

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CITY OF FOLSOM,

Employer,

and

STATIONARY ENGINEERS, LOCAL 39,

Exclusive Representative.

Case No. SA-IM-151-M

Administrative Appeal

PERB Order No. Ad-423-M

June 11, 2015

Appearance: Kronick, Moskovitz, Tiedemann & Girard by Kristianne T. Seargeant, Attorney, and Office of the City Attorney by Bruce C. Cline, Attorney, for City of Folsom.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the City of Folsom (City) from an administrative determination (attached) by the Office of the General Counsel granting a request for factfinding by Stationary Engineers, Local 39 (Local 39) pursuant to the Meyers-Milias-Brown Act (MMBA)¹ and PERB regulations.² Concurrent with its appeal, the City has requested a stay of the administrative determination pending the Board's review of its appeal from the administrative determination, pursuant to PERB Regulation 32370.³

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

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

³ PERB Regulation 32370 provides: "An appeal will not automatically prevent the Board from proceeding in a case. Parties seeking a stay of any activity may file a request for a stay with the administrative appeal which shall include all pertinent facts and justification for the request. The Board may stay the matter, except as is otherwise provided in these regulations."

We have reviewed the case file in its entirety in light of the issues raised by the City's appeal and request for a stay. We find the administrative determination to be well reasoned and in accordance with applicable law. We deny the City's appeal and request for a stay, and adopt the administrative determination as the decision of the Board itself, as supplemented below.

The City's appeal argues that PERB lacks jurisdiction to refer the present dispute to factfinding because Local 39 is contractually barred from demanding to bargain the subject of this dispute and/or because the subject in dispute is outside the scope of representation. In either event, the City contends that Local 39's request for factfinding should be denied because negotiations cannot lawfully be at impasse. The City also maintains that Local 39's insistence to impasse on a non-mandatory subject of bargaining is a per se violation of its duty to bargain in good faith. The City also contends that PERB lacks jurisdiction to refer *any* single-issue dispute to factfinding.

The purpose of the MMBA is to establish a method of collective bargaining for the resolution of disputes between public agencies and the representatives of their employees. (MMBA, § 3500; *County of Contra Costa* (2014) PERB Order No. Ad-410-M, pp. 17-18.) To that end, in 2011, the Legislature enacted Assembly Bill No. 646 (Statutes 2011, ch. 680) (AB 646)⁴ to establish an advisory factfinding procedure for resolving post-impasse bargaining disputes under the MMBA. Factfinding under the MMBA is triggered when a recognized employee organization files a request that the parties' "differences" be submitted to a factfinding panel. (MMBA, § 3505.4, subd. (a).) The request must be filed with the appropriate regional office of PERB, accompanied by proof of service and a statement that the

⁴ AB 646 is codified at MMBA sections 3505.4 through 3505.7.

parties have been unable to effect a settlement, and the request must be filed within certain time frames described in MMBA section 3505.4, subdivision (a), and PERB Regulation 32802.

We have previously determined that, both the plain language and the legislative history of AB 646 indicate that the Legislature made MMBA factfinding available for *any* dispute over any matter within the scope of representation, so long as the employee organization's request is timely and the dispute is not subject to one of the statutory exceptions. (*County of Contra Costa, supra*, PERB Order No. Ad-410-M, pp. 10; *City of Redondo Beach* (2014) PERB Order No. Ad-409-M, pp. 5-7; see also MMBA, §§ 3505.4, subd. (a), and 3505.5, subd. (e) [statutory exceptions to factfinding].) PERB does not conduct or in any way oversee the factfinding process nor determine the issues to be presented at factfinding. The Board's role is generally limited to determining whether a request for factfinding meets the statutory criteria. (*City of Redondo Beach*.)

Local 39 requested factfinding within 30 days of declaring impasse and the City's appeal does not challenge the timeliness of that request. Local 39's request was therefore timely. (MMBA, § 3505.4, subd. (a); *City of Redondo Beach, supra*, PERB Order No. Ad-409-M.)

We next address the City's contention that Local 39's request for factfinding is defective because it involves no mandatory subject of bargaining. Although the City disputes whether it has engaged in *meeting and conferring* within the meaning of MMBA section 3505 or simply held informal discussions with Local 39, it does not dispute the Office of the General Counsel's determination that the underlying dispute concerns the effects of the City's decision to institute a reclassification affecting members of Local 39's bargaining unit. The California Supreme Court has determined that classification and reclassification decisions are within the

scope of representation. (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 662-664.) Employee compensation, i.e., “wages,” is a statutorily enumerated subject and is thus also negotiable either in its own right or as an effect of a non-negotiable decision. (MMBA, § 3504.)

PERB’s designation of a subject as negotiable is a *statutory* designation. (MMBA, §§ 3505, 3509, subd. (a); EERA,⁵ § 3541.3, subd. (b).) Although a matter contained within a collective bargaining agreement is fixed for the duration of the agreement (*Glendale City Employees’ Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 335-337; *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1224), negotiable subjects do not cease to be designated as such simply because they are included within a collective bargaining agreement. (*Allied Chem. & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division* (1971) 404 U.S. 157, 187.)⁶ The fact that a subject is included in a collective bargaining agreement may affect the parties’ ability to make changes to that subject during the term of the agreement, but its inclusion in the agreement does not transform a mandatory subject of bargaining into a non-mandatory subject, nor cause a non-mandatory subject to become mandatory. (MMBA, §§ 3504, 3505; see also *North Bay Development Disabilities Services, Inc. v. NLRB* (D.C. Cir. 1990) 905 F.2d 476, 480.) We therefore reject the City’s contention that the present dispute is inappropriate for factfinding because it does not affect any mandatory subjects of bargaining.

⁵ The Educational Employment Relations Act (EERA) is codified at section 3540 et seq.

⁶ When interpreting the MMBA, PERB may take guidance from authorities interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 617.)

Because we have previously rejected the argument that MMBA factfinding is not available for single-issue disputes, we need not repeat that discussion here. (*County of Contra Costa, supra*, PERB Order No. Ad-410-M, p. 10.) However, the City's appeal raises the additional objection that Local 39 is contractually barred from bargaining over the matter in dispute. Because we have previously determined that the plain language and legislative history of AB 646, and the underlying purpose of the MMBA, indicate that the Legislature intended to make MMBA factfinding available for *any* dispute over any matter within the scope of representation so long as the employee organization's request is timely and the dispute is not subject to one of the statutory exceptions, we find nothing in the statute authorizing PERB to exclude the present dispute from proceeding to factfinding. To the extent the City may assert waiver by contract or another contract-based defense to bargaining over the subjects encompassed by this dispute, it may raise those arguments in unfair practice proceedings.

We also decline to address the City's contention that Local 39's request for factfinding is defective because the impasse declared by Local 39 was the result of its insistence on a non-mandatory subject of bargaining, allegedly in violation of Local 39's duty to bargain under the MMBA. Although PERB has broad authority to "investigate unfair practice charges or alleged violations of [the MMBA], and [to] take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of [the MMBA]," and to "take any other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of [the MMBA]" (MMBA, § 3509, subd. (a); EERA, § 3541.3, subds. (i) and (n)), the Board need not invoke its unfair practice jurisdiction to decide whether a dispute is appropriate for factfinding under MMBA

section 3505.4. (*City of Redondo Beach, supra*, PERB Order No. Ad-409-M, pp. 5-7; *County of Contra Costa, supra*, PERB Order No. Ad-410-M, pp. 12-13.) As we explained in *City & County of San Francisco* (2014) PERB Order No. Ad-415-M, PERB's unfair practice proceedings are better suited to resolving the often complex legal and factual issues raised by unfair practice allegations and for protecting the parties' rights to notice and meaningful opportunity to be heard before issues of liability are decided. (*Id.* at pp. 13-14.) To the extent Local 39 is alleged to have engaged in unlawful conduct to bring about the impasse on which its request for factfinding relies, the City's remedies lie in PERB's unfair practice proceedings, rather than an administrative appeal and request to stay an administrative determination.

ORDER

The City of Folsom's appeal from the administrative determination and request for stay in Case No. SA-IM-151-M is hereby DENIED.

Chair Martinez and Member Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
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March 12, 2015

John Spittler, Human Resources Director
City of Folsom
50 Natomas Street
Folsom, CA 95630

Charlie Solt, Business Representative
Stationary Engineers, Local 39
337 Valencia Street
San Francisco, CA 94103

Re: City of Folsom
Case No. SA-IM-151-M
MMBA Factfinding Request
Administrative Determination

Dear Interested Parties:

On February 23, 2015, the Stationary Engineers, Local 39 (Local 39 or Union) filed a request for factfinding with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.¹ Local 39 asserts that it and the City of Folsom (City) have been unable to effect a settlement in their negotiations regarding the effects on certain bargaining unit members' terms and conditions of employment arising from the City's decision to institute a "reclassification/reassignment." Local 39 gave the City written notice of declaration of impasse by letter dated January 21, 2015, which was received by the City on January 23, 2015.

On February 25, 2015, the City's Human Resources Director John Spittler, provided the City's position statement opposing the request. On February 27, 2015, Local 39 District Representative Charlie Solt, provided the Union's response.

Factual Background

Local 39 is the exclusive representative of the employees in the City's Miscellaneous Bargaining Unit.

The parties' are signatories to a Memorandum of Understanding (MOU) that is in effect from November 1, 2013 to June 30, 2016. Article III, subdivision 13 states in part that it is for the

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

City, "To determine minimum qualifications, skills, abilities, knowledge, selection procedures and standards, and job classifications, and to reclassify employees." Article XI, subdivision 2 states, "Article XI, POSITION CLASSIFICATION, Section 1, Employee Classification Study Requests, shall be amended to freeze submission and consideration of Employee Classification Study Requests for the term of this MOU."

On July 22, 2014, Local 39 received an e-mail message from the City, regarding the City's decision to increase the compensation of certain bargaining unit members retroactive to July 1, 2014.

On September 3, 2014, Local 39 and the City met regarding the July 22, 2014 notification.

On September 25, 2014, Local 39 requested another meet and confer session to discuss this issue.

On November 24, 2014, Local 39 and the City met again to discuss the City's decision. During this session, Local 39 provided the City with a written proposal. The City did not respond to the proposal, but verbally agreed "to review more classifications for possible compensation adjustments and to follow up on other matters raised by Local 39, prior to meeting again." (Local 39's Response (Feb. 27, 2014), p. 1.)

Subsequently, the City did not take any further action with respect to this issue.

On January 21, 2015, Local 39 sent the following letter to the City:

Six months have elapsed since Local 39 was notified by your office about the reclassification and compensation adjustment of several of our bargaining unit classifications. At the time, we formally requested to meet and confer, and submitted an information request. The City responded to the information request, and two meet and confer sessions took place. During the second meet and confer session Local 39 submitted a proposal.

No progress has been realized in addressing impact issues and concerns raised by Local 39. We believe impasse has occurred because the City has taken no affirmative action to address Local 39's concerns and we request to involve the support of a mediator to help facilitate a resolution to this impasse.

Please contact me at your earliest convenience to make the necessary arrangements.

On January 27, 2015, the City declined to participate in mediation, but did offer to "meet and discuss" all issues with Local 39.

Local 39's February 23, 2015 MMBA Factfinding Request states, "The City of Folsom and Local 39 have been unable to reach an agreement over the effects on employees terms and

conditions of employment of the City's decision to institute a 'reclassification/reassignment affecting members of Local 39.'"

The City's opposition focuses primarily on the negotiated terms of the parties' MOU, and asserts that mediation and factfinding are "inapplicable and unwarranted in these circumstances" because the Union has forgone its right to negotiate this issue. (City's Opposition (Feb. 25, 2015), p.1.) The City asserts that the parties were not engaged in negotiations over a mandatory subject of bargaining, and therefore were unable to reach an "impasse," but rather were participating in an informal information exchange in the interest of promoting harmonious labor relations. (*Ibid.*) The City further asserts that the request is an attempt to circumvent the provisions of the MOU, XI, subdivision 2, that serves to prohibit the Union from requesting a reclassification during the term of the parties' agreement.

On March 2, 2015, the parties were informed via e-mail message that Local 39's Factfinding Request had been granted by the undersigned Board agent.²

Discussion

MMBA section 3505.4, subdivision (a),³ provides as follows:

The employee organization may request that the parties' differences be submitted to a factfinding panel . . . If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party

² The e-mail message stated as follows,

As you know, on February 23, 2015, the Stationary Engineers, Local 39 filed a Request for Factfinding with PERB in the above-referenced matter. The purpose of this e-mail message is to notify the parties that pursuant to PERB Regulation 32802, subsection (c), the Request is hereby granted. A written administrative determination confirming this decision will be provided to the parties within the next ten (10) days.

Please note that a party's timelines to appeal the administrative determination to the Board itself do not begin until the administrative determination has been served on the parties. (See PERB Regulations 32147(a), 32350, 32360, 23802 and 61006.)

³ The factfinding provisions were added to the MMBA by Assembly Bill 646 (Stats. 2011, Ch. 680, § 2) and amended by Assembly Bill 1606 (Stats. 2012, Ch. 314, § 1.) The amendment, which added the language about either party providing written notice of declaration of impasse, was intended to be technical and clarifying of existing law. (Stats. 2012, Ch. 314, § 2.)

provided the other with a written notice of a declaration of impasse. . . .

PERB Regulation 32802 provides as follows:

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. . . .

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

The parties did not submit the bargaining dispute to mediation or select a mediator. Therefore, Local 39's factfinding request is based upon the written notice of a declaration of impasse by the Union. Local 39's letter to the City, received on January 23, 2015, constitutes a written notice of declaration of impasse, within the meaning of section 3505.4. The instant factfinding request was timely filed within thirty days, on February 23, 2015.

Accordingly, the instant factfinding request does satisfy the requirements of MMBA sections 3505.4 and 3505.5, and PERB Regulation 32802.

Next Steps

The instant request satisfies the requirements of PERB Regulation 32802 in that it was timely filed, based upon a written notice of declaration of impasse, and identifies the dispute subject to factfinding. Each party must select its factfinding panel member and notify this office in writing of his/her name, title, address and telephone number no later than March 20, 2014.⁴ Service and proof of service are required.

The résumés of seven factfinders, drawn from the PERB Panel of Neutrals, are being provided to the parties via electronic mail.⁵ The parties may mutually agree upon one of the seven, or may select any person they choose, whether included on the PERB Panel of Neutrals or not. In no case, however, will the Board be responsible for the costs of the chairperson.

If the parties select a chair, the parties should confirm the availability of the neutral, prior to informing PERB of the selection.

⁴ This deadline, and any other referenced, may be extended by mutual agreement of the parties.

⁵ The seven neutrals whose résumés are being provided are Elinor Nelson, Paul Roose, Carol Vendrillo, John Wurmuth, John LaRocco, Ronald Hoh, and Catherine Harris.

Unless the parties notify PERB, on or before March 20, 2015, that they have mutually agreed upon a person to chair their factfinding panel, PERB will appoint one of these seven individuals to serve as chairperson.

Right to Appeal

Pursuant to PERB Regulations, an aggrieved party may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid.*)

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

The Board's address is: Public Employment Relations Board
 Attention: Appeals Assistant
 1031 18th Street
 Sacramento, CA 95811-4124
 Telephone: (916) 322-8231
 Facsimile: (916) 327-7960
 E-File: PERBe-file.Appeals@perb.ca.gov

If a party appeals this determination, the other party(ies) may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Service

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

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Extension of Time

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

Sincerely,

Wendi L. Ross
Deputy General Counsel