

DISCUSSION

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c),² PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)³ Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Assn. v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Grant Joint Union High School District (1982) PERB Decision No. 196.)

While health care premiums are a matter within the scope of representation (Trustees of the California State University (1996) PERB Decision No. 1174-H; Temple City Unified School District (1990) PERB Decision No. 841), however, we find that the Association did not meet the first criterion by showing that the City changed its policy. The Association argues that an alleged past practice of parity among bargaining units, based upon a statement made during negotiations, should supersede language in the memorandum of understanding (MOU).

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

³When interpreting the MMBA, it is appropriate to take guidance from cases 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 [116 Cal.Rptr. 507].)

The Association argues that the Board agent misread MOU Article 53, the zipper clause, to preclude negotiations over this alleged past practice.

Both parties argue that Marysville Joint Unified School District (1983) PERB Decision No. 314 (Marysville) supports their positions. In Marysville, at pages 8-9, the Board held:

An employer violates its duty to negotiate in good faith when it unilaterally changes an established policy affecting a negotiable subject matter without affording the exclusive representative a reasonable opportunity to bargain. (Citations.) Established policy may be embodied in the terms of a collective agreement (citation) or, where a contract is silent or ambiguous as to a policy, it may be ascertained by examining past practice or bargaining history. (Citations.) However, where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning.
(Emphasis added.)

There is no dispute that MOU Article 34 provides a schedule of employer health care premiums for the duration of the MOU. In addition, assuming that a past practice existed, the MOU does not contain any provision for health premium parity among bargaining units.

MOU Article 53, the zipper clause, provides, in pertinent part:

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the full right and adequate opportunity to make demands and proposals with respect to any subject or matter within the scope of representation, that the understandings arrived at after the exercise of that right are set forth in this Agreement. The express provisions of this Agreement for its duration, therefore, constitute the complete and total contract between the City and MCEA with respect to wages, hours and other terms and conditions of employment. Any prior or existing Agreement between the parties, whether formal or informal, regarding any such matters is hereby superseded and terminated in its entirety. The parties voluntarily waive the right to meet and confer in good faith with respect to any subject or matter referred to or covered in this Agreement, except that the parties, by mutual agreement, may meet and confer and agree to amend any matter in this Agreement, including compensation; provided, however, that the City may make changes to the personnel rules consistent with rights MCEA has to meet with the City prior to implementation of such changes.

.....

All pertinent ordinances and resolutions shall be revised to conform with this Agreement. All other ordinances, resolutions, rules and regulations, practices and policies shall continue in force and effect during the term of this Agreement unless modified according to the provisions of this Agreement. (Emphasis added.)

Here, the language is not “silent or ambiguous.” The above provision clearly and unambiguously precludes bargaining “with respect to any subject or matter referred to or covered in this Agreement” absent the mutual agreement of the parties. Although the Association cites the last sentence in the last paragraph to support its position, the Association ignored the phrase “all other” and “unless modified according to the provisions of this agreement” in interpreting this sentence. In this context, we conclude that under MOU Article 53, the express provision setting a health benefit premium payment schedule in MOU Article 34 supersedes the alleged past practice of premium parity among bargaining units. This finding conforms to the holding in Marysville, cited above.

Finally, the Association cites Los Angeles Community College District (1982) PERB Decision No. 252 (LACCD) for the principle that zipper clauses should not preclude negotiations over health benefit parity. In effect, the Association argues that the City should have invoked the zipper clause when Modesto Police Officers Association and Modesto Police Management Association sought to negotiate health benefit premiums. In LACCD, the employer unilaterally changed shifts from those set forth in the contract without providing notice or opportunity to bargain to the union. The employer cited a contractual zipper clause, stating that it precluded the employer from having to negotiate the shift changes. Here, the Board held that the zipper clause did not accord the right to the employer to unilaterally change

or eliminate shifts. The Board also held that the zipper clause did not clearly and unmistakably waive a right to negotiate, stating:

The purpose of a zipper clause is to foreclose further requests to negotiate regarding negotiable matters, even if not previously considered, during the life of a contract. It does not, however, cede to the employer the power to make unilateral changes in the status quo.

We do not see the applicability of this case to the instant matter. In this case, there is no dispute that the parties have agreed to a health care premium schedule in Article 34 of the MOU and that there is no provision in the MOU establishing parity in premium payments among bargaining units. There is no argument that the City has breached Article 34. We also reject the Association's argument that the City breached the MOU through its strained interpretation of the last paragraph of the zipper clause. We, therefore, find that there is no breach of the MOU. We further find that under Article 53 of the MOU, the City is not obligated to negotiate a change to Article 34. Consequently, the City did not make an unlawful change in policy and thus did not violate the MMBA.

ORDER

The unfair practice charge in Case No. SA-CE-193-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neima joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8387
Fax: (916) 327-6377



February 5, 2004

W. Robert Phibbs, Attorney
Goyette & Associates
1300 G Street, Suite 200
Modesto, CA 95354

Re: Modesto City Employees Association v. City of Modesto
Unfair Practice Charge No. SA-CE-193-M
DISMISSAL LETTER

Dear Mr. Phibbs:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 14, 2003. The Modesto City Employees Association (MCEA) alleges that the City of Modesto (City) violated the Meyers-Milias-Brown Act (MMBA)¹ by failing to maintain the status quo of health benefits parity for employees in the unit MCEA represents.

I indicated to you in my attached letter dated January 13, 2004, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to January 23, 2004, the charge would be dismissed.

You were granted an additional week to respond to the questions raised in my letter. On January 30, 2004, you filed an amended charge in which you respond to my discussion of the PERB precedent in the area, chiefly Marysville Joint Unified School District (1983) PERB Decision No. 314.

The basis of your amended charge is that PERB should ignore contractual language that is "clear and unambiguous" in order to find the City failed to maintain MCEA parity with other City recognized employee organizations in health premium cost coverage. You point out that, the Board indicated in Marysville, supra that "Absent any evidence of bargaining history, we cannot infer the parties intended to attach a meaning to... their agreement contrary to its plain meaning."

You assert that the City's maintenance of parity for ten years and the City's representatives comments in 2000 that all units will "be treated the same" created a past practice and evidence

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

of bargaining history that should allow the Board to issue a complaint. You would have PERB connect the dots and draw an inference that Article 53 when it states "Any prior or existing Agreement between the parties, whether formal or informal, regarding any such matters is hereby superceded and terminated in its entirety..." does not mean what it says in this circumstance.

As I indicated, the language of Articles 53 and 34 of the current MOU between MCEA and the City establishes a rate of employer contributions for employee healthcare costs which may be altered if both parties agree to reopen discussions. The City indicated it did not wish to reopen those discussions with MCEA pursuant to Article 53.

Based on the clear language of the parties written agreement, I cannot find a violation of the status quo. The Board stated that in determining whether a past practice supercedes contract language, held that "...where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning." To find the contract does not state what it clearly does, creates a slippery slope for PERB to follow, and one in which you have provided no other authority. Therefore, I am dismissing the charge based on the facts and reasons contained in my January 13, 2004, letter.

Right to Appeal

Pursuant to PERB Regulations,² you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

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

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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

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

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

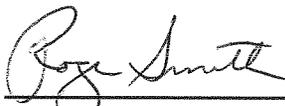
A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document.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

Final Date

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

Sincerely,

ROBERT THOMPSON
General Counsel

By 

Roger Smith
Labor Relations Specialist

Attachment

cc: Kyla Cristoffersen

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
 1031 18th Street
 Sacramento, CA 95814-4174
 Telephone: (916) 327-8387
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January 13, 2004

W. Robert Phibbs, Attorney
 Goyette & Associates
 1300 G Street, Suite 200
 Modesto, CA 95354

Re: Modesto City Employees Association v. City of Modesto
 Unfair Practice Charge No. SA-CE-193-M
WARNING LETTER

Dear Mr. Phibbs:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 14, 2003. The Modesto City Employees Association (MCEA) alleges that the City of Modesto (City) violated the Meyers-Milius-Brown Act (MMBA)¹ by failing to maintain the status quo of health benefits parity for employees in the unit MCEA represents.

Investigation of the charge revealed that MCEA and the City are parties to a written agreement that has a term of 8/1/2000 – 7/25/05. In 2000 during negotiations for the current agreement, City representatives committed to MCEA that “All bargaining units were equally valued”, and “All bargaining units will be treated the same.” Subsequently, Modesto Police Officers Association (MPOA) and Modesto Police Management Association (MPMA) accepted the offer that the City had made to MCEA for the following monthly premium payments for health, vision and dental plans.

2000	\$386.76
2001	\$416.76
2002	\$456.76
2003	\$486.76
2004	\$516.76

The amount the City contributes to employee benefits was agreed to by MCEA and became effective August 1 of each year through Article 34 of the MOU.

Modesto City Fire Fighters Association (MCFFA) and the City failed to reach agreement in 2000. The City’s proposal was ultimately implemented, but through an arbitration award

¹ The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

issued on May 2, 2002. The amounts of healthcare premium costs for employees in MCFFA's unit were increased as follows:

1/1/2000	\$406.63
7/31/2001	\$451.63
7/30/2002	\$506.63
7/29/2003	\$571.63
12/30/2003	\$646.63

Following notice of the arbitration award involving MCFFA, representatives of MPOA and MPMA sought to have the City alter the employer's contributions to healthcare costs for employees in their units. The City agreed to reopen negotiations with MPOA and MPMA and on February 11, 2003, the City Council agreed to new rates with both of those employee organizations. The new rates for those units were:

3/25/03	\$556.76
8/1/03	\$656.76
8/1/04	\$731.76

In addition, a newly established unit of management and confidential employees reached agreement with the City. That unit's agreement provides the following monthly employer contributions for premium costs:

8/1/03	\$571.76
8/1/04	\$676.76

On July 3, 2003, MCEA made a demand to meet and confer with the City based on the past practice of maintaining equal health benefits for all employees. On August 14, 2003, the City citing the state's fiscal crisis, declined MCEA's demand. Through this charge MCEA asserts that the City has failed to maintain status quo, that is, parity with other employee organizations in the amount of the employer's health premium contributions.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),² PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)³ Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive

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representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Association v. City of Stockton (1984) 161 Cal.App.3d 813; Grant Joint Union High School District (1982) PERB Decision No. 196.)

In this case, the matter of employer contributions to healthcare premium costs is clearly within scope. However, the current MOU does establish the ongoing employer contribution rates through 2005 for employees in the unit. There is no reference in the agreement that you have cited which provides for parity or a "me too" provision. Article 53 of the 2000 – 2005 MOU Full Understanding Modification and Waiver states:

The parties acknowledge that during negotiations which resulted in this Agreement, each had the full right and adequate opportunity to make demands and proposals with respect to any subject or matter within the scope of representation, that the understanding arrived at after the exercise of that right are set forth in this Agreement. The express provisions of this Agreement for its duration, therefore, constitute the complete and total contract between the City and MCEA with respect to wages, hours and other terms and conditions of employment. Any prior or existing Agreement between the parties, whether formal or informal, regarding any such matters is hereby superceded and terminated in its entirety. The parties voluntarily waive the right to meet and confer in good faith with respect to any subject or matter referred to or covered by this Agreement, except that the parties, by mutual agreement, may meet and confer and agree to amend any matter in this Agreement, including compensation: provided, however, that the City may make changes to the personnel rules consistent with rights MCEA has to meet with the City prior to implementation of such changes.

In Marysville Joint Unified School District (1983) PERB Decision No. 314 the Board, in determining whether a past practice supercedes contract language, held that ... "where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning." The language of Articles 53 and 34 of the current MOU between MCEA and the City establishes a rate of employer contributions for employee healthcare costs which may be altered if both parties agree to reopen discussions. The City does not at this time wish to reopen those discussions pursuant to Article 53. Therefore, the claim that the City has failed to maintain status quo does not comport with the Full Understanding Article of the MOU.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a

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January 13, 2004
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standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before January 23, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

A handwritten signature in cursive script that reads "Roger Smith".

Roger Smith
Labor Relations Specialist

RCS