506, and 3509, subdivision (b), and PERB Regulation 32603, subdivision (g).

On May 14, 2012, the City filed its answer to the complaint, denying the material allegations and raising affirmative defenses.

On July 11, 2012, an informal settlement conference was held, but the matter was not resolved.

On November 14, 15, and 16, 2012, and February 12, and April 16, and 17, 2013, a formal hearing was conducted in Oakland.

On July 29, 2013, the matter was submitted for decision following the submission of post-hearing briefs.

#### FINDINGS OF FACT

SEIU is an “employee organization” within the meaning of MMBA section 3501, subdivision (a), and an “exclusive representative” of a bargaining unit of public employees within the meaning of PERB Regulation 32016, subdivision (b). The City is a public agency within the meaning of section 3501, subdivision (c).

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<sup>2</sup> PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

SEIU represents a bargaining unit of maintenance employees. There were approximately 50 employees in the unit on July 1, 2011. Another group of miscellaneous employees in the City is unrepresented.

### Negotiations Background

SEIU and the City were parties to an MOU for a term of January 1, 2007, through December 31, 2010. In June 2010, the parties extended the MOU through June 30, 2011. The extension included a one year freeze on merit-based pay raises, coupled with a grant of retiree dental and vision coverage for bargaining unit employees, a benefit previously held only by unrepresented employees. The extension agreement listed a specific term for the merit raise freeze – an end date of June 30, 2011 – but none for the retiree medical benefit. Merit raises by practice are awarded on the employee’s anniversary date based upon the performance evaluation.

Like most municipalities in California, the City was suffering the effects of the 2008 recession, and like others had been enduring several years of a “structural deficit.” A structural deficit is the condition where the adopted annual budget ends the year with a shortfall, requiring the tapping of reserves or other measures to end in balance. The City was suffering from flat or declining revenues and increased costs largely due to employee health and retirement obligations. In the fiscal year 2010-2011, the City was expecting to end with a \$2.9 million deficit and projecting a deficit of \$5.1 million with a rollover budget in 2011-2012. Projected increased costs for the new fiscal year included increased health care premiums, increased contributions to the California Public Employees Retirement System (CalPERS), and increased retiree health care costs.

On January 11, 2011, the City held an informational meeting for its miscellaneous employees, both represented and unrepresented. SEIU representatives were not invited. City Manager Herb Moniz (Moniz) and Administrative Services Director Greg Rogers (Rogers) made a PowerPoint presentation of the City's financial situation. The City provided the financial picture described above. The City explained the financial situation was better than other municipalities and that the City still had reserves to cover some of the projected 2011-2012 deficit.<sup>3</sup> The City indicated that a hiring freeze had been imposed, but other cost-saving measures were being considered. These included: (1) continuation of the merit pay freeze through June 30, 2012, (2) up to 12 furlough days (estimated at 4.5 percent of salary), (3) an increase of one percent in employee contributions to CalPERS<sup>4</sup> (up from one percent), (4) a two-tier retirement plan with a lower formula for new hires, and (5) a retirement incentive program. The City republished the five bullet-pointed cost reduction items on its intranet following the presentation.

#### January 21, 2011 Meeting

On January 21, 2011<sup>5</sup>, the City met with SEIU Field Representative Angela Osayande (Osayande) and Chapter President Chris Southwick (Southwick). Moniz and Rogers gave the same PowerPoint presentation presented to the employees. Moniz stated the City wanted these measures implemented by July 1, 2011. The PowerPoint slide on concessions includes the words "options to consider." Although the City had desired to begin negotiations six months prior to the expiration of the existing MOU, SEIU did not elect its bargaining team until

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<sup>3</sup> A local newspaper article reporting on the adoption of the 2011-2012 budget stated the City had reserves of \$27.2 million.

<sup>4</sup> California Public Employees Retirement System

<sup>5</sup> Hereafter, all dates are in 2011, unless otherwise indicated.

February. Shortly after the meeting, Moniz announced his retirement and resigned his position.

#### February 25, 2011 Meeting

On February 25, 2011, a meeting occurred between the parties. Rogers and Finance Division Manager Eva Phelps (Phelps) represented the City. Osayande, Southwick, and Maintenance Technician William Hudson (Hudson) attended for SEIU. Rogers, who had taken the lead from Moniz as acting City Manager, asked when negotiations could begin and reiterated the City's desire for economic concessions. Rogers stated the City was seeking a one-year successor MOU.

SEIU indicated it was opposed to furloughs and wanted a two-year agreement. Rogers replied that all employees were accepting furloughs. Osayande reminded the City that other employees were unrepresented and the City had healthy reserves. Osayande told the City that the union would consult its members on the furlough proposal.

SEIU verbally requested a number of items of information: (1) the City's comprehensive annual financial report (CAFR), (2) the City's budget, (3) the CalPERS actuarial report, (4) the new CalPERS contribution rates, (5) the cost savings of the proposed furlough days, and (6) the cost savings of the one percent increase in the CalPERS contribution rates. SEIU was also interested in a longer, three-to-five year projection of PERS rate changes. The City informed SEIU that the CAFR and City budget were available online.

At some point in the meeting, Rogers angrily told Osayande, "This is San Ramon, and the union is not going to come in here and tell us what to do. This is not Oakland." Osayande negotiates for SEIU in Oakland.

Bargaining notes were kept throughout the negotiations by Employee/General Support Services Division Manager Antoinette Renault (Renault).<sup>6</sup> These notes indicate an early caucus was followed by an exchange on rising pension and health care costs and the City's statement that it wanted all miscellaneous employees to be treated the same. The City reported that safety employees would be accepting a one percent increase in retirement contributions and a second tier system for new hires. SEIU responded that a two-year agreement would get the parties to a point in the future when the economic recovery would likely begin. The notes also indicate that SEIU raised several non-economic issues, including "stability in scheduling." The parties concluded the meeting by scheduling their next meeting for March 25.

On March 24, Phelps emailed Osayande with the furlough savings figure (\$151,366) and the one percent retirement contribution (\$32,902) for the represented group only. Phelps's assistant had emailed a response to the requested items on March 21, but Phelps later realized that the two cost items were incorrectly calculated, resulting in the March 24 transmission. The delay in providing the information was a result of Phelps being on four weeks of jury duty.

#### March 25 Meeting

As would become the custom, the parties began their March 25 meeting at 10:00 a.m. Opening the meeting, Osayande stated SEIU was not ready to proceed because the information

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<sup>6</sup> Renault was tasked by the City with taking notes of the meetings. The notes were entered in the record as a joint exhibit, and both parties used the notes extensively as a script with witnesses to refresh recollection. The notes include the timing of breaks, identify the speakers, include the language of the speakers, and contemporaneously follow the exchanges. They are given significant weight here in light of all the circumstances. Bargaining notes are regarded as business records in labor cases and may be received into the record as substantive evidence of what occurred at bargaining meetings. (*Continental Can Co.* (1988) 291 NLRB 290, 294 [hearsay exceptions]; *Pacific Coast Metal Trades Dist. Council* (1986) 282 NLRB 239, 239 fn. 2 [same]; *Mack Trucks, Inc.* (1985) 277 NLRB 711, 725 [same, and weight needs to be judged].)

response was delivered late. The City reiterated its economic demands. Osayande asserted that two-tier pension plans provided no immediate savings. She stated that the merit-based salary freeze needed to be negotiated. Hudson presented a rough calculation of the amount saved by the previous merit pay freeze. Osayande described the meeting as a 20-minute bargaining session. Renault estimated it lasting two hours, noting that most of the meetings were between one and one half, and two hours. Based on the bargaining notes, the meeting was most probably around one hour. SEIU did not present any union proposals at this meeting. According to the notes, both sides postured on the degree of the City's financial distress regarding pension and health care costs.

SEIU asked about ground rules for the negotiations. Rogers responded that the City did not believe in ground rules. Hudson quoted Rogers as explaining the reason: "This is how we usually do it. We tell you what we have. You tell us what you want. And we sign off, and that's it." Hudson made a comment about the City having a "take-it-or-leave-it" attitude. The parties agreed to the next meeting, to be held on April 29.

#### April 1 Work Schedule Announcement

All of the bargaining unit's members perform maintenance work of some kind, while some are of a more skilled nature than others. On April 1, Public Services Director Karen McNamara (McNamara) issued a memorandum announcing a change in work schedules for the spring and summer period affecting approximately 31 of the unit's staff. McNamara had determined during the peak period of City's park and recreation facility usage, maintenance staff needed to work on the weekends in addition to their regular Monday through Friday schedule. This was necessary to make the maintenance staff "available and visible" to park

and pool users. The primary function of the weekend crew was trash removal and restroom clean-up.

Prior to 2011, the City had a practice of changing schedules to provide weekend coverage during the summer months. Under the prior practice, approximately 16 of the unit's employees were affected. For a number of years, weekend duty was handled by teams of six employees, each on a rotating schedule.

In her memorandum to the staff, McNamara stated that the City needed coverage for a longer period on the weekend days, that is, from 7:00 a.m. to 5:10 p.m. Two shifts would be utilized. The City planned to assign a weekend coordinator to oversee the work of the entire team. The coordinators would check in with the staff before the start of the first and second shifts to assure the maintenance routes were implemented. McNamara stated that the "consensus" of the staff was to schedule both days of the weekend with the same team of employees. She wrote:

This way, work left undone or that comes up on Saturday can be completed on Sunday by the same team without the need for a transmitting that information. Staff indicated that in order to have longer periods between weekend assignments, that it was more beneficial to schedule both days. The other option would be a Saturday or Sunday of a given weekend, however, the frequency that one would work a weekend would be increased.

Section 8.1 ("Hours of Work") of the expiring MOU provided: "The regular work hours for unit employees shall be five (5) shifts of seven and one-half (7.5) work hours in a seven (7) day work period." Section 8.2 ("Work Week") provided: "The workweek for employees as defined by the Fair Labor Standards Act (FLSA) is a regular recurring period of 168 hours in the form of seven consecutive 24 hour periods. The workweek is not necessarily the same as the calendar week." SEIU filed an unfair practice charge alleging that

McNamara's schedule announcement was a unilateral change the City refused to negotiate. The charge was withdrawn after the events in question here.<sup>7</sup>

Maintenance employees in SEIU's unit objected to the new schedule because the MOU provisions permitted the City to schedule them for ten consecutive days by scheduling the first five days of an employee's weekly assignment at the end of the seven day workweek and the next five days at the beginning of the following workweek, thus denying employees any weekend day off during the two-week assignment. Other employees worked seven days in a row, and some had 10-hour shifts. The City paid no overtime. None was required under the FLSA which were the only wage and hour provisions that applied to municipal employees. When McNamara asserted the practice did not violate the FLSA, SEIU contended that if nothing else, the practice circumvented the intent of law.

Hudson disputed McNamara's justification regarding the difficulty of transmitting information on what work needed to be done over the weekend. He testified that the schedule was prompted by a complaint by one employee that the Saturday crew was not emptying enough garbage cans, leaving it for the Sunday crew.

SEIU circulated a petition among the employees and presented the signatures to the City Council, but without effect. The City's implementation forced SEIU to develop a bargaining proposal that would ameliorate the effects of the new schedule.

#### April 29 Meeting

With Rogers ascending to the city manager position and assuming new duties, City Attorney Sheryl Schaffner (Schaffner) arranged for Attorney Jack Hughes (Hughes) to be

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<sup>7</sup> SEIU's unfair practice charge number SF-CE-838-M was filed on June 3, 2011 and withdrawn on January 26, 2012.

retained as the City's chief negotiator. The City was concerned about what it perceived as SEIU's "lack of sense of urgency" regarding the negotiations, particularly in light of the July 1 sunset date of the merit pay freeze.

Rogers wrote to Osayande on April 14 expressing these concerns and requesting a formal response by SEIU to the City's economic proposals as well as the scheduling of weekly meetings. Osayande responded by email on April 26, stating her disagreement over Rogers's characterization of the current negotiations, asserting that the January 21 meeting did not constitute negotiations and the January Powerpoint presentation was not a formal proposal. Also on April 26, Osayande wrote to Rogers with a new information request containing 13 items of more detailed financial information.

When the parties met on April 29, the City introduced Hughes. Hughes was accompanied by Schaffner, Phelps, and Renault. SEIU was represented by Osayande and three chapter members, including Hudson.

Hughes testified that he tries to incorporate interest-based principles into his bargaining by assessing the needs and wants of the union and having discussions that may lead to creative ways of solving problems. When receiving a proposal from the union, he seeks to ascertain the underlying reason behind it. Hughes prepares by studying the employer's finances, the MOU, and "how the place is working." He tries to develop a rapport with the other side and develop momentum early on. Hughes was instructed that he needed to achieve a one year term, not increase the City's costs, and achieve some modest concessions from SEIU.

Hughes repeated the City's contention that the parties had been bargaining and that its Powerpoint presentation constituted a proposal. Osayande disagreed and requested a written proposal. During the morning portion of the meeting, the parties went through the City's

response to SEIU's information request, item by item. Following the lunch break, the City presented a "comprehensive" offer with a one year term. The proposal included:

(1) restoration of the merit pay freeze through completion of negotiations, (2) authorization for 12 furlough days, (3) a second-tier retirement system, (4) a one percent increase in employee retirement contributions, and (5) a reopener clause allowing the City during the one-year term to "initiate negotiation concerning the impacts of management rights decisions, amendments to this Agreement necessitated by a change in law and/or legal judgment or a concern about the City's budget or any other negotiable subject."

According to Hughes, the City's top priority was the one year term. Hughes would draft a duration clause with a broad reopener for the City due to the "very dynamic legislative and economic environment where change was happening quickly." He asserted that nothing in the language was intended to waive the bargaining rights of SEIU, and the reopener clause was merely to "facilitate discussion if the need arose." On cross-examination, he characterized the proposal as an "embellished" reopener clause, but conceded that it permitted the City to reopen negotiations during the term of the MOU without limitation as to subject. Hughes added that he expected SEIU to come back seeking that the reopener language be bilateral. When asked if one was even necessary given the one year term, Hughes did not directly answer the question.

Osayande rejected the merit pay freeze and stated SEIU would present a counterproposal. Hughes expressed openness to ideas from SEIU. Osayande indicated SEIU might accept furloughs. SEIU's practice in contract negotiations is to lead with non-economic proposals in the hopes of achieving tentative agreements before tackling what are anticipated to be the more formidable economic issues. SEIU requested an economic justification for the number of furlough days sought. SEIU stated that it would convey the proposal to the

employees at the next general membership meeting. Near the end of the meeting, Osayande stated that SEIU would present non-economic proposals in week of June 9th. The parties agreed to future meetings on May 10 and May 24. The session lasted somewhat over two hours.

On May 5, Phelps emailed Osayande purporting to provide the “roll-up” costs. The email provides no additional information, but refers Osayande to an exhibit outlining the benefits available to all employees previously provided on April 29. The exhibit appears to be an employee policy document listing benefits available to all employees. Despite Hughes’s contention that the information provided satisfied SEIU’s request, the requested “ ‘add-on’ percentages used by the City for all salary related premiums added to salary” was not provided. It appears that if the City did not actually have or use a specific percentage as a calculation of roll-up costs, that point was never clarified between the parties.

After consulting with members, SEIU prepared a proposal for presentation at the next bargaining session.

#### May 10 Meeting

SEIU opened the meeting by presenting its counteroffer. As promised, SEIU agreed to furlough days, but only five instead of 12 and pre-scheduled dates instead of setting them at management’s discretion. Though the dates were bunched in the holiday season, SEIU proposed to allow the City to amortize the pay reduction over 26 pay periods. SEIU demanded a term of July 1, 2011, through June 30, 2014. SEIU also agreed to the one percent pension contribution. SEIU further proposed an amendment of the first sentence of section 8.1, adding the italicized language: “The regular hours for unit employees shall be five (5) shifts of seven and one-half (7.5) work hours in a seven (7) day work period *with two (2) days of rest*

*proceeding (sic) the five (5) day shift unless emergency work (overtime) or scheduled overtime has been approved by all parties.”*

According to the bargaining notes, Hughes asserted that the amortization plan could create a “legal hiccup.” Osayande responded that the law does not address furlough pay reductions. In response to the three-year term, Hughes asked if the union was accepting the second tier retirement plan. Osayande said the membership had not been consulted on that proposal and would want more time to consider it. Hughes asserted its importance in regard to future hires. Hughes also asked for a counterproposal on the merit pay freeze. Again, Osayande stated the members had not been consulted. Hughes had been warned about SEIU delaying negotiations and he was now sensing this to be the case.

Osayande broached non-economic issues, specifically focusing on the workweek issue. When Osayande cited 10 consecutive day work shifts and the unfair practice charge, Hughes responded that he would confirm that overtime was being paid. Hudson and Osayande provided more explanation of the stress and fatigue of working 10 days straight, especially on weekends when park users were present and heat indexes were high, making cleaning the restrooms difficult. Hughes responded that the schedule was financially driven.<sup>8</sup> Hughes also testified that he stated his belief that SEIU’s proposal on section 8.1 did not fully address the employees’ concerns and that SEIU needed to amend the proposal. The meeting lasted about two hours.

There was an issue regarding released time for negotiation preparations. The City reluctantly granted a full day of released time for three employee negotiators to prepare for the

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<sup>8</sup> At the end of the meeting, Osayande recognized that the two paragraphs of the counterproposal concerning the section 8.2’s work week and section 8.6’s pay periods were superfluous and they were withdrawn.

next negotiation session, after Hughes stated that preparation should be on the employees' volunteered time.

On May 18, the members were consulted regarding the second tier retirement proposal and the wage freeze.

#### May 24 Meeting

SEIU invited Field Supervisor Wayne Templeton (Templeton) to the negotiations. Templeton was Osayande's supervisor. Templeton offered comments reflecting good faith while again cautioning that economic issues typically get resolved later in negotiations and observing that parties often begin by resolving non-economic issues. Hughes did not disagree.<sup>9</sup> Templeton would remain for the duration of the negotiations and took the lead at various points.

After Templeton was introduced, Osayande turned the subject back to the substance of the negotiations, requesting from the City counteroffers to SEIU's May 10 proposals. Hughes refused, insisting that SEIU first respond to all of the proposals of the City, particularly the wage freeze proposal.

Hughes testified that the City was being open-minded about solving the City's economic crisis and not seeking to engage in positional bargaining. Hughes stated the City needed a response to the balance of the City's proposals before he could possibly get some authority from the City Council at the next closed session. Hughes concluded that despite Templeton's show of good faith, SEIU was engaging in stall tactics. He also conceded that SEIU had been "telegraphing" that it was opposed to the merit freeze, but claimed the need to

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<sup>9</sup> At the hearing, Hughes claimed that because economic issues take time, they will be among the first things put on the table.

see the union's official position. Hughes testified that it was important to know SEIU's position on whether the merit pay freeze would extend beyond July 1. Despite disappointment with evasiveness on Osayande's part, Hughes interpreted Templeton's comments to mean that SEIU was rejecting the balance of the City's proposal.

Hughes also testified that his failure to accept or reject SEIU's proposal on section 8.1 was because he did not feel it addressed the union's real needs. Osayande testified that she believed the City was "flipping the script" on the union. In response to the City's harping on the structural deficit, SEIU cited its past contributions to the deficit through the previous merit wage freeze and a one percent increase in pension contributions. The bargaining notes indicate at a point late in the session when the parties were disputing who owed whom a response, Hughes asserted that SEIU needed to go back to its members to finalize its workweek proposal. Osayande responded that this was condescending. The meeting ended after about two hours.

If there was any lack of clarity as to SEIU's position during the meeting, Templeton removed it in a letter the following day, stating that the union was not agreeing to extend the wage freeze. In response to Templeton's complaint about the City's refusal to respond to the union's workweek proposal, Hughes testified that SEIU's non-economic proposal on workweek was "in no way, shape, or form connected to trying to tackle" the City's proposals.

#### June 6 Meeting

Templeton opened the meeting expressing concern about a news report announcing the City Council's adoption of the 2011-2012 budget during the week of May 23 that included all of the concessions sought in the SEIU negotiations. Hughes responded that the budget was only an estimate. At the hearing, Hughes testified that he had never encountered an employer in his experience delaying adoption of a budget pending the outcome of negotiations.

SEIU next requested a calculation of the amount the City would save with the continued merit pay freeze. Hughes responded that the information was simply a cost that fluctuated from year to year; its total could not be calculated because it would require an examination of individual payroll records. Hughes admitted lacking knowledge about the City's payroll system.

Templeton also stated the union's need to know the dollar figure of savings required by the City in order to fashion alternative savings measures and to demonstrate that the unit's concessions were commensurate with concessions from other employees. Hughes testified that no answer was required on this because "the merit pay was a cost issue, not a savings issue." He is also quoted in the bargaining notes as stating the City was "going on last year's." At another point, he asked if the City produced the numbers of each unit would it be helpful to SEIU in selling its proposals to the membership, to which Templeton answered yes. Hughes is quoted as stating Phelps would "do [the] math."

This exchange was followed by SEIU's presentation of a comprehensive proposal on non-economic issues. The proposal called for (1) a second-tier retirement plan for new hires, (2) a statement of policy regarding sick leave addressing disciplinary action for excessive intermittent use of sick leave, (3) adding \$150 to the uniform compensation section to cover work boots, (4) elimination of two of 14 listed causes for disciplinary action, (5) substitution of the grievance procedure for the existing appeal process to challenge disciplinary action, and (6) changes to the grievance procedure. Some exchanges occurred. Hughes asked a question about *Skelly* hearings,<sup>10</sup> and later explained the law on the subject.

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<sup>10</sup> *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

SEIU also indicated it was working on a proposal for an alternative work schedule based on nine days of eight hours per day that would save the City an amount equal to the requested concessions, or roughly “four percent.”<sup>11</sup> Hughes testified that he appreciated Hudson bringing this idea forward, in contrast to Osayande’s rigid stance, because it reflected an interest-based approach. However, the bargaining notes contradict him, quoting Hughes as responding by “explaining the City’s plan.” SEIU then asked for the amount of savings for unrepresented employees, and repeated its interest in a three-year term. Hughes rejected the proposal, citing CalPERS as the “big issue.” When Hudson stated that he did not understand, Hughes responded, telling SEIU to “make a proposal” or a “what if” proposal (i.e., a “supposal”).

Immediately after this, Hughes asked what would occur if the parties were not done by July 1, but were still bargaining. Osayande asserted SEIU’s position was that the merit wage freeze would sunset. Hughes responded by demanding a side letter be signed to continue the freeze, and that without one, the City would be providing its last, best, and final offer (LFBO) at the next bargaining session.<sup>12</sup> Templeton replied that SEIU would “get back to him.” Hughes then asked why there was a need to get back and expressed disappointment with the union for using the sunset date as leverage. Templeton replied that the City was not providing a dollar savings target figure. Hughes responded that the City needed no cost increases and

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<sup>11</sup> The record does not indicate clearly from what gross figure four percent is calculated, but it is likely total unit compensation.

<sup>12</sup> Hughes alternatively testified that he knew the merit freeze would sunset and was annoyed that Osayande, in contrast to Templeton, failed to give him a straight answer on the point. He believed it would be customary in negotiations for the status quo to continue for the duration of the negotiations regardless of the language involved here.

additional concessions from SEIU. At the close of the meeting, the City agreed to transmit the amount of dollar savings sought from the SEIU unit. This meeting also lasted about two hours.

Later the same day Osayande emailed Hughes. Anticipating the next session on June 15, Osayande stated: “The parties met today and agreed to continue working on complete proposal packages that include economics. . . . We will submit additional proposals and or ‘suppose-als’ showing various scenario packages that can be used as examples to the employer or alternative ways of addressing fiscal targets.” She reminded Hughes of the information sought by SEIU.

Hughes emailed Osayande a response that included an estimate of \$170,000 for the savings achieved by extending the merit pay freeze, \$32,902 for the increased pension contribution, and a furlough option (without a dollar figure) in case the City needed additional savings. Hughes indicated that Phelps would be providing the estimated savings from the merit pay freeze for unrepresented employees. In regard to Templeton’s statement that SEIU would get back to the City on extending the merit pay freeze, Hughes repeated the City’s intention to submit its LFBO at the next meeting if no extension was obtained.

Schaffner testified that the lack of agreement on the merit pay freeze ending on July 1 was an imperative for the City Council because of “pretty significant” and “immediate” financial impacts. She stated that City Council did not have “comfort in continuing to negotiate, unless the parties were pretty close;” adding, “the City was feeling strongly that they needed to resolve their fiscal planning issues as well before they got into another fiscal year.” Schaffner understood that the City Council would adopt a budget in June with the savings from the unit as proposed and anticipated the need to amend the adopted budget if it did not achieve those savings in the negotiations.

On June 14, the City team met with the City Council. Hughes received updated authority as reflected in the City's LBFO that he would present at the June 15 session.

#### June 15 Meeting

According to the bargaining notes, Templeton opened the meeting announcing a plan to lay out the union's 9/8 economic proposal. He asked the City for a counter. Hughes responded with the estimated savings from the merit pay freeze for unrepresented employees (\$909,067).

SEIU then presented an 11-page package proposal described as a counterproposal. The proposals reiterated the intermittent sick leave policy reform, boot allowance, removal of two grounds for discipline, and substitution of the grievance procedure for the appeal procedure for disciplinary actions. SEIU countered the City's two-percent-at-60 formula for the second tier with 2.7 percent at 55 with the employees paying the employee contribution, up to a maximum of eight percent. The main economic proposal included a nine-day work period at eight hours per day, with every other Friday off, for a total of 26 days off, or the equivalent of a four percent savings. SEIU and the City would also split increases to health insurance premiums. The term of the MOU was three years.

According to the bargaining notes, Hughes asked short, single questions about the health insurance premium split, the three-year term, the second tier plan, and the sick leave policy. After hearing SEIU's reason for a three-year term, Hughes responded that the City would want a "simple reopener." Osayande stated it would only be for the merit increases. The City rejected the splitting of health care increases. Hughes testified such a proposal could not be put in the MOU because medical costs were uncertain, as were merit increases.

Hughes expressed disappointment with SEIU's lack of movement, and the City caucused. When the City returned, Hughes told SEIU that he appreciated the union's attempt, but the parties had a "fundamental gap" over the scheduling issue and the City's need for weekend coverage. He stated that the "hardest piece" was the work schedule, not economics. The City would adhere to the community's desire for seven-day service at the parks.

After the caucus, the parties engaged in what appears to have been the longest single discussion of a subject in the negotiations, and it concerned the work schedule issue. Schaffner contended the City had already considered the union's input, and conveyed that the City would stand behind its managerial prerogative over the scheduling of work. Later, after a challenge by Templeton, Schaffner responded that the City's bargaining team was not management and not privy as to why the City had not resolved the schedule issue earlier. This discussion continued until the noon break. Osayande is quoted as stating that the work schedule issue was not how many days of the weekend services are provided, but what the schedule required of the employees. The City's counterproposal on section 8.1 was to reaffirm management's right to unilaterally change the seasonal work schedule on a yearly basis.<sup>13</sup>

Hughes's testimony regarding the most critical bargaining session was both internally inconsistent and at odds with the notes. Hughes testified he was intent on wrapping up the negotiations on June 15. This was his plan despite his expressed openness to the 9/8 proposal and recognition that SEIU was struggling to cost out the offsetting savings of an extended merit pay freeze, which the City was not able to calculate for the union. Hughes added that the

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<sup>13</sup> In its post-hearing brief, the City argued that the City team determined that what had been an economics-driven negotiations was no longer given the emergence of the issue of work schedules and that Hughes "confirmed" this with SEIU. In support of that point, the City cited Hughes's testimony and the bargaining notes, which only confirm that it was the one subject around in which the City entertained extended discussion at the table.

9/8 proposal was a “considerable” one that needed to be digested. He wanted a caucus because he did not want to ask any stupid questions about the proposal, that he was “a bit at sea with the idea” and the possible history of alternative work schedules raised by Hudson. At this point, Hughes was willing to assume that SEIU’s calculation of the 9/8 proposal’s savings was reliable. The feedback Hughes received in the caucus was that there were probably going to be operational “speed bumps” with implementation. He testified:

I just explained that I was having some sense that there could be some operational challenges with that. I don’t know that I was hyper-specific, because, again, I’m just learning about this for the first time right then and there, and any comments I would have made were something that one of my bargaining teams members suggested to me may be an issue, but I had a little more homework to do.

Hughes’s testimony of the City’s good faith approach contradicts the weight of evidence as to the City’s rigid objection to negotiating schedule changes and insistence on SEIU accepting the City’s particular economic proposals.

According to the bargaining notes, just after the mid-day break, Hughes presented counteroffers to SEIU on the non-economic issues. The City agreed to strike out existing language permitting the City to require a medical provider’s verification of inability to perform assigned duties. The City agreed to SEIU’s proposal to include protections against disciplinary action against intermittent use of sick leave. The City accepted SEIU’s requirement of advance notice of suspected abuse, SEIU’s definition of excessive intermittent use, the requirement for a provider’s verification for a six-month period, and the ability of the supervisor to place an employee on probation. It added the supervisor’s right to extend the probationary period following disciplinary action.

The City rejected the boot allowance, citing the need for an offset. It also rejected the removal of the language on appeals of disciplinary actions; the City would agree to add language stating it would follow the law, while stating also that appeals of disciplinary action having no monetary impact were not required by law. Otherwise, the City had no interest in the proposal.

The City rejected SEIU's proposal on changes to language of the grievance procedure and the union's proposal to delete the language stating that a written reprimand would be placed in the employee's personnel file. Osayande recited a story about an alleged abuse of the disciplinary process. Hughes said he heard what she was saying, that it sounded like a big issue, but the City had no interest in removing the language from the MOU. Hughes again resorted to explaining the law. In response to Osayande's complaint about low morale under McNamara's management style, Hughes is quoted as responding that no words could fix such a problem in the MOU; it was a classic issue in labor negotiations.

At approximately 1:00 p.m., as the parties were discussing the grievance procedure, the City identified issues it had: further meeting dates and the extension of the merit pay freeze while the parties continued negotiations. Osayande responded that the membership agreed to the extension.

Next, Templeton stated that SEIU would provide the City its 9/8 proposal in writing. Hughes's next statement was that the City rejects a three-year term. Immediately after that, Hughes presented the City's LBFO. The only concession made by the City was the removal of the second-tier retirement plan, which Hughes acknowledged would save the City nothing in the first year due to the ongoing hiring freeze. Hughes testified that he had been instructed to

present the LBFO at this meeting and to clearly convey to SEIU that it was the City's LBFO. Hughes believed it would be something SEIU could sell to its membership.

Around 1:55 p.m., shortly before the meeting ended, Hughes raised the issue of the side letter extending the merit pay freeze and noted his need to consult with the City Council regarding that issue and whether to arrange further bargaining sessions. He again objected to the three-year term, stating the need for a "broad" reopener. Hughes testified that he wanted the side letter extension in writing because he felt somewhat snake-bitten by Osayande and Templeton. He denied declaring the parties were at impasse, conceding only that they could be headed there.

The next meeting was scheduled for June 29. SEIU believed the meeting was firmly set. The City maintained it was tentative only. Hughes testified:

Because I didn't know if we were going to be at an impasse at that point, and, if so, how that was going to be handled. You know, I'd been given some very clear instructions from my client. I followed through with them. At the meeting on the 15th, I conveyed a last, best, and final. The union was giving me something very different than that, and I needed to get direction from my client. The direction may or may not have left room for further bargaining.

The bargaining notes confirm that at the end of the meeting, just before 1:55 p.m., Hughes stated he needed to consult with the City Council regarding the side letter and more meeting dates.

Just after 1:55 p.m., SEIU promised a package proposal would be delivered the next day. The meeting lasted about four hours.

On June 16, Osayande emailed SEIU's comprehensive package proposal and stated, "See you on June 29, 2011." SEIU accepted the City's withdrawal of the second tier plan. SEIU countered the City's economic package with the following offers: (1) the 9/8 schedule,

with a return to the schedules prior to the May 2011 schedule change;<sup>14</sup> (2) a 50 percent sharing of the increase for the Kaiser medical plan and the preferred provider optional plan premiums, respectively;<sup>15</sup> (3) a one year continuation of the merit pay freeze; and (4) a two year term, expiring June 30, 2013. SEIU restated its original non-economic proposals, including the sick leave language, boot allowance, and revisions to the disciplinary and grievance procedure articles.

The same day, the City provided SEIU with language to sign that would extend the merit freeze until the parties completed negotiations and requested an executed copy by June 20. However, the City's proposal contained language not discussed by the parties, namely, that the freeze would be suspended by agreement to an MOU or the City's "taking final action" to resolve an impasse. Further, if SEIU sought any legal relief against the implementation of a "subsequently imposed MOU, the freeze would extend until a final resolution of the legal proceedings." The City team also emailed a statement to the SEIU team that the City team would present the package proposal to the City Council in closed session to let the council determine if there would be authorization to revise the LBFO, or ascertainment of room for further negotiations.

The City Council met on Saturday, June 18. The council rejected SEIU's offer. It instructed the City team to determine if SEIU would accept the City's LBFO, and if not, determine whether the parties were at impasse. Hughes testified that for the City the two "big

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<sup>14</sup> The prior schedule included one weekend crew working Sunday through Thursday, and the other working Tuesday through Saturday, with either an alternating Tuesday or Thursday off, every other week depending on the crew.

<sup>15</sup> The City estimated projected increases of 10 and 14 percent for the two plans, respectively.

areas of dispute” were “money and work schedule.” The City Council also scheduled June 28 as the time for adoption of a tentative agreement or taking “final action” regarding the impasse. The City provided no evidence that the council was informed of SEIU’s willingness to accept the interim pay freeze. Hughes testified that he concluded SEIU’s June 16 proposal did not meet the City’s cost savings needs, but he could not remember why it failed to do so. The City’s reaction to the 9/8 schedule was that it was “real comfortable with what [it] had,” did not want to make a change, and “there was a concern about, financially, how this would shake out for the city.”

On June 20, Schaffner emailed SEIU reporting on the June 18 meeting and warned that the City needed to hear whether SEIU accepted the City’s LBFO or “whether the parties were at impasse.” If no answer was received by the close of business June 23, the City would “take that as a rejection.” Finally, SEIU was advised that if the City did not receive acceptance of the City’s LBFO by June, the City would take “final action” regarding the impasse.

On June 22, Templeton responded with an email stating SEIU’s intention to continue bargaining, stating his belief that an agreement was possible. He implored the City to be more specific about the “specific fiscal targets” it sought to achieve. Schaffner emailed a response, reciting the bargaining history in the City’s view and repeating that the City Council had concluded that no further bargaining should occur absent acceptance of the City’s LBFO. Osayande replied with an email that recited the bargaining history from SEIU’s perspective view. She ended by stating:

We put forth our proposal verbally and in writing and (sic) June 15, and agreed to come back to the table on June 29. Now the City is pushing to impasse when we have not finished bargaining. WE (sic) do not bargain at the Council meetings or in their chambers, that is why you and Jack were charged with being the negotiators so that we could do just that at the table.

Schaffner ended the June 22 email exchange stating “we disagree with your representation of the history of these negotiations.”

In a separate June 22 email, Hughes responded to Templeton stating three points: (1) despite SEIU’s belated, but sincere effort to meet the City’s financial needs, the City rejected the proposal and the parties could only avoid impasse if SEIU accepted the City’s LBFO, (2) the scheduling issues had been bargained for six months and were intractable, (3) the June 29 date was a placeholder that was rendered moot by the City’s reiteration of its LBFO. Hughes offered June 24 as a meeting date for “further discussion” if it might break the impasse. SEIU did not accept the invitation.

On June 23, at 4:56 p.m., Templeton transmitted the executed merit pay freeze extension, without the language on the indefinite extension in case of legal proceedings. The City did not sign the agreement because it considered the extension a moot issue given SEIU’s failure to accept the City’s LBFO.<sup>16</sup> Schaffner testified the extension was only of value if there was a purpose in continuing negotiations, and the City viewed the parties as too far apart.

#### June 28 City Council Meeting

The first item on the City Council’s June 28 meeting agenda was a closed session to discuss the SEIU negotiations. A resolution approving the unilateral implementation of the City’s LBFO was listed under new business with a staff recommendation to adopt. Also listed

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<sup>16</sup> On June 23, Osayande emailed the City stating that the roll-up costs had not been provided and submitting additional information requests for the total, average and median wages paid employees budgeted for 2010-2011, and the actuals, year to date. Schaffner stated the roll-up costs had already been provided and the City was working on the remainder of the request. Schaffner responded with a spreadsheet containing budgeted and year-to-date wage and fringe benefit figures for the unit’s employees. Osayande claimed she did not receive the spreadsheet. According to Schaffner, Osayande was reluctant to accept it when later she personally offered to her.

under new business was a resolution pertaining to unrepresented employees approving suspension of the merit pay raises, an increase in the CalPERS employee contribution, and adoption of unpaid furlough days.

The staff recommendation on the SEIU negotiations contained the following summary:

The Union's response to the "best and final offer" made by the City was a proposal and a counter proposal along with a statement that they do not believe the parties are at an impasse. In light of the critical need for timely action on this matter, the City Council met in Closed Session on Saturday, June 18, 2011 to review the union's proposal and [counterproposal]. After these extended and extensive negotiations and exchanges, however, the City and the Union remain far apart on core fiscal matters. Furthermore, the parties are diametrically opposed on the most important non-financial issue with no meaningful movement by either party throughout the negotiation[s]. The City considers the negotiations to be at impasse and has informed the Union of this conclusion.

No description of the major "non-financial" issue was provided in the text. The staff memorandum stated that implementation was recommended because of "the need to timely address the 2011-2012 deficit" and because SEIU had not returned "a signed version of a promised stopgap Amendment . . . which might have allowed the parties to continue negotiations."<sup>17</sup> The memorandum added that if SEIU agreed to the LBFO prior to the City Council meeting, the council could adopt an alternative resolution reflecting that agreement. For the first time, the Council officially announced the parties were at impasse.

Speakers were permitted during the City Council meeting. Hughes spoke first. He began: "[T]his is as clear an impasse in a labor negotiation process as I've run into in 15 years of negotiating labor contracts." Hughes identified scheduling as the principal issue dividing

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<sup>17</sup> Although not specifically asked about the agreement, Hughes volunteered the City had not received one that fully protected the City. He did not deny receipt of the signed agreement sent by Templeton.

the parties and asserted that “throughout the balance of the bargaining process I’ve been involved with, I have seen no significant movement of any kind on either party’s part.” He claimed that the City made its “best effort to resolve it” at the June 15 session. Hughes noted the financial terms were identical to those of the unrepresented employees.

The next speaker asked why the City rejected the union’s one year merit freeze extension. Hughes responded that as stated earlier, “[F]inances are not so much the primary issue.” Another speaker asked why the 9/8 schedule was rejected. Hughes answered that SEIU demanded schedules so employees could work Monday through Friday, followed by Monday through Thursday. Osayande responded that “working the weekends was not the issue;” it was requiring 10 consecutive days. She believed the parties were not at impasse and that there was “plenty of room for [the parties] to work out their differences and the scheduling issue.” Another speaker asked, “Is it really that difficult to get together and figure out a schedule?” Hughes responded that the City had thoroughly examined the issue at the bargaining table. Hudson then spoke. He explained that with the medical premium cost split proposal, SEIU was offering more financially than was demanded by the City, and in addition the union offered a “structural change” on schedules: “We said look it, we’ll work Tuesday through Saturday, Sunday through Thursday . . . but let us have one of the days of the weekend off.” Hughes responded:

[W]hat’s remarkable to me about San Ramon is it’s been striving to minimize the impact of our current economy on the workforce to a greater extent than I believe any other client that I have at this time. And one of the strategies for that is a shorter term labor agreement as opposed to a longer term agreement.

Hughes described SEIU as offering some “additional inducements” at the front end to get a longer term. The City was uncomfortable with a longer term due to continuing downside risk,

and consequently sought a one year deal that would “mitigate the impact on the employees as much as possible.”

After further comments, the Vice Mayor spoke, and despite sympathy over the scheduling issue, noted the million military reservists who work weekends. He concluded the current schedule was “very doable.” The Mayor followed: “We’re not asking anything from you that we’re not asking from all our employees. No more, no less.” He added that the City had looked very closely at SEIU’s June 15 counteroffer: “[U]nfortunately, the Union’s offer does not meet our fiscal needs and actually runs contrary to . . . our basic operational needs at this time. And, that we are just too far apart to expect to resolve our differences in . . . any further discussion at this point.”

Following these comments, the City implemented the terms of its LBFO. The implementation included the merit pay freeze, up to 12 unpaid furlough days, language specifically legitimizing the back-to-back workweek scheduling, the one percent increase in employee retirement contributions, and the one year term with unlimited reopeners for the City.<sup>18</sup> It implemented the identical economic terms for the unrepresented at the same meeting.

On June 29, SEIU arrived for bargaining, but the City did not appear. At 1:00 p.m., Osayande emailed Hughes and Schaffner asking where the meeting would take place. Hughes responded that he was not prepared to bargain over the “2012-2013” successor agreement – the implication being he had just concluded the 2011-2012 negotiations with SEIU.

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<sup>18</sup> Though the resolution states in the “whereas” clauses the intention to implement five furlough days (the same as for unrepresented), the resolution itself adopts the attached City LBFO, which authorizes 12 furlough days.

By letter dated June 30, Osayande restated SEIU's position that the parties were not at impasse. She announced a plan to present "substantial movement" in regard to the 9/8 schedule, the retirement plan, furloughs, and term.

By letter dated July 1, Hughes restated the City's position that negotiations were closed, but offered to meet "in the interests of good labor relations."

By letter dated July 7, Osayande transmitted the same message contained in her June 30 letter.

The parties met on July 8. Hughes asked the purpose of the meeting, adding that the "ball was in SEIU's court." SEIU presented a package proposal with a one year term. SEIU withdrew the 50 percent split on health insurance premium increases, the 9/8 schedule, the \$150 boot allowance, the removal of two disciplinary causes, the right to grieve discipline, and two other language changes to the grievance procedure. SEIU counter-proposed to accept (1) the merit pay freeze through June 30, 2012, (2) up to five furlough days in the 2011-2012 fiscal year, and (3) the City's new retirement plan and employee contribution. SEIU maintained its proposal on a minor language change to the grievance procedure proposed earlier and adopted in the City's implementation. SEIU retained its proposal for an intermittent sick leave abuse policy, but deleted the City's amendment stating that "[e]mployees may not use sick leave unless they are truly sick or they have another lawful reason for using sick leave." SEIU

proposed overtime if the City scheduled weekend work following a regular five day workweek, dropping its opposition to 10 day scheduling.<sup>19</sup>

Hughes testified that he “suspected” that the package did not constitute substantial movement and “wasn’t going anywhere” given the instructions of his principals. He interpreted the work schedule proposal as a means to block weekend work because it was subject to “approval” by SEIU. His “take away” from the meeting was a “real passion” by the employees on the “operational issue,” and because employees were unhappy and impasse was not any better for the City than the employees, he did believe the City should consider it further. Since he would not be available for the next few weeks due to personal commitments, he expected the City staff would follow up. At a later point, he stated to SEIU that he understood the problem about working 10 days straight, was not sure it was the right thing to do ultimately, and that the City was “absolutely committed to giving [the 10 day work period] a shot” during a one year trial, and revisiting the issue thereafter.

According to the bargaining notes, SEIU also proposed that the City could avoid the overtime payment by scheduling a five-day week over the weekend. SEIU told the City it was leaving full discretion to the City how to schedule coverage over the weekend and that it would assist in that scheduling should the City encounter difficulties.

After further questions Hughes and attempted reassurances by Templeton concerning the scheduling issue, Hughes made a comment about impasse in connection with furloughs,

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<sup>19</sup> The language carried over the definition of regular hours, with an amendment in the italics: “The regular hours for unit employees shall be five (5) consecutive shifts of seven and one-half [7.5] work hours in a seven (7) day work period *with 2 consecutive days of rest [preceding] the five (5) DAY SHIFT UNLESS EMERGENCY WORK AND (OVERTIME) OR SCHEDULED OVERTIME HAS BEEN APPROVED BY ALL PARTIES.*” (Italicized for emphasis.)

followed by a Templeton question whether there was possibility for movement. Hughes answered that SEIU could agree to the City's LBFO so the parties could declare victory, or he would "pick up his marbles and go home." Hughes testified that this was one of the "little sayings" or "colloquialisms" he uses in bargaining. He added that he would have "go home and figure out another way to go at this."

Near the end of the meeting, Osayande pointed out that despite the City's insistence on the importance of scheduling and SEIU's concession of managerial prerogative on that issue, the City never presented a proposal to SEIU on the subject. Hughes responded that SEIU was claiming the City was "wrong," whereas the City's position was that the contract allowed the current schedule. Immediately thereafter, Hughes declared, "We're done." At the end of the meeting, Southwick asked, "What is the issue?" Hughes responded, "Look at the LBFO. It is clear."

Schaffner testified that she agreed with Hughes's conclusion that the negotiations had been completed as of June 28, but whether impasse could be broken by substantial movement was not a subject about which she had any competence. She stated: "My impression was, if there was substantial movement, there might be an obligation to reopen, but it was not an area I felt like I knew that that looked like." There was no evidence the City presented SEIU's revised offer to the City Council.

#### July, August, and September Meetings

SEIU proposed, and the City agreed, to meet with new representatives from SEIU, ostensibly in the context of attempting to resolve the underlying unfair practice charge in this case and the unilateral change charge previously filed. However, Osayande arranged the meeting with Schaffner and described the subject of the meeting as "scheduling and [the]

imposition matter.” SEIU Political Organizer Ariana Casanova (Casanova) and Field Director Leah Berlanga replaced Osayande and Templeton at a July 19 meeting. As a result of a follow-up meeting on July 28, the City agreed to include McNamara at a subsequent meeting. The parties met on August 23 and August 30, and focused on the scheduling matter. On August 29, McNamara issued a memorandum on scheduling. Teams would be assigned for Thursday through Sunday duty for a longer work day for 13 week periods, but with fewer staff on each of the teams. At the August 30 meeting, SEIU proposed that the employees be given five-day schedules, but with one of the weekend days scheduled off. SEIU also asked the City to investigate the availability of employees who would volunteer for weekend coverage. This proposal pertained to the 2012 summer season. McNamara insisted on teams that worked both weekend days. For her, the issues were that employees on Saturday were not sufficiently motivated to complete their share of the work on that day and there would be work which employees on the next shift might not know of.

At a September 7 meeting, Hudson reported there were no employees volunteering to take full weekend coverage, and he presented an alternative, rotating schedule where one team would work both weekend days. SEIU confirmed that the proposal applied to 2012. Hughes responded that the City was not interested in an agreement for 2012 at that time.

SEIU then attempted to see if the parties could reach agreement on an MOU by revisiting the other issues in the 2011 negotiations. It went through the City’s last offer to attempt obtain tentative agreements, without success. Hughes suggested that it might be possible to achieve something if the scheduling issue was set aside, or if the scheduling issue was resolved. The City explained SEIU’s language could be taken to the City Council. After a break, the parties engaged in further discussions about the schedule, without success. SEIU

passed a proposal that would retain the MOU language in 8.1, but add a requirement that the parties “meet in February to discuss the seasonal schedule.” The City passed a proposal stating that the parties would discuss the seasonal schedule in February, but that the City will continue its practice of unilaterally adjusting schedules on a day-to-day basis or to establish work-teams as needed. Hughes informed SEIU that he had not expected language on section 8.1 and that he had exhausted all of his authority at the table on that provision. Hughes agreed to take SEIU’s section 8.1 language to the City Council on September 13, 2011, along with a cap of five furlough days, and removal of the City reopener language.

On September 13, 2011, the City Council rejected SEIU’s request to accept its latest proposal.

On November 8, 2011, Osayande emailed Schaffner a demand to return to the bargaining table over the imposed terms in light of “changed circumstances.” This was based on information SEIU received indicating that the City’s “finances are in better shape than previously expected.” By letter dated November 29, Osayande repeated her demand and included information requests on budget matters. Phelps responded on November 15, stating that the parties were still at impasse, while maintaining there was only slight improvement in the City’s financial position as of June 30, 2011.<sup>20</sup>

#### City’s Impasse Procedures

The City’s employer-employee relations policy (EERP) contains impasse procedure provisions. Impasse is defined as occurring when “the representatives of the City and a Recognized Employee Organization have reached a point in their meeting and conferring in

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<sup>20</sup> Eventually, many months later, the parties negotiated a successor MOU effective July 1, 2012.

good faith where their differences on matters to be included in a Memorandum of Understanding, and concerning which they are required to meet and confer, remain so substantial and prolonged that further meeting and conferring would be futile.” Section 16 (“Initiation of Impasse Procedures”) provides that “either party may initiate the impasse procedure” by giving the other party a written request for an impasse proceeding together with a statement of its position on all issues. A meeting so scheduled will conduct a “review of the position (sic) of the parties in a final effort to reach agreement” and failing that, a discussion of “arrangements for the utilization” of the prescribed “impasse procedures.” Section 17 (“Impasse Procedures”) provides that the parties will proceed to mediation if they agree to submit to mediation, and failing that, the parties may agree to factfinding. If the parties agree to neither procedure, the City Council is authorized to take “such action regarding the impasse” it “in its discretion deems appropriate as in the public interest.” Any legislative action shall be “final and binding.” The City made no request to participate in impasse procedures to resolve the 2011 bargaining.

### ISSUES

1. Did the City fail to meet and confer in good faith by prematurely declaring that the parties were at impasse?
2. Did the City unlawfully implement a memorandum of understanding?
3. Did the City refuse to engage in “changed circumstances” bargaining?

### CONCLUSIONS OF LAW

#### Failing To Bargain In Good Faith to Impasse

MMBA section 3505 requires public agencies and recognized employee organizations to meet and confer in good faith over wages, hours, and other terms and conditions of

employment. In *Los Angeles County Civil Service Commission v. Superior Court* (1978)

23 Cal.3d 55, 61-62, the court stated:

Thus a public agency must meet with employee representatives (1) promptly on request; (2) personally; (3) for a reasonable period of time; (4) to exchange information freely; and (5) to try to agree on matters within the scope of representation. Though the process is not binding, it requires that the parties seriously “attempt to resolve differences and reach a common ground.” [Citation.] The public agency must fully consider union presentations; it is not at liberty to grant only a perfunctory review of written suggestions submitted by a union.

If the parties engage in good faith bargaining, yet reach a point where further discussions would be fruitless, and prospects for reaching agreement have been exhausted, a bona fide impasse occurs. Thereupon, the parties must proceed to the impasse resolution procedures; and failing resolution there, the employer may unilaterally implement terms and conditions reasonably comprehended within its LBFO. (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 33-38; *City & County of San Francisco* (2009) PERB Decision No. 2041-M, p. 40.) A bona fide impasse declared by the employer assumes it has bargained in good faith. (*County of Riverside* (2014) PERB Decision No. 2360-M [an employer’s premature imposition of its LBFO, prior to reaching impasse and exhausting impasse resolution procedures, if they exist, is an illegal unilateral change]; *Temple City Unified School District* (1990) PERB Decision No. 841, pp. 11-12.)

Absent a conflict with the fundamental purposes of the MMBA, the City’s definition of impasse in its employee relations ordinance is applicable to the case at bar. (See *County of Riverside, supra*, PERB Decision No. 2360-M, p. 12.) The City’s definition of impasse (i.e., the differences “remain so substantial and prolonged that further meeting and conferring would be futile”) is consistent with PERB’s definition described above as the point where prospects

for agreement have been exhausted. In determining the existence of impasse, PERB has focused on a number of objective factors, including the number and length of negotiation sessions, the extent to which the parties have made and discussed counterproposals to each other, the number of tentative agreements, and the number of unresolved issues. (*Id.* at p. 14.)

In evaluating claims that a party has prematurely declared impasse, PERB analyzes the totality of the bargaining conduct leading up to the impasse declaration. (*Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M.) “Good faith” requires “a genuine desire to reach agreement,” rather than merely going through the motions of negotiations. (*Id.*; see also *Modesto City Schools* (1983) PERB Decision No. 291, p. 35 [face-to-face bargaining allowing for the exploration of new proposals which may provide avenues to resolve differences is encouraged].) Under this test, PERB determines whether the charged party’s conduct as a whole “indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained.” (*Oakland Unified School District* (1982) PERB Decision No. 275.) When the employer objects on grounds of negotiability “[t]he obligation to negotiate includes the obligation to express one’s opposition in sufficient detail to permit the negotiating process to proceed on the basis of mutual understanding.” (*Jefferson School District* (1980) PERB Decision No. 133, p. 11.)

Absent evidence of bad faith bargaining, discussion of proposals and review of outstanding differences over five final bargaining sessions, with only minor movement to bridge substantial differences on economic issues and important non-economic issues has led to a finding of bona fide impasse. (*Regents of the University of California* (1985) PERB Decision No. 520-H.) Continued movement on minor issues will not prevent a finding of impasse if the parties remain deadlocked on one or more major issues. (*California State*

*University* (19981) PERB Decision No. 799-H.) On the other hand, where the parties continue to make economic concessions and display movement, an abrupt declaration of impasse that denies one party an opportunity to respond the other's final offer has been found to be premature. (*Kings In-Home Supportive Services Public Authority, supra*, PERB Decision No. 2009-M; see also *County of Riverside, supra*, PERB Decision No. 2360-M [contemporaneous movement and narrowing of issues in context of time pressure for completion of negotiations, coupled with insubstantial justification for impasse declaration].) A hurried attempt to present an LBFO with little discussion when the parties differed on only one economic subject, prompting a counterproposal and request for additional sessions from the other party, yet produced no further face-to-face meetings, were facts leading to a finding of a premature declaration of impasse. (*City of Selma* (2014) PERB Decision No. 2380-M.) A lack of bona fide impasse was found in *City of Selma* despite the union's slowness in presenting an economic proposal in the context of concessionary bargaining, particularly in light of evidence of the employer's intention to meet an externally imposed deadline for negotiations that coincided with the unilateral imposition as to another union concurrently involved in bargaining.

Based on the guidance set forth above, it must be concluded that the City prematurely declared impasse and failed to exhibit good faith in the bargaining leading up to the June 6 meeting, when it abruptly announced its intention to produce its LBFO absent SEIU's agreement to a side letter extending the merit pay freeze, and the June 15 meeting, when, after obtaining "updated authority" from the City Council, the City presented its LBFO that included a single concession, the removal of the two-tiered retirement plan, which would save the City no money during the term of the imposed MOU due to the hiring freeze. The day after the

June 15 meeting, SEIU provided an executed side letter extending the merit pay freeze for the duration of bargaining, which the City determined was moot because the distance between the parties was too great. Throughout this period, only SEIU demonstrated real and significant movement. Then, despite SEIU having also submitted a comprehensive new proposal on June 16 that included the one year merit wage freeze sought by the City, cost-sharing of the anticipated increases in health premiums, and wage concessions based on working 26 fewer days in the year through the 9/8 schedule, the City refused to meet at the “tentatively” scheduled June 29 meeting because SEIU had refused to accept the City’s LBFO. Despite this clear movement on the key issues, the City’s lead negotiator described the impasse to his principals as one of the “clearest” he had ever witnessed in his career, while incorrectly representing that there had been “no significant movement of any kind on either party’s part.” The City’s resolution states the “critical need for timely action,” but the record offers no explanation as to what compelled such urgency. Schaffner cited the lack of a merit pay raise freeze as the City Council’s imperative, but the increases were not earned until the employee’s anniversary date, and SEIU had offered an interim extension. Taken as a whole, the sequence and evolution of bargaining in this case is remarkably close to what transpired in *City of Selma, supra*, PERB Decision No. 2380-M, where the employer desired to implement concession terms of uniform application to separate units coinciding with the budget process.

SEIU has demonstrated a lack of good faith negotiating on the City’s part. The signs of the City’s lack of intent to genuinely attempt to resolve differences surfaced in January when the City made the PowerPoint presentation to all miscellaneous employees, announcing the

City's intent to seek across-the-board concessions.<sup>21</sup> (*General Electric Co.* (1964) 150 NLRB 192, 194.) Moniz communicated a goal to the employees of July 1, 2011, for the implementation. Rogers's comment to Osayande about the difference between San Ramon and Oakland coupled with his comment in connection with the City's lack of interest in ground rules legitimately prompted Hudson's comment suspecting a "take-it-or-leave-it" attitude on the City's part. When the early meetings suggested resistance from SEIU, the City retained Hughes.

At his first session on April 29, Hughes asserted that the seasonal work schedule was financially driven, when it was not, and told SEIU that its section 8.1 proposal needed more work. The City foreclosed any signals of areas of compromise to the union in these initial exchanges.

When SEIU produced Templeton at the next meeting on May 24, as a more conciliatory spokesperson, who broached non-economic subjects as a means for SEIU to gauge the City's good faith, the City was again dismissive. Hughes certainly disabused Templeton of any prospect of an attempt to exchange SEIU's non-economic proposals for the City's economic proposals to create momentum, when he ended the meeting by stating that the work week proposal was "in no way, shape, or form" connected to the City's economic concessions.

At the June 6 meeting, Templeton began by attempting to smoke out the City's flexibility to continue negotiations past July 1 by citing the news article on the City's adoption of the budget that assumed the economic savings sought from SEIU. Hughes did not reveal any of the City's intentions in that regard. He asserted that in his experience he had never

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<sup>21</sup> The absence of evidence that safety employees were required to accept furlough days, merit pay freezes, or similar equivalent concessions should be noted in this context.

encountered an employer holding up budget approval pending the outcome of negotiations. (But see *City of Selma*, supra, PERB Decision No 2380-M, p. 8.) At this meeting, Hughes denied that a calculation of the projected savings from a 2011-2012 merit pay freeze was pertinent (it was simply a fluctuating cost), or could even be calculated. SEIU needed confirmation to determine if its 9/8 proposal was sized right.<sup>22</sup> After presentation of SEIU's non-economic terms, including the three-year term, Hughes mechanically responded that CalPERS was the "big issue." While future CalPERS increased contributions were a potential risk, so, too, were health insurance premiums, but the City showed no interest in SEIU's alternative proposal on that subject. Despite Hughes's assertion to the City Council on June 28 that SEIU had proposed front-loaded concessions as means for a longer term, these concessions were not time-limited, but were amendments to the MOU. (*State of California (Department of Personnel Administration)* (1989) PERB Decision No. 739-S.) The City's one year term proposal allowed full and unrestricted reopener rights to the City and none to SEIU, a clearly unacceptable proposal because it completely undermines the purpose of negotiating an MOU of any length term. (See *San Bernardino City Unified School District* (1998) PERB Decision No. 1270.)

Also at the June 6 meeting, Hughes announced the City's intention to present the City's LBFO at the next meeting, around the time Templeton stated the union would have to get back to him regarding an extension of the merit pay freeze. SEIU indicated its intention to provide an alternative economic proposal (i.e., the 9/8 plan), while insisting on greater clarity on the target savings sought by the City, which Hughes agreed to provide.

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<sup>22</sup> Health premium contributions are generally pre-tax payments resulting in less impact to employees financially.

At the June 15 meeting, the City again offered no counterproposal to SEIU's comprehensive proposal, and offered the same answer to the health insurance premium cost sharing proposal as it gave for the merit pay freeze, that such future costs were uncertain. Avoiding future cost uncertainty was a primary motivation of the City, according to Hughes. Then Hughes abruptly asserted that economic issues were not the primary obstacles. This was *before* the parties had even engaged in the most detailed single discussion of a bargaining subject in the negotiations, the seasonal work schedule. By the time the City was prepared to declare impasse no tentative agreements had been executed on any issues, economic or non-economic. The record establishes that the City consistently demonstrated a willingness to provide only a "perfunctory review" of SEIU's proposals. (*Los Angeles County Civil Service Commission v. Superior Court, supra*, 23 Cal.3d 55, at p. 62.)

During the parties' last face-to-face negotiation session on June 15, SEIU announced that the membership had agreed to the temporary wage freeze side letter and Hughes had challenged SEIU to make either proposal or a "supposal" on the 9/8 schedule (which Templeton promised in writing). Nevertheless, Hughes presented the City's LBFO with only the removal of the second tier retirement plan. Hughes ended the meeting without promising another face-to-face meeting because he deemed it in the City Council's prerogative to determine whether the parties were at impasse, even without a meeting to explore SEIU's 9/8 proposal.

Following the June 15 meeting, SEIU provided a comprehensive written counterproposal and its executed offer of the interim merit pay freeze. The City Council responded by communicating its ultimatum that the union accept the LBFO or have the terms imposed.

Under *Kings In-Home Supportive Services Public Authority, supra*, PERB Decision No. 2009-M, it must be concluded that the City prematurely declared impasse by denying SEIU an opportunity to fully present its new proposal addressing the outstanding economic and non-economic issues in the bargaining. The declaration was sudden and abrupt while SEIU was continuing to make concessions. (*Id.*) Impasse declaration was prompted not by the City's assessment of the parties' actual differences, but on the fact that it had not achieved capitulation to all of its economic demands. The record gives no indication that the City ever considered or devised a strategy designed to obtain consent from SEIU for a successor MOU. The fact that the concessions sought by the City may have been "modest" in its view does not legitimize a take-it-or-leave-it approach to bargaining.

The objective factors further demonstrate a lack of genuine impasse. (*City & County of San Francisco, supra*, PERB Decision No. 2041-M.) There were a total of five bargaining sessions at which the fully constituted bargaining teams were present. A total of approximately 13 hours were logged. This is not a long time for successor agreement negotiations in the context of concessionary bargaining. No tentative agreements were executed. The record -- particularly the bargaining notes -- give little evidence of constructive, problem-solving exchanges. SEIU had agreed in principle to two of the three economic concessions demanded by the City, offered the side letter extension, and promised an economic counterproposal that would arguably provide more savings than demanded by the City. This demonstrates movement rather than stalemate. At the same time most of the non-economic issues had not been wrapped up.<sup>23</sup>

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<sup>23</sup> SEIU does not argue that the City violated the MMBA by engaging in surface bargaining, except as it supports the premature declaration of impasse violation.

The City violated sections 3503, 3505, and 3506 of the MMBA by prematurely declaring impasse and unilaterally implementing the terms of its LBFO. Because the City's local rule defines impasse consistent with PERB precedent, the City by the same conduct violated PERB Regulation 32603, subdivision (g).

#### Implementation of an MOU

In *Modesto City Schools, supra*, PERB Decision No. 291, PERB held that held that an employer may implement the terms reasonably comprehended within its last, best, and final offer following good faith negotiations and completion of impasse procedures. (*Modesto City Schools, supra*, PERB Decision No. 291.) *Modesto* further held that it was an unfair practice for an employer to implement a duration clause that limited negotiations for a specified period of time even if that term was included in its LBFO.

MMBA section 3505.7 provides that, although a public agency may implement its last, best, and final offer after exhaustion of impasse procedures, it "shall not implement a memorandum of understanding." PERB has not addressed what constitutes unilateral implementation of an MOU in violation of the statute, as opposed to a package of terms and conditions reasonably comprehended within the LBFO. (See former sec. 3505.4)

In *Rowland Unified School District* (1994) PERB Decision No. 1053, PERB clarified the *Modesto* rule, acknowledging that because a duration clause is a negotiable subject, the employer could implement on such language. However, such a clause cannot operate to waive the union's right to bargain, and its implementation violates the statute if it limits the union's right to bargain. (*Id.* at pp. 11-12; *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S, p. 9.)

The imposed clause denied SEIU its right to reopen negotiations during the term as well as its ability to complete negotiations in the light of “changed circumstances.” The City Council’s resolution does not state in words the intention to implement an MOU. Nevertheless, SEIU asserts that imposition of an MOU resulted from the forfeiture of bargaining rights within the meaning of *Rowland* and *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74. SEIU provides no argument explaining how a mere negotiations waiver term constitutes the implementation of an MOU. Regardless, the City Council resolution adopted the City’s proposal for duration language that allowed unlimited reopeners and none to the union. Hughes ignored Osayande’s proposal for reopeners limited to the merit pay freeze, despite his expectation of a counter. The imposed clause deprived SEIU of the right to reopen negotiations, and possibly even complete negotiations in the face of “changed circumstances.”

The City unlawfully imposed a waiver of bargaining rights, in violation of sections 3503, 3505, and 3506 of the MMBA.

#### Refusal To Engage in “Changed Circumstances” Bargaining

SEIU contends that even if the City lawfully declared impasse in June, its July 7 meeting with the City broke the impasse and required the City to resume negotiations, which the City refused to do. Under *Modesto*’s “changed circumstances” rule, the party objecting to impasse must offer some concessions from its previous position sufficient to trigger the possibility for further give-and-take.

SEIU’s subsequent entreaty to the City, in which it offered unfettered control of scheduling to the point of merely accepting overtime if the City still insisted on no-weekend days off during 10 consecutive day shifts, was juxtaposed to what appeared to be an extremely

weak justification that instructions on unfinished work could not be transmitted between work crews, or that employees on the Saturday shift could not be trusted to complete their share of work. The City had deployed weekend coordinators throughout the weekend shifts. It is the job of supervisors to address just such issues.

The City's bargaining team asserted no movement from SEIU sufficient to bridge the gap. SEIU wanted to hone in on the one issue Hughes maintained was the key reason for impasse. By limiting its request to negotiate over the summer scheduling and signaling capitulation to all of the City's economic demands, SEIU demonstrated sufficient movement to constitute changed circumstances in the negotiations.

The City argues that the complaint does not allege this theory and therefore cannot be reached. The issue will be decided notwithstanding the lack of being pled in the complaint because it is intimately intertwined with the pleaded theories and was fully litigated. (*City of Selma, supra*, PERB Decision No. 2380-M, p. 15.) As to the merits, the City does not dispute that the duration clause language unreasonably deprived SEIU of bargaining rights, but asserts only that the City had legitimately declared impasse, a contention rejected above.

The City unlawfully refused to resume bargaining in the face of changed circumstances in violation of sections 3503, 3505, and 3506 of the MMBA.

#### REMEDY

MMBA section 3509, subdivision (b), states, in part:

The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board.

It has been found that the City failed to meet and confer in good faith in violation of MMBA sections 3505 and 3509, subdivision (b), and PERB Regulation 32603, subdivision (c),

by (1) prematurely declaring the parties were at impasse without satisfying its obligation to meet and confer in good faith with the SEIU and imposing its LBFO; (2) imposing a reopener clause allowing the City, but not SEIU unlimited reopeners over the course of a specified term during which terms and conditions were unilaterally imposed by the City; and (3) failing to resume negotiations following the breaking of the negotiations impasse as a result of SEIU's new proposals which constituted changed circumstances. The appropriate remedy in bargaining cases includes an order to cease and desist from the unlawful conduct, and to restore the status quo. (*Desert Sands Unified School District* (2004) PERB Decision No. 1682; *Regents of the University of California* (1994) PERB Decision No. 1077-H.) Restoring the status quo typically requires rescission of the unlawful conduct and to make employees whole for losses resulting from the unlawful conduct. (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 946.) Accordingly, the City is ordered to rescind its unilateral imposition of the LBFO, and make employees whole for actual losses that resulted from implementation of the LBFO until such time as the parties completed a successor MOU. Interest at the rate of 7 percent per annum will be added to any monetary loss. (*Ventura County Community College District* (2003) PERB Decision No. 1547; *The Regents of the University of California* (1997) PERB Decision No. 1188-H.) As such remedy may require calculations, offsets, and tax consequences considering furloughs and retirement deductions, an opportunity to discuss a negotiated solution may better serve the parties. Hence, this order shall be stayed for 45 days before submitting the matter to compliance to allow the parties an opportunity to consider whether a negotiated remedy is appropriate. If the parties decline to negotiate or are unable to reach an agreement within 45 days, this order shall then take effect. (*Ventura County Community College District, supra*, PERB Decision No.

1547.)

As a result of these violations, the City also interfered with the rights of employees to be represented by SEIU in violation of MMBA section 3506 and PERB Regulation 32603, subdivision (a), and denied SEIU its right to represent employees in their employment relations with the City in violation of MMBA section 3503 and PERB Regulation 32603, subdivision (b). Imposition of the reopener language also violated PERB Regulation 32603, subdivision (g). It is appropriate to order the City to cease and desist from such unlawful conduct. (*Rio Hondo Community College District* (1983) PERB Decision No. 292.)

Finally, it is appropriate that the City be ordered to post a notice incorporating the terms of the order at locations where notices to public employees are customarily posted for employees represented by SEIU. Posting such a notice, signed by an authorized agent of the City will provide employees with notice that the City has acted in an unlawful manner, it is required to cease and desist from such activity, and it will comply with the order. It effectuates the purposes of the MMBA that employees are informed of the resolution of this controversy and the City's readiness to comply. (*Placerville Union School District* (1978) PERB Decision No. 69.)

#### PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the City of San Ramon (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, and 3506, and Public Employment Relations Board (PERB) Regulation 32603, subdivisions (a), (b), (c), and (g) (Cal. Code of Regs., tit. 8, sec. 31001 et seq.), by (1) prematurely declaring the parties were at impasse without satisfying its obligation to meet and confer in good faith with the Service Employees

International Union Local 1021 (SEIU) and unilaterally imposing its last, best, and final offer; (2) unilaterally imposing a reopener clause allowing the City, but not SEIU, unlimited reopeners over the course of a specified term during which terms and conditions were unilaterally imposed by the City; and (3) failing to resume negotiations following the breaking of the negotiations impasse as a result of SEIU's new proposals, which constituted changed circumstances.

Pursuant to section 3509, subdivision (b), it is hereby ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith by prematurely declaring the parties are at impasse and unilaterally imposing its last, best, and final offer.

2. Unilaterally imposing a reopener clause allowing the City, but not SEIU, unlimited reopeners over the course of a specified term during which terms and conditions were unilaterally imposed by the City.

3. Failing to resume negotiations following the breaking of impasse as a result of SEIU's new proposals, which constituted changed circumstances.

3. Denying SEIU its right to represent bargaining unit employees in their employment relations with the City.

4. Interfering with the right of bargaining unit employees to be represented by the employee organization of their choosing.

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

1. Rescind imposition of the last, best, and final offer, and return to the

status quo as it existed before imposition on June 28, 2011, until such time as the parties completed a successor MOU.

2. Make all affected employees whole for loss of wages or benefits due to the City's violation of the MMBA, including interest at 7 percent per annum.

3. With regard to the make-whole remedy and the order to return to the status quo, this Order shall be stayed for 45 days to provide the parties an opportunity to meet and confer over a mutually acceptable remedy. In the event no agreement is reached within 45 days and the parties have not mutually agreed to an extension of time within which to do so, SEIU shall notify the General Counsel of PERB, or the General Counsel's designee, so that compliance proceedings may be initiated.

4. Within ten (10) workdays of the service of a final decision in this matter, post copies of the Notice, attached hereto as an Appendix, at all work locations where notices to employees in the City are customarily posted. The Notice must be signed by an authorized agent of the City, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to the physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with its employees in the bargaining unit represented by SEIU. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The City shall

provide reports in writing, as directed by the General Counsel or her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU.

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  
(916) 322-8231  
FAX: (916) 327-7960  
E-FILE: PERBe-file.Appeals@perb.ca.gov

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

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

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)