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

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| UNITED PROFESSIONAL FIREFIGHTERS, LOCAL 1230,<br><br>Charging Party,<br><br>v.<br><br>CITY OF PINOLE,<br><br>Respondent. | Case No. SF-CE-864-M<br><br>PERB Decision No. 2288-M<br><br>October 15, 2012 |

Appearances: Davis, Cowell & Bowe by W. David Holsberry and Elizabeth Q. Hinckle, Attorneys, for United Professional Firefighters, Local 1230; Meyers, Nave, Riback, Silver & Wilson by Samantha W. Zutler, Attorney, for City of Pinole.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

## DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the United Professional Firefighters, Local 1230 (UPF) from the partial dismissal (attached) of an unfair practice charge. The charge, as amended, alleged that the City of Pinole (City) violated its duty to bargain in good faith under the Meyers-Milias-Brown Act (MMBA).[1] The Board agent found that the charge failed to state a prima facie violation of the duty to bargain in good faith.[2]

The Board has reviewed the partial dismissal and the record in light of UPF's appeal, the City's response, and the relevant law. Based on this review, we find the partial dismissal and warning letters to be well-reasoned, adequately supported by the record, and in accordance with applicable law, with the exception of one issue. Accordingly, the Board adopts the partial

[1] The MMBA is codified at Government Code section 3500 et seq.

[2] We address herein only those charges dismissed by the Board agent.

dismissal and warning letters as the decision of the Board itself to the extent set forth below, supplemented by the discussion below of the issues raised on appeal. The Board remands this matter for issuance of a complaint on the issue of whether the City violated the MMBA by unilaterally imposing a proposal that purportedly waived statutory rights concerning pension benefits.

## PROCEDURAL HISTORY

On July 12, 2011, UPF filed an unfair practice charge alleging that the City violated the MMBA by refusing to meet and confer and by making unilateral changes to terms and conditions of employment for represented employees. Subsequently, UPF amended the charge to allege that the City refused to provide information requested during bargaining and insisted to impasse on non-mandatory subjects of bargaining concerning the City's pension proposals.

As relevant here, UPF appeals from the dismissal of the following allegations: (1) the City failed to meet and confer in good faith by failing to provide information about the value of concessions it sought during bargaining; (2) the City engaged in surface bargaining over its pension proposals; (3) the City unilaterally changed terms and conditions of employment by prohibiting on-duty firefighters from attending City Council meetings; and (4) the City insisted to impasse on pension proposals that were non-mandatory subjects of bargaining, amounted to a waiver of statutory rights, and were unlawfully implemented retroactively.

## DISCUSSION

### Refusal to Provide Information

In its appeal, UPF asserts that the City refused to provide information it requested concerning "the total value of concessions" sought by the City to address its projected budget deficit. The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (*Stockton Unified School District*

(1980) PERB Decision No. 143 (*Stockton*).) An employer need not comply with an information request, however, if the requested information does not exist. (*Stockton*; *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I (*Los Angeles Superior Court*); *Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista*).) Further, there is no obligation for an employer to provide detail regarding the thought process or rationale underlying its managerial decisions. (*Los Angeles Superior Court*; *Ventura County Community College District* (1999) PERB Decision No. 1340.)

We agree with the Board agent that the charge failed to allege facts showing that the City either ignored or responded with deliberately misleading information to any specific request for information made by UPF. In support of its position, UPF points to a letter dated April 11, 2011, in which it stated that it did not "feel that the information that we have been provided has been accurate nor has it been consistent" and that, during contract negotiations, "we have requested to know the financial goals of the City regarding Fire Department cost reductions." In addition, the letter asserts that, during negotiations, UPF "requested the amount of savings that the City would achieve if we agreed to that particular proposal and was informed that the projected savings had not been determined. Yet the projected savings were presented at one of the subsequent public meetings." Neither the April 11, 2011, letter nor any other facts alleged in the charge identifies a specific request for information. Rather, at most, it indicates that, at an unidentified time and in an unidentified manner, UPF requested that the City provide it with a statement of the amount it would save if UPF agreed to a particular proposal to which the City responded that it did not break down its requested concessions in that manner and, therefore, did not have the information requested. The allegation that the City provided conflicting information at multiple meetings of the City Council concerning the estimated savings to be achieved by closing one fire station temporarily, even if true, does not

establish that the City failed to comply with a request to provide specific information. Accordingly, we conclude that the allegations of the charge are insufficient to establish a prima facie violation of the duty to furnish information during bargaining.

Surface Bargaining

In its appeal, UPF contends that the City engaged in surface bargaining by proposing and insisting to impasse on pension proposals based upon a document prepared by a joint working group of local government managers. We agree with the Board agent that the allegations of the charge fail to establish a prima facie case of surface bargaining. The fact that the City presented proposals similar to those that may have been recommended or utilized by other employers does not indicate that the City lacked a genuine desire to reach agreement. (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 (*Placentia*).) Nor do the facts as alleged indicate an intent to subvert the negotiating process, rather than a legitimate bargaining position adamantly maintained. (*Oakland Unified School District* (1982) PERB Decision No. 275; *Placentia*.) Instead, the evidence provided indicates that the City indicated a willingness to compromise on some aspects of the proposal, such as the second-tier formula. We conclude that the allegations fail to establish a prima facie case of surface bargaining.

Attendance at City Council Meetings

UPF contends that the City engaged in an unlawful unilateral change when it instructed the fire chief that firefighters were not to attend City Council meetings while on duty and in uniform, without first meeting and conferring. In order to establish a violation of the duty to bargain based upon a unilateral change, the charging party must establish: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a

change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 (*City of Vernon*); *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; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

For a past practice to be binding, it must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092; *Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) PERB has also described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186; *County of Placer* (2004) PERB Decision No. 1630-M.) The burden is on UPF to allege facts showing that the City breached an established past practice. (*San Francisco Unified School District* (2009) PERB Decision No. 2057; *City of Commerce* (2008) PERB Decision No. 1937-M.)

The charge alleges that, for more than 25 years, "on-duty firefighters have been permitted to attend Pinole City Council meetings." While lacking in specifics, we find that the charge alleges the bare minimum necessary to establish the first three elements of a prima facie case of unilateral change. The charge alleges that a practice existed under which firefighters were permitted to attend City Council meetings for 25 years, and that the City unilaterally changed that practice on or about July 20, 2011, without giving UPF notice or an opportunity to bargain over the change. The directive issued by the fire chief appears to have acknowledged the existence of some kind of practice of permitting firefighters to attend City

Council meetings, and that the practice was changed to prohibit such attendance while on duty. The charge further alleges that the change in practice amounted to a change in policy. There is a factual dispute over whether the practice was a binding past practice, as UPF alleges, or merely an informal practice or violation of work rules, as the City asserts. This factual dispute cannot be resolved at this juncture, as we must accept the allegations of the charge as true. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489). Therefore, we conclude that the charge establishes the first three elements of a prima facie case of unilateral change.

To satisfy the fourth element, the charge must allege facts showing that attendance at City Council meetings was a matter within the scope of representation. MMBA section 3504 defines the scope of representation as including "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." The charge is entirely devoid of such allegations. By stating that off-duty personnel are welcome and that UPF representatives will typically be in attendance, the fire chief's directive expressly contemplates that UPF representatives will continue to attend City Council meetings.

UPF asserts that the City's directive was targeted specifically at the ability of firefighters to attend City Council meetings, but not at other on-duty, non-working activities, and that the timing of the directive "emphasized its coercive effect." A March 15, 2011, letter from the City manager, however, states that the City had received citizen complaints about the presence of uniformed personnel in coffee houses and grocery stores, thus indicating that the policy was aimed at other non-working, on-duty activities as well. UPF fails to explain how

the focus of the directive on City Council meetings demonstrates that it concerned a matter within the scope of representation. There are no facts alleged that the on-duty attendance at such meetings related in any way to the job duties or working conditions of firefighters.

UPF also asserts that the possibility of disciplinary consequences brings the directive within the scope of representation, citing *City of Vernon*. In that case, the city adopted an order prohibiting city employees from using city facilities to wash their personal vehicles, and that employees who violated that order would be subject to discipline.[3] Following the issuance of the order, a firefighter who violated the order was suspended for three shifts and denied overtime for six months. Rejecting the city's argument that the order was a reasonable work and safety rule over which the duty under the MMBA to meet and confer did not apply, the court of appeal found that the rule was within the scope of representation, in part, because of the disciplinary penalties imposed for violations of the rule, which clearly affected employee wages. In this case, there is no allegation that any employee was threatened with or subjected to discipline for violating the rule. Accordingly, because the charge fails to allege facts establishing that the alleged change in policy concerned a matter within the scope of representation, we conclude that the charge fails to allege a prima facie case of unilateral change with respect to on-duty attendance at City Council meetings.

Pension Contributions

UPF asserts that the City engaged in bad faith bargaining by insisting to impasse on a proposal that amounted to a waiver of statutory rights limiting employee pension contributions to nine percent and the right to an election to approve or reject changes to employee contribution rates. UPF further asserts that the City improperly implemented its last, best and final offer (LBFO) retroactively. In response, the City argues that the interpretation of pension

[3] The apparent genesis of the rule was that a city employee had injured himself while washing his car on city property and filed a workers compensation claim against the city.

statutes exceeds PERB's jurisdiction, that UPF's argument is based upon a new argument or legal theory that was not raised previously, and that there is no "statutory maximum amount" that an employee may contribute to his or her pension. In addition, the City asserts that it implemented its LBFO consistent with the prior negotiations between the parties and applicable case law.

We first address the City's assertion in its response to the UPF's appeal that "interpretation of PERS statutes exceeds PERB's jurisdiction." While it is true that PERB does not have jurisdiction to enforce statutes such as those in the Government Code governing municipal pensions or in the Education Code, PERB necessarily must interpret certain statutes beyond the collective bargaining laws that PERB administers in the course of determining questions arising under the statutes we do enforce. For example, we construe the Education Code in order to determine whether a particular bargaining proposal is outside the scope of bargaining. (*Healdsburg Union High School District and Healdsburg Union School District* (1980) PERB Decision No. 132.) We do so with the sanction of the California Supreme Court. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865, accord, *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375.)

1. Waiver of Statutory Rights

It is well established that an employer may not insist to impasse upon a waiver of statutory rights. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2081-S; *Chula Vista.*) UPF asserts that the pension proposal proposed and implemented by the City amounted to a waiver of a statutorily-prescribed maximum pension contribution by employees of nine percent. For the reasons discussed below, we conclude that

the allegations of the charge are sufficient to support a viable theory of law so as to warrant issuance of a complaint.

The parties agree that contributions to the California Public Employee Retirement System (CalPERS) for employee pension benefits include both an employer and an employee component. For the firefighter employees at issue in this case, the statutory employee contribution rate is nine percent of the employee's wages. (Gov. Code, § 20678.) Employers are required to contribute an additional amount to cover the remaining cost of providing pension benefits, as established by the CalPERS board of directors. (Gov. Code, § 20806.)

Prior to the 2011 negotiations, Article 21.2 of the parties' memorandum of understanding (MOU) required the City to pay the nine percent employees' share of CalPERS contributions. In addition, Article 21.3 of the MOU provided that the City would pay all of the employer's share of contributions, except that, if the employer's share exceeded 11.5 percent, the additional employer contribution would be split 50-50 between the City and the bargaining unit employees. It is undisputed that, by the time the parties were negotiating this issue, the employer's share had risen to 21.252 percent, which was 9.752 percent over the agreed-upon threshold of 11.5 percent. Therefore, the City and the employees were each responsible for 4.7676 percent of the increase in the employer contribution.

Thus, prior to the 2011 negotiations, the agreement and practice of the parties was for the employer to pay both the employee's contribution of nine percent, plus 16.287 percent (11.5 percent + 4.7876 percent) for the employer's share. At that time, employees paid only their half of the increase in the employer's contribution above 11.5 percent, or 4.7876 percent.

During the 2011 negotiations, the City proposed eliminating the language of Article 21.1 requiring it to pay the employee's share of CalPERS contributions and instead replacing it with the provision that "Employees shall pay the full nine percent (9%) of the

required CalPERS Employee Contribution Rate." The City did not propose any change to the language of Article 21.3 concerning the cost-sharing of employer contributions, nor did UPF propose any modification to that provision. Thus, the City's LBFO did not alter the parties' agreement concerning the employer's contribution. Instead, it only altered the prior agreement for the employer to pick up the entire employee's contribution of nine percent by shifting responsibility for the employee's share back to the employees. As a result, while the employees' share of the employer's contribution remained at 4.7876 percent, the net effect of the City's proposal was to increase the total amount to be contributed by employees to 13.7876 percent.

The charge, as amended, alleges that the City's pension proposal required bargaining unit members to contribute an amount in excess of a "statutory maximum" of nine percent without their consent, thereby amounting to an unlawful waiver of a statutory right. In support of this allegation, the charge cites Government Code sections 20469, 20474, 20678 and 20710. It does not, however, identify which of these statutes is alleged to have been violated or explain how these statutes establish a prohibition against employees contributing in excess of nine percent.

It appears that the relevant municipal pension statutes establish a system whereby employees contribute a part of the cost of providing a particular level of benefits and the employer contributes part of the cost. Government Code section 20691 permits the employer to pay all or a portion of the contributions required to be paid by a member, although the employer may increase, reduce or eliminate its portion of the employees' normal contribution. In addition, nothing in the relevant statutes appears to prohibit the parties to agree, through collective bargaining, that employees pay part of the employer's contribution.

Government Code section 20678 provides that, for certain local safety members, "the normal rate of contribution shall be 9 percent of the compensation paid to those members." UPF asserts that this statute sets a cap of 9 percent of compensation that an employee may be charged for pension contributions. By forcing employees to pay more than 9 percent, UPF argues, the City has imposed an illegal waiver of this statutory right. The City argues that this is not an absolute maximum and that, through collective bargaining, the parties can agree to cost-splitting measures that result in employees paying more than 9 percent.

Assuming, as we must, that the facts alleged in the charge are true, and after examining the pension statutes, we conclude that UPF has articulated a viable legal theory that would support its claim that employees cannot be forced to pay more than 9 percent of their salary as pension contributions. In reaching this conclusion, we do not purport at this state of pleading to interpret the Legislature's intent in passing Government Code section 20678, but instead rely on the parties to more fully make their case with evidence of legislative history, practices throughout the state and other means to support their respective positions concerning the ultimate issue in this case – whether the pension statutes prohibit the employer from unilaterally imposing a proposal that causes employees to pay more than 9 percent of their salary in total pension contributions.[4]

In processing an unfair practice charge, the role of a Board agent is to investigate the charge to determine if an unfair practice has been committed, but the Board's regulations do not "empower agents to rule on the ultimate merits of a charge." (*Eastside Union School*

[4] UPF also relies on Government Code sections 20469 and 20474 in support of its claim that there can be no change in pension contributions unless employees vote on such changes. We find that argument less persuasive in support of UPF's claim, but nevertheless rely on the parties to more fully make their case at the hearing on the merits as to the relevance of these statutes.

*District* (1984) PERB Decision No. 466 (*Eastside*); PERB Regulations 32620 and 32640.[5]) Thus, the Board has stated, "where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (Emphasis added.) (*Eastside,* at p. 7; see also *County of San Joaquin* (2003) PERB Decision No. 1570-M, at p. 6 [where a local rule is reasonably susceptible of the interpretation offered by the charging party, a complaint should issue].) We construe this language to mean that a complaint may be issued to test viable competing theories of law.

In this case, the parties have advanced contrary theories of law concerning the legal significance of the provisions of Government Code section 20678(a) regarding the "normal rate of contribution." Since the combination of the employees' share (nine percent) and the previously-agreed-upon amount of the employer contribution that the employees share with the City total nearly 14 percent of payroll, there is merit in UPF's claim that the imposition was an illegal waiver of a statutory right. There is also merit to the City's assertion that the nine percent "cap" was not exceeded by its unilateral imposition because Government Code section 20678(a) refers only to the employees' share. The statutes are silent on what amounts of the employer's portion the parties can agree to share. Because this dispute over complex laws relating to municipal pensions goes to the heart of the merits of the UPF's claim that the imposition amounted to an illegal waiver of a statutory right, the parties should have the opportunity to litigate this issue fully by presenting evidence and argument in support of their respective claims.

Although the Board's role ordinarily is to resolve disputed questions of law, under the unique setting of this case, where there is no guiding PERB precedent and the legal issues

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

involve are technical and complex issues of pension laws outside PERB's normal jurisdiction, we find it appropriate to remand this matter for issuance of complaint so that the issues may be decided upon a full evidentiary record. We caution that, in reaching this decision, we do not make any determination on the ultimate merits of this case, but hold only that, under the circumstances presented here, the charge states a viable theory of law under the standard set forth in *Eastside*.

2. Retroactive Implementation of LBFO

UPF contends that the City was not privileged to take unilateral action on July 29, 2011, to implement its proposals to change employee pension contributions retroactive to July 1, 2011, because the parties continued to negotiate through July 26, 2011, and therefore had not yet exhausted impasse procedures as of the July 1, 2011 date. We find no merit in this argument. Once an employer has exhausted applicable impasse resolution procedures, the employer may lawfully implement policies reasonably comprehended within its pre-impasse proposals. (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900-901.) It is clear that the City's LBFO, presented on June 9, 2011, included the proposal to implement the pension contribution changes effective July 1, 2011. The fact that the parties continued to negotiate over those proposals does not preclude the City, upon having bargained to impasse in good faith, from implementing the terms of its LBFO as presented during negotiations. Moreover, the charge fails to allege facts showing that any deduction actually occurred prior to impasse.

ORDER

The unfair practice charge in Case No. SF-CE-846-M is hereby DISMISSED WITHOUT LEAVE TO AMEND with respect to the allegations that the City of Pinole (City): (1) failed to meet and confer in good faith by failing to provide information about the value of

concessions it sought during bargaining; (2) engaged in surface bargaining over its pension proposals; (3) unilaterally changed terms and conditions of employment by prohibiting on-duty firefighters from attending City Council meetings; and (4) unlawfully implemented its pension proposals retroactively.

The charge is hereby REMANDED to the Office of the General Counsel for issuance of a complaint consistent with this decision on the issue of whether the City unlawfully insisted to impasse on and unilaterally implemented pension proposals that were non-mandatory subjects of bargaining amounting to a waiver of statutory rights.

Chair Martinez and Member Huguenin joined in this Decision.

# PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1023
Fax: (510) 622-1027

March 1, 2012

W. David Holsberry, Attorney
Davis, Cowell & Bowe
595 Market St., Suite 1400
San Francisco, CA 94105

Re: *United Professional Firefighters, Local 1230 v. City of Pinole*
Unfair Practice Charge No. SF-CE-864-M
**PARTIAL DISMISSAL**

Dear Mr. Holsberry:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 12, 2011. The United Professional Firefighters, Local 1230 (Union or Charging Party) alleges that the City of Pinole (City or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by refusing to meet and confer and by making unilateral changes to terms and conditions of employment for represented employees.[2] A first amended charge was filed on August 2, 2011; the City's response was filed on September 12, 2011; the Union filed a reply to the City's response on September 23, 2011; and the Union filed a second amended charge on November 17, 2011.

Charging Party was informed in the attached Warning Letter dated December 21, 2011, that certain allegations contained in the charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless these allegations were amended to state a prima facie case or withdrawn prior to January 6, 2012, the allegations would be dismissed. The Union filed a Third Amended Charge on January 12, 2012; the City responded to the Third Amended Charge on February 1, 2012; and the Union made a brief reply on February 2, 2012.

PERB's investigation revealed the following relevant facts.

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

[2] This Partial Dismissal Letter does not address concerns that the City unilaterally changed terms and conditions of employment when it browned out Fire Station 74.

**Background Bargaining History**

On June 30, 2008, the parties' memorandum of understanding (MOU) expired while negotiations over a successor agreement were on-going. That MOU contained the following relevant provision:

> **Article 15. Constant Staffing**
> 15.1 Minimum Staffing
>
> Effective January 1, 2006, the minimum total staffing is a total of 18 fire-sworn personnel that includes the following:
>
> - Six (6) Captains
> - Six (6) Engineers and/or Engineers/Paramedics
> - Six (6) Firefighters and/or Firefighters/Paramedics
>
> The City will maintain six (6) sworn positions per day with three (3) assigned to Firestation 73 and three (3) assigned to Firestation 74.[3]

Ultimately, the City imposed terms and conditions of employment for a period of one year.[4] One year later, the parties negotiated a one-year MOU that contained the following relevant provision:

> **Article 14. Minimum Staffing**
>
> 14.1 Minimum Staffing.
>
> For the term of this agreement, the Fire Chief or his/her designee will have the discretion to not fill up to three vacant suppression personnel positions within the Fire Department (minimum staffing level of 15).
>
> In addition to the above vacancies, if two or more personnel are off on a duty shift due to vacation, sick leave, workers' compensation, or disability, it will be at the discretion of the Fire Chief whether or not to backfill those positions.

[3] There are only two firestations in the City.

[4] The imposed terms and conditions are not the subject of this charge, and the Union does not provide a written copy of the terms imposed.

> Engines in operation will be staffed at a minimum of three (3) personnel. Any extra personnel (above 3) will become additional staffing at either Station 73 or 74, as assigned by the Chief or his/her designee.
>
> In the event the staffing level is 16 suppression personnel, all employees shall be assigned to a regular duty shift. No personnel should be moved between shifts unless there is a long-term vacancy. During the term of this agreement, a long-term vacancy should be defined as: an absence that is longer than three months.
>
> At the expiration of this agreement the Minimum Staffing language negotiated effective January 1, 2006 shall be reinstated. [Emphasis added.]

In February 2010, a joint working group made up of the Alameda County City Managers' Association and the Contra Costa County Public Managers Association adopted a proposal for pension reform. The Proposal for Regional Pension Reform sought to address concerns regarding the long-term fiscal sustainability of public retirement systems, and to preempt overreaching and inappropriate pension reform by statewide initiative. The report recommended the following changes: (1) creation of a modified level of retirement benefits for all new city employees in the Alameda/Contra Costa region; and (2) current employees would participate in funding their own pensions in all cities. According to the report, these changes would result in both immediate and long-term savings for the employing cities and counties while allowing the entities to continue to attract and retain qualified employees. Having adopted goals for pension reform, the report recommended the following action: (1) cities should seek legislative pension reform at the State level through advocacy; and (2) individual managers should discuss the goals with their respective city councils, and seek direction for negotiating pension reform as collective bargaining agreements expire.

In April 2010, the City altered staffing levels at a time when the parties were in negotiations over an MOU. At that time, the parties reached an understanding to the following principles: the matter was best discussed in the context of negotiations for a successor agreement (rather than separately as an effects-only meet and confer session); and any concession made by the Union would be considered a contribution by the Union to the overall deficit facing the City.

**Facts Giving Rise to This Charge**

In January 2011, the parties began negotiating for a successor to the one-year MOU that expired on July 1, 2011.

On February 25, 2011, the City proposed a change to the minimum staffing levels that would strike existing language and replace it with the following language:

> The City will maintain minimum staffing of three (3) personnel assigned to each active Engine Company. The number of Engine Companies running per day shall be determined by the Fire Chief or his/her designee.

After the City made its staffing proposal, it announced that it was browning out Station 74 for the 2011-2012 fiscal year. It then offered to bargain over the effects of this decision, but refused to negotiate over this decision in the context of the successor MOU.

Also on February 25, 2011, the City proposed a change to Article 21.2 – Employee Contribution Rate Paid by the City. The City proposed to strike the existing language that required the City to pay the employee's pension contribution and replace it with the following language:

> Employees shall pay the full nine percent (9%) of the required CalPERS Employee Contribution Rate.

The City did not propose any change to the requirement in the expired MOU that employees pay half of the employer's contribution above 11.5%. Thus, as written, the City's proposal was that employees continue to pay half of the employer's contribution above 11.5% and also assume the 9% statutory maximum for employee contributions. Currently, the employer's contribution rate is 21.252%. The result of this under the expired MOU was that the City was paying 16.376% in employer contribution rates and employees were paying 4.876% in employer contribution rates. The proposed language in the successor MOU would have employees paying 4.876% plus an additional 9% contribution rate.

During a City Council meeting on March 8, 2011, the City discussed the proposal to brown out Station 74. The City announced that the cost, including overtime, to fully staff Station 74 was estimated at $660,000. Savings from a long-term brown-out of Station 74 was estimated at $880,000. Browning out a "second shift" would yield $440,000 in savings. During a City Council meeting on March 9, 2011, the City provided information that directly conflicted with the information provided the day before. For example, the City stated that it would cost $845,000 to fully staff Station 74, and that eliminating a single shift would net savings of $345,000. Additionally, City staff members at the meeting stated that in order to keep Station 74 open, it would cost $500,000 from the City's General Fund, and the remaining cost would have to come from labor concessions. A motion to accept these staffing changes was voted on, but not approved.

During a City Council meeting on April 5, 2011, City managers acknowledged that two additional personnel added to the Fire Department would result in "significant" savings to the overtime costs, and that this concern was being addressed in effects bargaining sessions with the Union. Union representative Vincent Wells pointed out that there was an apparent discrepancy in the City's calculated savings in that, if eliminating a single shift would save the City over $400,000, then closing the station and all three shifts currently staffing the station should result in a savings of over $1 million, rather than the approximately $800,000 estimated

at earlier City Council meetings. When a Council Member asked what the savings would be from the closure of Station 74, the City Manager responded that it would depend on the overtime savings and that she could provide an analysis at a later date.

On April 11, 2011, the Union sent a letter to the City's Assistant City Manager questioning the veracity of the information that was presented to the City Council prior to its adoption of the decision to close Station 74. Additionally, the Union withdrew a package proposal it had recently made, and requested that the parties meet to discuss the City's methodology for estimating the cost savings from the proposed station closure.

In letter dated April 11, 2011, Wells raised the concern that conflicting information had been provided with regard to the cost savings associated with the closure of Station 74. According to Wells, the City Council had approved the station closure based on representations that it would result in a $500,000 savings. However, in negotiations, the Union was informed that the actual savings from the station closure was $350,000 and that the Union should provide the City with ideas to recoup the additional $150,000 in savings that it needed. Wells queried whether the City Council would have approved the station closure if it had been told that actual savings from that conduct would be substantially less than the amount presented.

On June 9, 2011, the City presented two last, best and final offers (LBFO). Option A was for a one-year MOU in which current employees would pay the full 9% of their own pension contributions plus half of the employer's contributions; a second-tier plan would be created for new employees. Option B was for a two-year MOU in which current employees would pay the full 9% of their own pension contributions plus half of the employer's contributions; in exchange for the second year in the MOU, the City would drop the second-tier retirement plan for new employees. Other terms in the two options were essentially the same. Both options included minimum staffing levels as contained in the City's February 25, 2011 proposal, which provided for a minimum staffing level of three personnel per station, but eliminated the requirement that Stations 73 and 74 remain staffed at a specific minimum level.

On July 5, the Union's attorney sent a letter to the City manager raising the concern that browning out Station 74 constituted a unilateral change to the then-operative MOU. Additionally, the Union raised a concern that the City refused to discuss the closure of Station 74 during negotiations, but then included the February 25 proposal for minimum staffing levels as an element of its LBFO.

On July 20, 2011, Chief Hanley sent an e-mail message to all staff informing them that, at the direction of the City Manager, the on-duty companies assigned to Stations 73 and 74 would not be permitted to attend City Council meetings. According to the Union, for more than twenty five years, on-duty firefighters have been permitted to attend City Council meetings. Often, on-duty firefighters have been called upon to present information to the City Council and/or simply to observe the proceedings. The July 20, 2011 e-mail message did not provide a rationale for the directive, but the Union notes in its second amended charge that on-duty firefighters have historically been required to attend other non-Fire Department-related events such as National Night Out, Coastal Cleanup, and various ribbon-cutting ceremonies. This

concern was never raised at the bargaining table, despite the parties' on-going communications.

On July 26, 2011, Union President Vince Wells informed Fire Chief Hanley that Captain Brian Lowry no longer wished to serve as acting Battalion Chief. Chief Hanley's response to this was to inform Wells that Lowry would be ordered to continue serving in this position and that his failure to comply would result in discipline.

On July 29, 2011, the parties exchanged a series of e-mail messages. The City initiated the exchange, in order to notify the Union that it would begin deducting 9% in PERS contributions, retroactive to July 1, 2011. The Union disputed that retroactivity could be lawfully applied to the deductions.

**Discussion**

Based on the above-described facts, the Union alleges that the City committed a number of per se violations of the duty to meet and confer in good faith, as well as engaging in a course of conduct that was intended to delay or prevent good faith negotiations over the successor MOU, which amounts to surface bargaining.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),[5] 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.) The per se categories include: (1) an outright refusal to bargain; (2) refusal to provide information necessary and relevant to the employee organization's duty to represent bargaining unit employees; (3) insistence to impasse on a non-mandatory subject of bargaining; (4) bypassing the employee organization's negotiators; and (5) implementation of unilateral changes in working conditions without notice and an opportunity to bargain. (*South Bay Union School District* (1990) PERB Decision No. 815.)

Unilateral Changes

Attendance at City Council Meetings

According to the Union, the parties have, for the past twenty five years, encouraged and endorsed on-duty firefighters' attendance at City Council meetings. According to the Union, on-duty firefighters have historically been encouraged to attend City Council meetings, and have provided information to the City Council upon request. Accordingly, the directive that on-duty personnel may no longer attend City Council meetings represents a change. What is

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

less clear is whether this change was within the scope of bargaining such that the City was duty-bound to meet and confer prior to announcing the change.

It is axiomatic that a refusal to bargain is not an unfair practice if the refusing party had no duty to bargain. (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M.) In this case, it appears that firefighters had been permitted to engage in certain non-duty or non-fire suppression activities for a long period of time. However, absent facts demonstrating that firefighters were required to attend City Council meetings, or that attendance at the meetings was a regular job duty, it is not clear that the change is a violation.

Acting Assignments

The alleged unilateral change in this case is based entirely on a statement by Hanley to Wells on July 26, 2011, that Lowry would be ordered to continue serving in his acting position, under threat of discipline. The facts of what was stated are disputed. What is undisputed is that Lowry was permitted to resign his acting position, and that he was not disciplined for doing so. Therefore, the only issue is whether the statement that was made by Hanley to a Union officer amounts to a unilateral change.

In a unilateral change case, the statute of limitation begins to run on the date on which official action is taken. (*Anaheim Union High School District* (1982) PERB Decision No. 201.) At present, there are no facts demonstrating that the City took any official action either to discipline Lowry for opting out of the acting assignment, or to change the policy in which employees' acting assignments were optional. Accordingly, it is not clear that the City unilaterally changed the policy concerning acting assignments on July 26, 2011, or at any time thereafter.

Insistence on Non-Mandatory Subjects of Bargaining

PERB has long held that an employer may not insist to impasse that a union waive statutory rights. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2081-S.) However, parties may engage in negotiations dealing with permissive, non-mandatory subjects of bargaining. (*San Mateo County Community College District* (1993) PERB Decision No. 1030.) Once a party has communicated its refusal to waive its right and refusal to include the non-mandatory subject of bargaining in the agreement, the other party's insistence that the proposal be included violates the Act. (*Chula Vista City School District* (1990) PERB Decision No. 834.) There are no magic words that need to be invoked for a party to take the position that the non-mandatory proposal shall not be included in the contract. (*Ibid.*) Some communication to the employer of the union's opposition is, however, a prerequisite to charging the employer with bargaining to impasse on a non-mandatory subject. (*San Mateo County Community College District*, *supra*, PERB Decision No. 1030.)

According to the Union, the California Government Code sets a maximum amount for the employee's contribution at 9%. (See Gov. Code, § 20691.) However, the language that the Union appears to rely upon establishes a "normal rate of contribution," not a maximum rate.

The Union fails to provide additional language or arguments upon which to base this argument. Thus, it is by no means clear that the employer's insistence to impasse on a proposal that the employees assume greater than 9% contribution of their retirement costs would constitute a waiver of statutory rights, as it does not appear that the statute contains a maximum rate of contribution.

Even assuming there were a statutory maximum for employee contributions, the Union has not presented any facts establishing that it put the City on notice of its opposition to negotiating employee contributions of greater than 9%. In its third amended charge, the Union asserts that it never agreed to pay the additional amount, but it does not allege that it raised an objection to negotiation over the matter. Accordingly, it is not clear that the City bargained to impasse over a non-negotiable waiver of statutory rights and absent additional facts, this allegation must be dismissed.

LBFO/Bad Faith Bargaining

The Union has a number of concerns about the City's implementation in July of its LBFO. First, the Union argues that the implemented terms are identical to the City's initial proposal—essentially, the City did not make any concessions despite engaging in an outward display of negotiating. Second, the Union argues that the City implemented terms and conditions that the Union had never agreed to. Third, the Union argues that the City implemented the LBFO retroactively to July 1, despite the fact that the parties continued to negotiate through July 26, 2011. However, it is not clear if the Union believes that retroactivity should be to the last date the parties met and conferred, or that there should be none at all. Additionally, the Union argues that by increasing employees' pension contributions as one of the components of the LBFO, the City has unlawfully attached its employees' wages, in violation of state attachment laws.

It has long been held that,

> Once impasse is reached, the employer may take unilateral action to implement the last offer the union has rejected. The employer need not implement changes absolutely identical with its last offer on a given issue. However, the unilateral adoptions must be reasonably comprehended within the preimpasse proposals. While the employer has no license to grant a wage increase of greater than any offered the union at the bargaining table, the employer may institute a wage increase identical with one which the union has rejected as too low.

(*PERB v. Modesto City Schools District* (1982) 136 Cal.App.3d 881, 900-901, internal citations omitted.) Thus, the Union's first two concerns-that the terms implemented by the City were identical to its initial proposal and that the Union never agreed to them-even if true, do not establish a violation.

Under California law, public sector employers may lawfully make unilateral changes in terms and conditions of employment only after completing any required impasse procedures. (*Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 422.) Once the employer exhausts impasse procedures, either party may decline further requests to bargain and the employer may implement policies reasonably comprehended within its last, best and final offer. (*PERB v. Modesto City Schools District*, *supra*, 136 Cal.App.3d 881.) Thus, the key to resolution of this matter is the determination of whether the June 9, 2011 LBFO reasonably comprehends the actions taken by the City on July 29, 2011. Because both alternative LBFOs presented on June 9, 2011 stated that changes to employee contribution rates would be effective July 1, 2011, it appears that the employer's implementation was reasonably comprehended within its LBFO.

However, this Board has held that the methodology used to make adjustments in employee wages is a negotiable subject. (*Laguna Salada Union School District* (1995) PERB Decision No. 1103.) Thus, to the extent that the City attempted to "recover" the unpaid difference between the employee contribution amount required under the expired MOU and the amount required based on the imposed contract for the month of July, it was required to negotiate with the Union to determine the methodology for doing so. In any event, the fact do not establish that the City in fact made the kind of methodological change that was found offensive in *Laguna Salada Union School District*, *supra*, PERB Decision No. 1103. In fact, the employer's implementation of the LBFO was on the last day of the pay period for the month of July 2011. Because both options also stated that the proposal to change employee contribution rates would be effective July 1, 2011, the employer's implementation of this term within the month tends to demonstrate that the first deduction at the higher rate would have been on employees' July 2011 paycheck. Under the circumstances, it appears that the employer did not apply terms and conditions that were not reasonably comprehended in its LBFO, nor did it change the method in deducting employee contributions to pensions.

Surface Bargaining

The charge alleges that the employer violated Government Code section 3505 and PERB Regulation 32603(c) by engaging in bad faith or "surface" bargaining. Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 (*Placentia Fire Fighters*).) PERB has held it is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "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; *Placentia Fire Fighters*, at p. 25.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through

the motions of negotiations. (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (*Oakland Unified School District* (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (*Ibid.*) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (*Stockton Unified School District* (1980) PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134); and reneging on tentative agreements the parties already have made (*Charter Oak Unified School District* (1991) PERB Decision No. 873; *Stockton Unified School District*, *supra*; *Placerville Union School District* (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. (*Placentia Fire Fighters*, *supra*, 57 Cal.App.3d 9, 25; *Oakland Unified School District*, *supra*, PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229.)

In the Third Amended Charge, the Union states,

> . . . the City and its representatives failed to meet and confer in good faith by providing conflicting information about proposed cost-savings effecting [sic] Local 1230 bargaining unit members, by refusing to inform Local 1230 about what cost-savings it sought from the bargaining unit, by refusing to discuss its own proposal on staffing and any cost-savings from that proposal in the context of MOU negotiations, and by engaging in surface bargaining and maintaining a "take it or leave it" attitude with respect to its proposals on pensions and capping medical contributions. . . . The city refused to focus on or objectively consider Local 1230 proposals unique to the City or to exhibit an open mind to any alternatives to its proposals, nor did the City have a sincere desire to reach an agreement which did not conform to purported extra-unit or regional concerns.

However, these allegations are not supported with facts. The Union provides a copy of the Regional Pension Reform plan, and points out that the City's proposals during the latest round of negotiations borrows language from the Regional Pension Reform plan. Even assuming the City remained firm in that proposal throughout negotiations, this fact, alone, does not establish

that the City was engaged in surface bargaining. Additionally, the facts provided in the charge relative to the City's alleged refusal to inform the Union of the cost savings sought from Union concessions consists of Union officers attending public meetings and questioning the figures presented at those meetings. There are no facts demonstrating that an official request for necessary and relevant information was made and either ignored or responded to with deliberately misleading information. Thus, while it may be true that conflicting information was provided at public meetings in response to various inquiries, it is not clear that the City deliberately misinformed the Union or refused to respond to any requests for information.

In short, although there appear to have been a number of miscommunications between the parties and the City took firm positions as to several negotiable issues, the facts do not establish that the City engaged in a course of conduct with the intent of thwarting the parties' negotiations.

Therefore, the allegations which fail to state a prima facie case are hereby dismissed based on the facts and reasons set forth in this and the December 21, 2011 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[6] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (PERB 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 during a regular PERB business day. (PERB Regulations 32135(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. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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

If Charging Party files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (PERB 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 PERB Regulation 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. (PERB Regulation 32135(c).)

Extension of Time

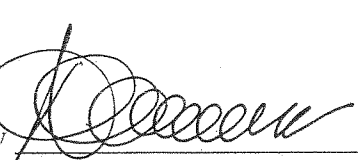
A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. 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. (PERB 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,

M. SUZANNE MURPHY
General Counsel

By 
Alicia Clement
Regional Attorney

Attachment

cc: Edward L. Kreisberg, Attorney

AC

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1023
Fax: (510) 622-1027

December 21, 2011

W. David Holsberry, Attorney
Davis, Cowell & Bowe
595 Market St., Suite 1400
San Francisco, CA 94105

Re: *United Professional Firefighters, Local 1230 v. City of Pinole*
Unfair Practice Charge No. SF-CE-864-M
**WARNING LETTER**

Dear Mr. Holsberry:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 12, 2011. The United Professional Firefighters, Local 1230 (Union or Charging Party) alleges that the City of Pinole (City or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by refusing to meet and confer and by making unilateral changes to terms and conditions of employment for represented employees. A first amended charge was filed on August 2, 2011; the City's response was filed on September 12, 2011; the Union filed a reply to the City's response on September 23, 2011; and the Union filed a second amended charge on November 17, 2011.

PERB's investigation of the charge and amended charges, as well as the response and reply thereto, revealed the following relevant facts. Charging Party is the exclusive representative of a bargaining unit of firefighters. Since February 2011, the parties have been in negotiations over a successor memorandum of understanding (MOU).

In response to what it perceived as a net loss in revenue, the City began negotiations with concessionary proposals which included reductions in pay and increases in health benefits and retirement costs. According to the City, other bargaining units were similarly impacted. The parties met for negotiations an unspecified number of times during February, March, April, May and June 2011. On July 22, 2011, the parties met with a State Mediation and Conciliation Service (SMCS) mediator in an attempt to resolve their outstanding disputes. According to the City, it attempted to limit its key proposals to economic items, but agreed to modifications on non-economic items. Despite the assistance of SMCS, the parties deadlocked on the issues of pension and health benefits and minimum staffing levels. Ultimately, the City imposed its last, best and final offer (LBFO).

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

In its charge, the Union states:

> [T]he City of Pinole and its representatives failed to meet and confer in good faith and instead engaged in surface bargaining and maintained a "take it or leave it" attitude with respect to its proposals on pensions and capping medical contributions. These proposals "injected extra-unit matters" into the negotiations because they related to the purported need for "regional public pension reforms" rather than relating directly to the circumstances in the City of Pinole and the needs and proposals of the Local 1230 bargaining unit. The City of Pinole refused to focus on or objectively consider Union proposals unique to the City of Pinole or to exhibit an open mind to alternatives to its proposals, nor did the City of Pinole have a sincere desire to reach an agreement which did not conform to purported extra-unit or regional concerns.

No additional facts are provided regarding the specific proposal(s) made by either party.

According to the Union, on an unspecified date, the City altered staffing levels and "browned out" Fire Station 74.[2] The Union asserts that these decisions were made with the intention of "coercing" bargaining unit members. The City asserts that the decision to close or "brown out" Station 74 was made at a public City Council meeting in May 2011. According to the City, the Union's President, Vince Wells, spoke at several City Council meetings where station closures were discussed and acknowledged that the City had the right to "either close or keep the station open."

While the parties were negotiating the effects of the station closure, the issue of staffing levels was raised. The expired MOU stated that staffing levels would revert back to 2006 levels. The 2006 staffing levels for Station 74 allocated three personnel to staff that station. The City took the position that the closure of Station 74 negated that particular requirement. The Union's argument is apparently that the City's duty to revert to 2006 staffing levels obligated it to maintain Station 74 and to staff it accordingly.

According to the Union, on July 20, 2011, the City made two unilateral changes to terms and conditions of employment for firefighters. First, it announced that on-duty firefighters were not permitted to attend City Council meetings. According to the City, in July 2011, firefighters working as part of an on-duty fire company attended a City Council meeting in uniform during their scheduled work shift. In response to this conduct, the City Manager and Fire Chief announced that while all off-duty personnel were welcome to attend City Council meetings,

[2] Both parties use the phrase "brown out" to describe the temporary closure of one of the fire stations due to lack of funds.

on-duty personnel could watch City Council meetings live at the fire station while waiting for calls, but should not leave their assigned work stations to attend meetings.

Second, the Union asserts that on July 20, 2011, the City announced that "acting" supervisory assignments were no longer voluntary. The Union provides no additional facts regarding this allegation. However, in its response, the City states that after the Union rejected the City's LBFO, the Union President presented the Fire Chief with three letters from employees in different "acting" positions, each stating that they no longer wished to serve in those acting positions. According to the City, the Fire Chief stated in response to the letter from the Acting Battalion Chief only, that "losing the Acting Battalion Chief would create a problem and that he might need to direct someone to work in that capacity to ensure department coverage and operations." Ultimately, no action contrary to the wishes of that employee were taken and the Fire Chief arranged for an external battalion chief to serve in his stead.

According to the City, the parties' MOU states:[3]

> The City shall provide an incentive pay program for those employees with the rank of Captain, who have been requested to serve as the Battalion Fire Chief for the Battalion 7 area in his or her absence. The purpose of this program is to provide an opportunity for Captains to gain additional management experience and to provide overall management coverage of operational and tactical response requirements when the [F]ire Chief is absent an[d] has so directed. Additional compensation will be provided . . . to those fire personnel.

Thus, while refuting the statement that the Fire Chief made any threat, the City argues that operations require that it has either a Battalion Chief or an Acting Battalion Chief at all times, and that the above-quoted language was never intended to make the decision optional at the employee's discretion. The other two employees were permitted to resign their acting positions without incident.

Finally, the Union asserts that, on July 29, 2011, the City "threatened to unilaterally attach current wages of [Union] members." The Union does not provide any additional facts related to this allegation. It appears, however, that the conduct which the Union characterizes as attaching the wages of employees is the City's imposition of its LBFO, which included an increase in employee contributions to pension and health benefits, resulting in an overall decrease in the employees' wages.

[3] Neither party provides a copy of the MOU, but the City quotes portions of the MOU in its response.

**Discussion**

PERB Regulation 32615(a)(5)[4] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

As written, the charge contains a number of statements that are simply legal conclusions. As discussed in greater detail below, the charge fails to allege the prima facie elements of an unfair practice.

I. Surface Bargaining

The charge alleges that the employer violated Government Code section 3505 and PERB Regulation 32603(c) by engaging in bad faith or "surface" bargaining. Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 (*Placentia Fire Fighters*).) PERB has held it is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "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; *Placentia Fire Fighters*, at p. 25.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (*Oakland Unified School District* (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (*Ibid.*) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S.)

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

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (*Stockton Unified School District* (1980) PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134); and reneging on tentative agreements the parties already have made (*Charter Oak Unified School District* (1991) PERB Decision No. 873; *Stockton Unified School District, supra*; *Placerville Union School District* (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (*Placentia Fire Fighters, supra*, 57 Cal.App.3d 9, 25; *Oakland Unified School District, supra*, PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229.)

In this case, the Union states in its charge that the City entered negotiations with a take-it-or-leave-it attitude. However, other than the fact that the parties failed to reach an agreement, the Union provides no facts to support this contention. Thus, absent additional facts from which PERB could make a determination that the City's conduct evidenced a take-it-or-leave-it attitude, this allegation will be dismissed.

Even assuming Charging Party is able to amend the charge to include facts demonstrating that the City entered negotiations with a take-it-or-leave-it attitude, the allegation of a single indicia of bad faith bargaining does not establish a prima facie case of bad faith bargaining. (*Oakland Unified School District* (1996) PERB Decision No. 1156.)

II. Unilateral Changes

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c), 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.)[5] 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; *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.)

[5] When 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.)

A. Brown Outs

Whether a subject is within the scope of representation is a legal determination that must be made by the Board. (*South Bay Union School District* (1990) PERB Decision No. 791.) The MMBA states, at section 3504:

> The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order. [Emphasis added.]

Whether a matter is negotiable, even though not specifically enumerated, is determined under the three-part test established in *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623: (1) Does the management action have a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees. If not, there is no duty to meet and confer. (2) Does the significant and adverse effect arise from the implementation of a fundamental managerial or policy decision. If not, then the meet and confer requirement applies. (3) If both factors are present, the Board applies a balancing test. The action is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question. (*City of Alhambra* (2010) PERB Decision No. 2139-M.)

It is axiomatic that a refusal to bargain is not an unfair practice if the refusing party had no duty to bargain. (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M.) The test for determining the scope of representation under the MMBA, described above, closely resembles the test adopted by the United States Supreme Court when interpreting the scope of bargaining under the National Labor Relations Act (NLRA). The Court pointed out in *First National Maintenance Corp. v. National Labor Relations Board*, (1981) 452 U.S. 666, that the importance of labeling a subject matter a mandatory subject of bargaining is not only to ensure that certain subjects affecting employer-employee relations are fully negotiated, but to establish and maintain industrial peace and the flow of commerce. The issue in *First National Maintenance Corp. v. National Labor Relations Board, supra*, 452 U.S. 666, was whether the employer's decision, motivated purely by the fiscal needs of the business, to close one of its locations was a mandatory subject of negotiations. The Court reasoned that requiring an employer to negotiate over a decision to close part of its business disproportionately harms the employer because the union's practical purpose in participating in negotiations over this decision "will be largely uniform: it will seek to halt or delay the closing." (*Ibid.* at 686.) Requiring the employer to complete negotiations before implementing the change by labeling the decision a mandatory subject of bargaining would "afford a union a powerful tool for achieving delay, a power that might be used to thwart

management's intentions in a manner unrelated to any feasible solution the union might propose." (*Id.* at p. 683.)

As noted by the California Supreme Court, decisions to close a plant or reduce the size of an entire workforce directly affect the amount of work that can be accomplished or the nature and extent of the services that can be provided and are therefore, "fundamental management" decisions. (*Building Materials & Construction Teamsters Union, Local 216 v. Farrell* (1986) 41 Cal.3d 651.) Furthermore, the scope of bargaining under the MMBA may be narrower than under the NLRA, as the legislative exclusion of merits, necessity or organization during negotiations was included to forestall any expansion of the language of "wages, hours and working conditions" to include more general managerial policy decisions. (*San Jose Police Officers Association v. City of San Jose* (1978) 78 Cal.App.3d 935.) PERB has routinely held that a decision which reflects a change in the nature, direction or level of services falls within management's prerogative and is outside the scope of representation. (*Arcata Elementary School District* (1996) PERB Decision No. 1163; see also, *Moreno Valley Unified School District* (1995) PERB Decision No. 1106 [staffing pattern determinations are a matter of managerial prerogative and not subject to negotiations].)

In this case, the Union argues that the City was obligated to negotiate over the decision to temporarily close Station 74. Charging Party has not provided evidence of any PERB cases in which the negotiability of "brown outs" was at issue. "Brown outs" appear to be the public sector equivalent of the private sector act of shutting down part of a business—for purely fiscal reasons, the City has determined that it must scale back the number of locations at which it offers fire suppression services. Under these circumstances, the most likely outcome of a requirement that the parties negotiate over this matter is simply to delay the inevitable reduction in fire prevention services during a period of worsening financial circumstances. Thus, in this case, "brown outs" have a significant and adverse effect on terms and conditions of employment, but the employer's need for unencumbered decision-making appears to outweigh any benefit to employer-employee relations by requiring the parties to negotiate over the matter.

Accordingly, it is not clear that the City had a duty to meet and confer over the decision to implement "brown outs." Absent evidence that "brown outs" are within the scope of representation, Charging Party has not established the prima facie elements of a complaint for failure to meet and confer in good faith over the decision to brown out Station 74.

A finding that the parties are not required to meet and confer over the decision to implement "brown outs" does not absolve the employer from its duty to meet and confer with the Union over any negotiable effects of its decision, however. As noted in *Claremont Police Officers Assoc. v. City of Claremont, supra*, 39 Cal.4th 623 at 634, requiring effects bargaining maintains an appropriate balance between an employer's right to close its business and an employee's need for some protection from arbitrary action.

In order to establish the prima facie elements of a charge of failure to meet and confer over negotiable effects, the charging party must show that it made a request to bargain the effects of

the decision. (*Sylvan Union Elementary School District* (1992) PERB Decision No. 919.) Once the union requests to bargain over the effects of a permissive/non-negotiable change, the employer is obligated to negotiate over all the reasonably foreseeable effects thereof. (*The Regents of the University of California (Lawrence Livermore National Laboratory)* (1997) PERB Decision No. 1221-H.)

Implementation of a non-negotiable decision prior to agreement or exhaustion of impasse (assuming the respondent provided notice and a meaningful opportunity to bargain) is lawful if: (1) the implementation date is not an arbitrary one; (2) notice of the implementation date is given sufficiently in advance for meaningful negotiations prior to implementation; and (3) the employer negotiates in good faith prior to and after implementation as to those subjects not necessarily resolved by virtue of the implementation. (*Compton Community College District* (1989) PERB Decision No. 720.)

Here, it appears that the parties engaged in some discussion with regard to staffing levels and how the closure of Station 74 would impact the Constant Staffing provision in the parties' MOU. What is unclear is whether these discussions took place in the context of a meet and confer demand over the effects of the brown out decision. Absent facts demonstrating that the Union demanded and the City was required to meet and confer over staffing as a foreseeable effect of the brown out of Station 74, PERB may not presume that these elements of a prima facie charge have been met.

Thus, under the circumstances, PERB cannot find the prima facie elements of a complaint for failure to meet and confer in good faith over the negotiable effects of a decision to brown out Station 74.

B. Attendance at City Council Meetings

It is a fundamental rule of labor law that certain terms and conditions of employment must remain in effect following the expiration of a collective bargaining agreement during the parties' negotiations over a successor agreement. (*Antelope Valley Union High School District* (1998) PERB Decision No. 1287.) The status quo against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51.) The fact that the collective bargaining agreement does not clearly refer to certain benefits does not detract from the fact that their existence represents the status quo. The employer cannot change the status quo on items within scope without first complying with the Act's meet and confer requirements. (*Clovis Unified School District* (2002) PERB Decision No. 1504.)

A valid past practice must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a period of time as a fixed and established practice. (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186.) In other words, it must be "regular and consistent" or "historic and accepted." (*Ibid.*) Additionally, Charging Party must provide evidence that the employer knew of the employees' conduct. (*State of California*

*(Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization)* (1998) PERB Decision No. 1279-S.)

The Union alleges that the City "unilaterally altered the status quo by announcing that on duty employees were no longer permitted to attend and observe Pinole City Council meetings." However, the Union provides no evidence of a policy or past practice of permitting firefighters to attend City Council meetings while on duty. Absent evidence that the status quo included a policy of permitting firefighters to attend City Council meetings while on duty, this allegation will be dismissed.

C. Acting Assignments

The Union also alleges that "the City of Pinole threatened to unilaterally alter the status quo by refusing to adhere to the recognized practice that acting assignments were voluntary." However, the Union provides no facts demonstrating that there was a recognized practice that acting assignments were voluntary. Absent such facts, this allegation will be dismissed.

D. Wages/LBFO

The Union alleges that the City threatened to attach employees' wages, and that it has unilaterally imposed contract terms that violate public employee retirement statutes.

A local agency under the MMBA is empowered to establish procedures for dispute resolution. (Gov. Code, §3507.) PERB regulation 32603 states that it is an unfair practice for an employer to fail to exercise good faith while participating in any required impasse procedure or for an employer to violate a local rule. Thus, in jurisdictions governed by the MMBA, local rules, regulations and ordinances, as well as applicable contract provisions, must be examined to determine what, if any, impasse resolution mechanisms are required.

From the facts provided by both parties, it appears that the parties were meeting and conferring for a period of time before resorting to some form of dispute resolution involving SMCS. Although not characterized in this fashion by the Charging Party, it also appears that the dispute resolution process was undertaken as part of an impasse procedure and did not result in an MOU, at which point the City implemented its LBFO.

While it is true that the employer may not implement changes to the status quo while the parties are meeting and conferring over a successor MOU, it may lawfully implement changes reasonably contemplated within in its LBFO after completing its duty to meet and confer. (*City of Clovis* (2009) PERB Decision No. 2074-M.) However, neither party provides a copy of the City's local rules. Thus, it is unclear whether Charging Party intends to argue that the City has implemented an unreasonable local rule, or that it has violated a local rule. Nor is it clear whether the parties had reached impasse as defined by the City's local rules. The Union must amend the charge to include facts demonstrating either that the City failed to follow its own rules regarding impasse; that its impasse procedures were unreasonable on their face; or that the City's implementation of its LBFO occurred prior to the parties reaching a valid

impasse. Absent additional facts, PERB cannot find a violation of the Act and this allegation will be dismissed.

To the extent that Charging Party intends to allege that the increased withholdings by the City violate Government Code sections 20469, 20474, 20678, and 20710, those allegations must be addressed in another forum. PERB does not enforce the provisions of the Government Code relative to the Public Employees' Retirement System.

For these reasons the charge, as presently written, does not state a prima facie case.[6] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Third Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before January 6, 2012,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Alicia Clement
Regional Attorney

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

[7] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)