STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BURBANK CITY EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF BURBANK, Respondent.	Case No. LA-CE-326-M PERB Decision No. 1988-M November 25, 2008

Appearances: Edward R. Purcell, Labor Consultant, for Burbank City Employees Association; Carol A. Humiston, Senior Assistant City Attorney, for City of Burbank.

Before Neuwald, Chair; Rystrom and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by the City of Burbank (City) to the proposed decision of an administrative law judge (ALJ). The unfair practice charge filed by the Burbank City Employees Association (Association) alleged that the City violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to provide the Association with requested information necessary and relevant to the Association's representation of its member, City public works employee Willard Moore (Moore), in a disciplinary arbitration. The ALJ found that the City committed the charged violation.

The Board has reviewed the entire record in this case, including but not limited to, the unfair practice charge, the complaint and answer, the hearing transcripts and exhibits, the

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

ALJ's proposed decision, the City's exceptions and the Association's response thereto. Based on this review, we affirm the violation found by the ALJ for the reasons discussed below.

BACKGROUND

Events Leading up to the Association's Information Request

On May 9, 2006, the City served Moore with a Notice of Proposed Three-Day Suspension Without Pay. The City proposed to discipline Moore for his failure to comply with the City's Public Works Department Attendance Standards Policy. Specifically, the notice charged Moore with a violation of Article XIV, Section A, Subsection 2(A) and (S) of the memorandum of understanding (MOU) between the City and the Association.[2] In its discussion of the facts underlying the charge, the notice referenced a 2002 proceeding before the United States Department of Labor regarding Moore's use of leave under the Family and Medical Leave Act (FMLA). Attached to the notice were 16 documents upon which the charge was based. The City sent a copy of the notice to the Association's president.

On May 31, 2006, the City served Moore with a formal Notice of Three-Day Suspension. The notice contained a finding that Moore did violate Article XIV, Section A, Subsection 2(A) and (S) of the MOU. The discussion of the facts underlying the finding was identical to that in the proposed notice. The notice also informed Moore that he had a right to

[2]Subsection 2 states, in relevant part:

> Suspension, demotion, or dismissal of an employee may be accomplished for any one or more of the following reason[s]:
>
> (A) Violation of any official regulation or order or failure to obey any proper direction made and given by a superior, or failure to comply with any condition of employment or to maintain any necessary qualification in the course of municipal employment;
>
> (S) Violation of administrative rules and regulations.

appeal the suspension pursuant to Article XIII of the MOU. Again, the City sent a copy of the notice to the Association's president.

Article XIII of the MOU provides two separate grievance procedures. Section C provides for advisory arbitration that may be initiated by the Association or an individual employee. Section D is available to an employee only "with the approval of the [Association]." It provides for arbitration that "shall be binding upon the grievant, but only advisory respective to the City, and subject to review by the City Manager." Section E of Article XIII states that disciplinary actions may only be appealed through the Article XIII grievance procedures "and shall not be subject to the jurisdiction of the Civil Service Board."

On June 23, 2006, the Association's president sent the City a letter appealing Moore's suspension pursuant to Article XIII, Section D. The letter requested that the matter be scheduled for arbitration. Sometime thereafter, the Association retained Labor Consultant Edward R. Purcell (Purcell) to represent Moore in the arbitration proceedings. On or about August 18, Purcell received copies of the notices and supporting documents from the Association.

The Association's Information Request

On September 1, 2006, Purcell sent a letter to Assistant City Attorney, Jina Oh (Oh), who had been assigned to represent the City in Moore's arbitration. The letter informed Oh that the Association had retained him to represent Moore in the disciplinary arbitration. It then requested "the following documents and information concerning the various charges against Mr. Moore:"

> 1. Copies of all written requests made by the City to Mr. Moore requesting medical certification, documentation, or verification of any kind for sick leave hours used by Mr. Moore during the course of his Burbank employment.

2. Pursuant to number 1 above, copies of all written information provided to the City by Mr. Moore in response to its requests.

3. A list of all dates on which the City made verbal requests to Mr. Moore for medical certification, documentation, or verification of any kind for sick leave hours used by Mr. Moore during the course of his Burbank employment.

4. Any information in the possession of the City or its managers concerning verbal responses made by Mr. Moore in conjunction with number 3 above.

5. Copies of all municipal law, rules or regulations maintained by the City concerning its administration of or compliance with the federal Family Medical Leave Act (FMLA).

6. A list of all BCEA employees granted sick leave without pay by the City pursuant to Article VI, H of the MOU for the past 2 years.

7. All records in the City's possession concerning Mr. Moore's previous complaint to the U.S. Dept. of Labor concerning the City's failure to afford him FMLA leave as referenced in point 3, para[graph] 5 of the May 9, 2006 disciplinary notice.

The letter asked the City to "transmit the requested information as soon as possible." It also informed Oh that the Association president would be contacting her with six possible arbitration hearing dates. On September 5, 2006, the parties agreed to hold the arbitration hearing on December 7 and 8, 2006.

The City's Response

On September 5, 2006, Oh e-mailed eight City employees in the human resources and public works departments. Her e-mail informed them of the dates for Moore's arbitration hearing and asked each of them to attend a meeting to determine which of them had documents and information responsive to the Association's information request.

On September 13, 2006, Oh and the eight e-mailed employees met to discuss the information requested by the Association. It appears from the record that the participants were

able to identify where the information was located but none produced anything to Oh at the meeting. Oh testified that over the following weeks she received information sporadically from the meeting attendees.

Having received no response from the City, Purcell sent a letter to Oh on September 26, 2006 inquiring about the information he had requested on September 1. On October 2, Oh responded by letter that the City was in the process of gathering the information and "you should receive any further documentation by mid-October."

On October 26, 2006, Oh sent Purcell a letter stating:

> This letter is in response to your request for documents dated September 1, 2006. After due consideration it is the position of the City that your client, Willard Moore, through the Burbank City Employees Association (BCEA) has already been provided with all of the documents pertaining to the arbitration scheduled for December 7th and 8th, 2006. The documents you have requested are immaterial and overbroad and beyond the scope of what is necessary for the arbitration. In addition, item number 6 is not only irrelevant to the issue at hand but is protected under medical and general privacy rights of the employees in question.

The letter then listed each of the seven items of information requested in the September 1, 2006 letter. Items one through four were labeled "Immaterial and overbroad" with no further explanation. Item six was labeled "Immaterial, overbroad, protected under medical and general privacy rights." Item seven was labeled simply "Immaterial." Attached to the letter was the City's sick leave policy in response to item five.

The Association's Second Request and the City's Response

On November 3, 2006, Purcell sent a response to Oh's October 26 letter. In his letter Purcell stated: "My intent here is to renew the Union's September 1 request for material necessary for it to defend the charges against Mr. Moore." The letter then explained why the Association believed each of the seven items of requested information was relevant to its

representation of Moore. With regard to item six, the request for information about employees who had taken unpaid sick leave under Article VI, Section H of the MOU, the letter asked the City to provide the Association with "specific citations" to the "medical and general privacy" rights asserted by the City as its reason for not producing the information. Additionally, the letter stated the Association was "willing to receive such information in redacted form, protecting the names of the employees in question."

Oh responded by letter on November 9, 2006. The letter stated that the only issue in the Moore arbitration was "whether or not a three day suspension is appropriate discipline." It then stated that the City had provided the Association with all of the documents pertaining to this issue and therefore "your request for further documentation is immaterial, overbroad and beyond the scope of what is necessary for this arbitration." The Association filed its unfair practice charge with PERB on November 16.

On November 22, 2006, Purcell and Oh participated in a conference call with Sara Adler (Adler), the arbitrator presiding over Moore's hearing. During the call, Purcell and Oh agreed to limit the scope of information to be provided by the City to the two years prior to the events underlying Moore's discipline. Adler then ordered the City to produce information from the prior two years that was responsive to the Association's entire September 1 request. By the first hearing date on December 8,[3] the City had provided the Association with some of the responsive information. The remainder of the information was produced by the City's witnesses during the course of the arbitration hearing. On December 26, the Association amended its charge with PERB to include the facts outlined above.

[3]The hearing did not begin on December 7, 2006 as scheduled because the arbitrator was ill.

ALJ's Proposed Decision

The ALJ concluded that the City violated its duty to meet and confer in good faith by failing to provide the Association with the information it requested in a timely manner or, in the alternative, adequately justifying why it could not provide the information. Because the Association had received all of the requested information by the end of the arbitration hearing, the ALJ did not order the City to provide the information. Thus, the ALJ's remedy consisted of a cease and desist order and notice posting.

City's Exceptions

In its exceptions, the City claims it had no duty to provide the requested information because: (1) MMBA section 3505 does not apply to disciplinary arbitrations; and (2) the discovery provisions of the California Arbitration Act (CAA)[4] trump any duty to provide information under MMBA. The City also asserts that the Association waived its right to the requested information by not providing for arbitration discovery in the MOU. The City further excepts on the ground the ALJ failed to make specific findings that the information requested by the Association was "necessary and relevant" to Moore's disciplinary arbitration and was not provided in a timely manner. Finally, the City argues that PERB should defer to the arbitrator's ruling on the relevancy of the requested information.

Association's Response to Exceptions

The Association responds that the City's claims that it had no duty to provide the requested information are meritless and that the ALJ found the requested information relevant because the City failed to establish any recognized defense to its failure to provide the information. The Association also takes issue with the City's interpretation of several PERB decisions upon which the City relies in its exceptions.

[4]CAA is codified at Code of Civil Procedure section 1280 et seq.

DISCUSSION

1. Duty to Provide Information Relevant to Contractual Disciplinary Arbitration

It is a long-established principle of labor law that a recognized employee organization "is entitled to all information that is necessary and relevant to discharging its duty to represent unit employees." (Stockton Unified School District (1980) PERB Decision No. 143 (Stockton); NLRB v. Acme Industrial Co. (1967) 385 U.S. 432, 435-436 [64 LRRM 2069] (Acme Industrial).)[5] Absent a valid defense, an employer's refusal to provide such information upon request is a per se violation of the employer's duty to meet and confer in good faith. (Stockton; Curtiss-Wright Corp. v. NLRB (3d Cir. 1965) 347 F.2d 61 [59 LRRM 2433].) MMBA section 3505 requires public agencies and recognized employee organizations to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment." Therefore, a public agency employer's refusal to provide "necessary and relevant" information to a recognized employee organization upon request violates MMBA section 3505. (Town of Paradise (2007) PERB Decision No. 1906-M.)

The City does not dispute these fundamental principles. Nonetheless, it argues that the duty to provide information does not apply to disciplinary arbitrations. After an exhaustive recitation of the legislative history of Section 3505, the City concludes that the legislature did not intend for the duty to extend beyond the meet and confer process. Thus, the City asserts, because disciplinary arbitration is not a part of the meet and confer process but rather "an adversarial proceeding" that does not contemplate the exchange of information, Section 3505 does not apply to such proceedings.

[5]When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act (NLRA) and California labor relations statutes with parallel provisions. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

Though we have found no authority that supports the City's argument, the City contends that in Los Angeles Unified School District (1994) PERB Decision No. 1061 (LAUSD), "PERB held that the right to receive information under the EERA does not extend to a disciplinary arbitration proceeding." This contention misinterprets the case. The issue before the Board in LAUSD was whether information requested by a union for the purpose of representing a member in a disciplinary hearing before the district personnel commission was entitled to a presumption of relevance. The separate opinions by the three panel members focused on the fact that the information was requested for use in a forum not created by the parties' collective bargaining agreement (CBA). Nowhere in its decision did the Board address the employer's duty to provide information for use in a contractual disciplinary forum. Thus, because the Association requested information for the purpose of representing Moore in a disciplinary arbitration proceeding created by the parties' MOU, LAUSD does not apply here.

While PERB has not explicitly addressed whether an employer has a duty to provide information relevant to a contractual disciplinary arbitration, it has addressed the duty in the context of a disciplinary grievance. In Hacienda La Puente Unified School District (1997) PERB Decision No. 1184 (Hacienda La Puente), the Board held that an employer has a duty to provide information relevant to a disciplinary grievance. The Board began its analysis by observing:

> The employer's duty to furnish information, like its duty to bargain, 'extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.' (Acme Industrial.) This includes information needed to police and administer an existing CBA, including grievance processing. (Chula Vista City School District (1990) PERB Decision No. 834; Modesto City Schools and High School District (1985) PERB Decision No. 479; Acme Industrial.)

The Board then found that the school district committed an unfair practice by refusing to provide the union with a requested "letter/incident report" which may have served as the basis for the reprimand grieved by the employee.

PERB also has not addressed whether the duty to provide information continues once the grievance proceeds to arbitration. However, the National Labor Relations Board (NLRB) has ruled that an employer has "an obligation to furnish information to the Union in order to assist it in properly preparing for arbitration if the information requested was relevant to the grievance scheduled for arbitration." (Montgomery Ward and Co. (1978) 234 NLRB 588, 589 [98 LRRM 1022]; The Kroger Co. (1976) 226 NLRB 512, 514 [93 LRRM 1315].)[6] Of particular significance to this case, the NLRB has held that an employer's refusal to provide information relevant to a pending contractual disciplinary arbitration was an unfair labor practice. (NLRB v. Pfizer, Inc. (7th Cir. 1985) 763 F.2d 887 [119 LRRM 2947].) Following the above authority, we hold that MMBA section 3505 requires an employer to provide a recognized employee organization with requested information that is relevant to a pending contractual disciplinary arbitration.

As an alternative, the City argues that it had no duty to provide the requested information because the Association's information requests did not "invoke" Section 3505 or request to meet and confer. PERB has never required information requests to contain either of

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[6]In Chesapeake and Potomac Telephone Co. v. NLRB (2d Cir. 1982) 687 F.2d 633, 635-636 [111 LRRM 2165], the court explained the rationale for recognizing the duty to provide information in the pre-arbitration hearing context:

> Reasonable discovery of material relevant to a grievance prior to an arbitration hearing enables a union to make an informed evaluation of the merits of its claim and to withdraw the arbitration demand or settle the grievance if the information indicates that the grievance is less meritorious than it had initially believed, thus eliminating delay and expense that might otherwise be incurred.

these items in order to trigger the employer's duty to provide the requested information. Accordingly, this argument is without merit.

a. California Arbitration Act Discovery Provisions versus Duty to Provide Information under MMBA

In addition to its argument based on the MMBA itself, the City asserts a second ground for finding that the MMBA's duty to provide information does not apply in this case: discovery in disciplinary arbitration proceedings is controlled by the provisions of the CAA, not the MMBA. In support of this argument, the City notes that the California Supreme Court has called the CAA "a comprehensive statutory scheme regulating private arbitration in this state [by which] the Legislature has expressed a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." (Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, 9 [10 Cal.Rptr.2d 183] [internal quotation marks and citations omitted].)[7] From this, the City concludes that PERB has no jurisdiction to determine whether the City committed an unfair practice in this case.

The United States Supreme Court rejected a similar argument in Acme Industrial. There, the employer refused to provide information relevant to pending grievances. (Id., at pp. 434-435.) The employer argued, and the court of appeal agreed, that, in light of "national labor policy favoring arbitration," the binding arbitration provision of the parties' CBA divested the NLRB of jurisdiction to decide whether the employer's failure to provide information constituted an unfair labor practice. (Id., at p. 435.) The Supreme Court found no conflict between the policy favoring arbitration and the Board's exercise of jurisdiction over

[7]Also in support of this argument, the City states that "California Courts have consistently applied the CAA to agreements to arbitrate in collective bargaining agreements." The City then cites to cases where the court applied the CAA to confirm or vacate an arbitration award. We agree that the CAA gives the courts the authority to confirm or vacate arbitration awards that arise out of a CBA. However, this says nothing about the relationship between the CAA's discovery provisions and the MMBA's duty to provide information.

the alleged unfair labor practice because "the assertion of jurisdiction by the Board in this case in no way threatens the power which the parties have given the arbitrator to make binding interpretations of the labor agreement." (Id., at p. 437-438.) Indeed, the Court observed that "[f]ar from intruding upon the preserve of the arbitrator, the Board's action was in aid of the arbitral process" because it helps the union to "sift out unmeritorious claims" before they reach arbitration. (Id., at p. 438.)

Similarly, we find no conflict between California's "strong public policy in favor of arbitration," as embodied in the CAA, and PERB's jurisdiction under MMBA to determine whether a refusal to provide requested information relevant to a contractual disciplinary arbitration constitutes an unfair practice. In fact, the two statutes work in tandem to make the arbitration process more efficient for all parties by reducing the number of meritless claims that reach arbitration. Moreover, because PERB's unfair practice inquiry is limited to whether a party was entitled to particular information before the arbitration hearing, PERB will not be intruding on the arbitrator's power to interpret the MOU or to rule on the relevance and admissibility of evidence during the hearing. Therefore, we find that the CAA in no way eliminates or limits a party's entitlement to relevant information under MMBA section 3505.

b. Waiver of Right to Information

In a corollary to its CAA argument, the City asserts the Association had no right to information in Moore's disciplinary arbitration because the parties' MOU did not provide for arbitration discovery. Code of Civil Procedure section 1283.05 sets forth the means for obtaining discovery in arbitration proceedings. Under Code of Civil Procedure section 1283.1(b), parties may incorporate the discovery provisions of Section 1283.05 into an arbitration agreement. Based on these code sections, the City contends "there is no right to discovery unless the arbitration agreement provides for it." Thus, the City argues, because the

MOU did not provide for arbitration discovery, the Association had no right to the requested information.

In essence, the City claims that the MOU's silence regarding arbitration discovery acts as a waiver of the Association's statutory right to receive information relevant to contractual disciplinary arbitrations. PERB rejected an identical argument in Hacienda La Puente:

> In its first exception, the District apparently contends that, because the CBA does not require the District to provide the Association with information regarding grievance processing, the Association has waived its right to such information. It is well established, however, that the Board will not infer a waiver of the right to bargain from silence. (San Mateo County Community College District (1985) PERB Decision No. 486; see also, Chula Vista City School District (1990) PERB Decision No. 834 at pp. 50-52 [finding right to necessary and relevant information implicit in duty to bargain].) Therefore, the CBA's silence regarding the Association's right to information is not a waiver of that right.

Following Hacienda La Puente, we find that the MOU's silence regarding arbitration discovery did not waive the Association's statutory right to information in contractual arbitration proceedings.[8]

At the PERB hearing, the City also attempted to establish that the Association had waived its right to information by its conduct in past disciplinary arbitrations. In support of this theory, the City presented evidence about discovery in a 2005 disciplinary arbitration between the City and the Association involving Moore and made an offer of proof that Senior Assistant City Attorney Terry Stevenson would testify to the parties' discovery practice in prior disciplinary arbitrations. The ALJ excluded this evidence because he found past practice

[8]It is worth noting that, even if the MOU did contain a discovery provision, the provision in itself would not constitute a waiver absent evidence the parties agreed to the provision in exchange for a waiver of the statutory right to information. (Modesto City Schools and High School District (1985) PERB Decision No. 479 (Modesto).)

irrelevant to whether the City had breached its duty to provide information in the 2006 Moore arbitration.

While the formal rules of evidence do not apply in a PERB hearing, "[i]mmaterial, irrelevant, or unduly repetitious evidence may be excluded." (PERB Reg. 32176.)[9] As a matter of law, the Association's failure to exercise its statutory right to request information in prior disciplinary arbitration proceedings does not constitute a waiver of that right "for all times." (See San Jacinto Unified School District (1994) PERB Decision No. 1078 ["[A] union's acquiescence in previous unilateral changes does not operate as a waiver of the right to bargain for all times."].) Thus, because evidence of the parties' discovery practice in past disciplinary arbitrations was not legally relevant in this matter, the ALJ did not err in excluding it.

2. Failure to Provide Requested Information

PERB has long held that an exclusive representative is entitled to all information that is necessary and relevant to the discharge of its duty of representation in negotiations, processing of grievances and administration of the contract. (Stockton; Modesto.) In Chula Vista City School District (1990) PERB Decision No. 834 (Chula Vista), PERB adopted the United States Supreme Court's ruling in Acme Industrial that an employer must provide requested information for a grievance proceeding:

> if it likely would be relevant and useful to the union's determination of the merits of the grievance and to their fulfillment of the union's statutory representation duties. (Id., at pp. 437-438.)

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

a. Relevance of Information

The City excepts to the ALJ's failure to make separate and detailed findings that each of the items in the Association's September 1, 2006 information request was relevant to Moore's disciplinary arbitration. However, in concluding that the requested information was relevant, the ALJ was not required to make such findings.

Information that is necessary for an exclusive representative "to decide whether to proceed with a grievance or arbitration" on behalf of a bargaining unit member is presumed relevant. (Ralphs Grocery Co. (2008) 352 NLRB No. 18, *29 [183 LRRM 1356] (Ralphs).) The exclusive representative need not explain the relevance of the requested information unless the employer rebuts the presumption of relevance. (Id., at p. *31.) When the presumption has been rebutted, "[t]he determination of whether requested information is relevant is made under a liberal discovery-type standard." (Chula Vista, internal quotations omitted.) Under this standard, information may be relevant even though the exclusive representative is able to present the grievance without it. (Newark Unified School District (1991) PERB Decision No. 864.) However, information is relevant only if it can assist the exclusive representative in determining the merits of the particular grievance for which it is requested. (Ventura County Community College District (1999) PERB Decision No. 1340 (Ventura County CCD).)

All of the information requested by the Association pertained to the merits of Moore's grievance. Items one through four and seven requested information about the City's responses to Moore's requests for sick or FMLA leave. Item six asked for information about use of unpaid sick leave by members of Moore's bargaining unit pursuant to the MOU. Item five, the City's laws, rules and regulations pertaining to FMLA leave, were applicable to bargaining unit members including Moore. Accordingly, all of the items requested in the September 1,

2006 letter were presumptively relevant to the Association's representation of Moore in his disciplinary arbitration.

b. City's Defenses to Production of Information

"Presumptively relevant information must be furnished on request to employees' collective-bargaining representatives unless the employer establishes legitimate affirmative defenses to the production of the information." (Ralphs, at p. *29.) The employer may be excused from providing the requested information if: (1) the information is "plainly irrelevant" (Stockton); (2) the information does not exist or producing it is unduly burdensome (Chula Vista); or (3) disclosure of the information would compromise a recognized right of privacy (Modesto). The employer bears the burden of proving these defenses. (Bakersfield City School District (1998) PERB Decision No. 1262; Modesto.)

In its October 26, 2006 response to the Association's information request, the City stated that the requested information was "immaterial and overbroad and beyond the scope of what is necessary for the arbitration." The letter asserted that all but item five were "immaterial" and/or "overbroad." It further asserted that the information sought regarding granting of unpaid sick leave to other bargaining unit members was "protected under medical and general privacy rights."

These cursory justifications do not establish an affirmative defense to production of the requested information. First, the City has failed to show that the requested information was "plainly irrelevant." In Ventura County CCD, the exclusive representative requested a list of faculty members who had been interviewed as part of a review of the college's basketball program. However, the grievance that triggered the request challenged a teacher's nonrenewal based on the district's tenure review process. The Board found the requested list was not relevant because the exclusive representative failed to show "a need for the list in order to

determine the merits of that employee grievance." Here, as discussed above, all of the information requested by the Association was necessary and relevant to determining the merits of Moore's grievance challenging his discipline for violating the public works department's attendance policy. Thus, the requested information was not "plainly irrelevant" to Moore's grievance.

Second, the City's statement that the requests were "overbroad" could be construed as indicating it would be unduly burdensome for the City to produce the information. This appears to have been the City's intent given that during the November 22, 2006, conference call with the arbitrator, the parties agreed to limit production of information to the prior two years. However, the City's letter did not say how or why production would be burdensome or suggest a way to narrow the request to alleviate the problem. Moreover, Oh testified she believed that no information responsive to items three and four existed, yet her letters to Purcell did not mention this.

Third, the City asserted employees' privacy rights as justification for not providing evidence of bargaining unit members' use of unpaid sick leave. However, the City did not provide any explanation as to what specific privacy interests would be compromised by providing the requested information. In its November 3, 2006 letter, the Association asked the City to provide the specific legal authority upon which its objection rested. The Association also stated that it would accept the information "in redacted form, protecting the names of the employees in question." The City did not provide the requested authority nor did it respond to the Association's redaction proposal. Thus, the City failed to establish that employees' privacy rights would be compromised by producing the requested information.

Furthermore, the City's duty to provide the information did not end with its October 26, 2006 response. Once the employer responds to the union's request, it has no obligation to

produce further information unless the union reasserts or clarifies its information request. (Oakland Unified School District (1983) PERB Decision No. 367.) On November 3, 2006, the Association by letter reasserted its request and explained the reasons it was seeking the information. As a result, the City was obligated to respond to the Association's request. Its November 9, 2006 letter, which merely reiterated the City's position that the information requested was "immaterial, overbroad and beyond the scope of what is necessary for this arbitration," did not satisfy its duty to provide the information or adequately justify why it could not do so. (See Azusa Unified School District (1983) PERB Decision No. 374 ["The District's belief that the information was unnecessary or the Association's reasons for wanting it impractical does not constitute adequate justification."].)

c. Timeliness of City's Responses

In addition to being substantively inadequate, the City's responses to the Association's information requests were untimely. "Unreasonable delay in providing requested information is tantamount to a failure to provide the information at all. . . . The fact that an employer ultimately furnishes the information does not excuse an unreasonable delay." (Chula Vista.) A delay may be found reasonable when the delay was justified by the circumstances and the union was not prejudiced by the delay. (Union Carbide Corp. (1985) 275 NLRB 197, 201 [119 LRRM 1077].)

Regarding the City's justification for the delay, Oh testified that she did not respond to the Association's request for seven weeks because she was: (1) "receiving information in piecemeal form" from various people; (2) "occupied with other matters of [her] employment;" and (3) "forming [her] legal opinions regarding this case and how to go about handling it."[10]

[10]Oh sent a letter to Purcell on October 2, 2006 stating that the City was in the process of gathering the information and that he should have it by mid-October. However, the letter

This does not indicate diligence on the part of the City. Specifically, the record does not show why it took the City seven weeks to formulate its October 26, 2006 response to the Association which simply provided one attachment and then indicated why the City could not respond to six of the seven requests for information. Further, even after the arbitrator ordered the City to produce the information, it produced only some of the information prior to the arbitration hearing. The Association did not receive the remainder of the information to which it was entitled until December 8, the day of the arbitration hearing, and even then only after the information was produced by the City's own witnesses at the hearing. Finally, the City's delay in producing the information certainly hampered the Association's ability to adequately prepare Moore's defense for the hearing. Accordingly, the City's delay in producing the information was unjustified and prejudicial to the Association.

For the reasons above, the City violated MMBA section 3505 by failing to promptly provide the Association with requested information relevant and necessary to its representation of Moore in the disciplinary arbitration.

3. Deferral to Arbitration Award

Finally, the City argues that PERB should defer to the arbitrator's ruling on the relevance of the information requested by the Association. Deferral to arbitration is an affirmative defense that must be raised by the City in its answer or it is waived. (East Side Union High School District (2004) PERB Decision No. 1713.) The City did not raise a deferral defense in its answer nor did it attempt to amend its answer at hearing to include the defense. Thus, the City waived the deferral defense. As a result, even though the City raised the defense in its post-hearing brief, the ALJ could not consider it in his proposed decision.

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did not address the substance of the information request and therefore cannot be considered a response to it.

(Sonoma County Office of Education (1997) PERB Decision No. 1225.) For the same reason, the Board cannot consider the deferral defense on appeal.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the City of Burbank (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3505, and Public Employment Relations Board (PERB) Regulation 32603(c) (Cal. Code Regs., tit. 8, sec. 31001 et seq.), by failing to provide the Burbank City Employees Association (Association) with requested information necessary and relevant to the Association's representation of its member, City Public Works employee Willard Moore, in a disciplinary arbitration.

Pursuant to Government Code sections 3509(a) and 3541.5(c), it is hereby ORDERED that the City, its governing council, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to provide necessary and relevant information requested by the Association for the purpose of representing bargaining unit members.

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

1. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to employees are customarily posted, copies of the Notice attached hereto. The Notice must be signed by an authorized agent of the City, indicating the City 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.

2. 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 his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

Chair Neuwald and Member Rystrom joined in this Decision.

APPENDIX

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. LA-CE-326-M, Burbank City Employees Association v. City of Burbank, in which all parties had the right to participate, it has been found that the City of Burbank (City) violated the Meyers-Milias-Brown Act, Government Code section 3505, and Public Employment Relations Board Regulation 32603(c) (Cal. Code of Regs., tit. 8, sec. 31001 et seq.), by failing to provide the Burbank City Employees Association (Association) with requested information necessary and relevant to the Association's representation of its member, City Public Works employee Willard Moore, in a disciplinary arbitration.

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 provide necessary and relevant information requested by the Association for the purpose of representing bargaining unit members.

Dated: _____ CITY OF BURBANK

By: _____
Authorized Agent

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.