STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ESCONDIDO CITY EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF ESCONDIDO, Respondent.	Case No. LA-CE-618-M PERB Decision No. 2311-M March 8, 2013

Appearance: Hayes & Cunningham by Amanda K. Hansen, Attorney, for Escondido City Employees Association.

Before Martinez, Chair; Huguenin, Winslow, and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Escondido City Employees Association (Association) of the partial dismissal of its unfair practice charge. The charge, as amended, alleges that the City of Escondido (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by transferring bargaining unit work without negotiating with the Association.[2] The charge, as amended, alleges that this conduct constitutes a violation of MMBA section 3505, and therefore an unfair

[1] MMBA is codified at Government Code section 3500 et seq. Hereafter, these sections of the Government Code will be cited to as sections of the MMBA.

[2] The charge, as amended, also alleges that the City violated the MMBA by issuing a directive prohibiting an employee from exercising protected rights and by retaliating against the same employee for exercising protected rights. These allegations were not dismissed, and therefore are not before the Board itself on appeal.

practice under PERB Regulation 32603, subdivision (c).[3] The Office of the General Counsel dismissed this aspect of the amended charge for failure to state a prima facie case. The Association filed a timely appeal. The City did not file a statement in opposition to the appeal as allowed by PERB Regulation 32635, subdivision (c).

---

[3] MMBA section 3505 provides:

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
>
> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

PERB Regulation 32603 provides, in relevant part:

> It shall be an unfair practice for a public agency to do any of the following:
>
> (c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(PERB Regs. can be found at Cal. Code Regs., tit. 8, sec. 31001, et seq.)

The Board has reviewed the record in its entirety and given full consideration to the issues raised on appeal. Based on our review, we reverse the partial dismissal and remand the case to the Office of the General Counsel for issuance of a complaint on the alleged unlawful transfer of work by the City for the reasons discussed below.

SUMMARY OF FACTUAL ALLEGATIONS

The Association is an employee organization within the meaning of the MMBA, and the exclusive representative of City employees in the Administrative, Clerical and Engineering (ACE) bargaining unit. The City is a public agency within the meaning of the MMBA.

The City's General Fund deficit for fiscal year 2009/2010 was projected at $8.4 million. The City determined that it could not address the deficit without reductions in staff. On March 4, 2010, the City informed the Association's attorney of its intent to lay off all full-time code enforcement officers.[4] The City also advised the Association of its intent to negotiate the impact of the layoffs.

On March 15, 2010, the representatives of the Association and the City met to negotiate the impacts of the layoffs during a meet and confer session. Also on March 15, 2010, the parties agreed to the terms of a severance package for the laid off employees, and executed a tentative agreement memorializing their agreement. The layoffs were effective March 31, 2010.

---

[4] The range of duties performed by employees in the classes of Code Enforcement Officer I (entry level) and II (journey level) is described as follows. They perform a variety of technical duties in support of the City's code enforcement program; monitor and enforce applicable ordinances, codes and regulations related to land use, building, housing, health and safety, property maintenance, mobile home parks, abandoned vehicles, noise and other matters of public concern; investigate violations and initiate procedures to abate violations and obtain compliance including issuing notices of violations, citations and other correspondence specifying necessary corrective actions; and serve as a resource and provide information on City regulations to property owners, residents, businesses, the general public and other City departments and divisions. (Job Description, City of Escondido, last rev. 12/2007 [attached as exh. S to City's Statement of Position].)

The charge states that the City found employment for two of the affected employees. A third, Sandra Moore (Moore), exercised her bumping rights and agreed to be demoted to a lower classification previously held in the same bargaining unit. Subsequently, Moore was placed on the City's re-employment list. Effective June 27, 2010, Moore was reinstated to her former classification within the bargaining unit, Code Enforcement Officer II. Upon reinstatement, Moore continued to perform the same code enforcement duties as before.

The tentative agreement on effects of the layoff contained a verbatim copy of a provision from the parties' Memorandum of Understanding (MOU), effective July 1, 2009 through June 30, 2010. That provision, entitled Management Right to Contract with Outside Vendors, states:

> The City will continue to accomplish work internally within the City workforce and assign such work among various City departments. When extra ordinary or specialty work must be accomplished, the City will seek the most cost effective resources to accomplish such work either through temporary employees or outside professionals.

The Association alleges that since effectuating the layoffs the City has increasingly utilized part-time code enforcement officers to perform the work of the full-time code enforcement officers. Part-time code enforcement officers are outside the bargaining unit. They perform the same job duties as full-time code enforcement officers. The City counters that it did not transfer bargaining unit work, but rather, cut back its code enforcement efforts due to the budgetary constraints, and reorganized and streamlined the code enforcement program, thereby reducing overall workload.

The unfair practice charge was filed on July 7, 2010. A warning letter from the Board agent dated June 28, 2011, invited the Association to file an amended charge to correct deficiencies in the initial charge. A first amended charge was filed on July 15, 2011. The Association complied with the Board agent's request for additional information about Moore

by letter dated September 6, 2011. A second amended charge was filed on October 11, 2011. And, the partial dismissal letter issued on December 5, 2011.

THE PARTIAL DISMISSAL OF THE UNFAIR PRACTICE CHARGE

The Office of the General Counsel determined that the City had a duty to negotiate the transfer of work from full-time to part-time code enforcement officers because the layoff of the full-time officers resulted in full-time officer duties ceasing to be performed by full-time officers, citing to the Board's decision in *Desert Sands Unified School District* (2010) PERB Decision No. 2092 (*Desert Sands*). The Office of the General Counsel also determined that the City had no duty to negotiate the decision to layoff all full-time code enforcement officers, and satisfied its duty to negotiate the effects. The dismissal letter relies on the provision in the effects bargaining tentative agreement regarding management's right to contract with outside vendors to find that the Association waived its right to negotiate the transfer of bargaining unit work to part-time officers.

THE ASSOCIATION'S APPEAL

The Association raises three issues on appeal. First, the Association argues that the Office of the General Counsel correctly found that the City had a duty to negotiate the transfer of work, but erred in finding that the City's meet and confer obligations extended only to the effects of the layoff. Second, the Association argues that the Office of the General Counsel erred in finding that the Association waived its right to negotiate the transfer of work. Last, the Association argues that the Office of the General Counsel exceeded the scope of its authority in dismissing the transfer of work allegations in two ways. According to the Association, the Office of the General Counsel did not have the authority to issue the dismissal

without providing the Association with notice of the allegations' deficiencies in a second warning letter or to decide the waiver issue.[5]

DISCUSSION

Timeliness of the Charge

PERB Regulation 32620, subdivision (b)(5), requires dismissal of a charge or any part thereof if it is determined that the charge is based upon conduct occurring more than six months prior to the filing of the charge. A charging party bears the burden of demonstrating that the charge is timely filed. (*County of Sonoma* (2012) PERB Decision No. 2242-M.) The statute of limitations is an element of the charging party's prima facie case. (*Long Beach Community College District* (2009) PERB Decision No. 2002.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

The statute of limitations for new allegations contained in an amended charge begins to run based upon the filing date of the amended charge (*Sacramento City Teachers Association (Marsh)* (2001) PERB Decision No. 1458) unless the new allegations in the amended charge relate back to the original allegations in the initial charge. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959.) An amended charge relates back to the initial charge only when it clarifies facts originally alleged in the initial charge or adds a new legal theory based on facts originally alleged in the initial charge. (*Ibid.*)

Here, the conduct underlying the charge, the alleged unlawful unilateral transfer of work, occurred subsequent to March 31, 2010, the effective date of the layoffs. The initial charge was filed within six months of that date on July 7, 2010, and is therefore timely. The amended charges were not filed until July 15 and October 11, 2011, more than six months from

[5] Because the Board has decided to reverse the dismissal of the charge on substantive grounds, it is unnecessary to reach the third issue raised by the Association.

the conduct underlying the charge. The timeliness of the amended charges turns on whether the new allegations clarify facts originally alleged in the initial charge or add a new legal theory based on facts originally alleged in the initial charge.

The initial charge sets forth two legal theories, "unlawful prohibition on protected activity" and "retaliation for protected activity." The amended charges set forth a new legal theory, "unlawful transfer of unit work." Despite the absence of the new legal theory in the initial charge, the original allegations included the following statement:

> Since effectuating these layoffs in April 1, 2010, the City has increasingly utilized part-time Code Enforcement Officers, who are not in the ACE unit, in order to fulfill the necessary City service while avoiding recalling Mr. Lane from layoff status.

The new allegations in the amended charges concerning the transfer of unit work clarify these facts. The new allegations also add a new legal theory based on facts originally alleged.

While the initial charge focused primarily on the Association's protected activity and retaliation allegations, it provided sufficient factual allegations to raise the transfer of unit work claim. Once timely raised, a charging party may supplement factual allegations and legal theories in subsequent amendments to the charge. PERB Regulation 32620 authorizes a Board agent to "[m]ake inquiries" and "[a]ssist the charging party to state in proper form the information." This authority includes asking a charging party for clarification of facts and assisting with identifying proper legal theories. (*Los Banos Unified School District* (2007) PERB Decision No. 1935.) Because the new allegations in the amended charges concerning the transfer of unit work relate back to the original allegations in the initial charge, the amended charges are deemed timely filed.

Unlawful Unilateral Change: Transfer of Bargaining Unit Work

MMBA section 3505 requires the governing body or other representative of a public agency to meet and confer in good faith regarding wages, hours and other terms and conditions

of employment with representatives of recognized employee organizations. PERB Regulation 32602, subdivision (c), makes it an unfair practice under the MMBA for a public agency to refuse or fail to meet and confer in good faith with an exclusive representative as required by MMBA section 3505.

To determine whether a party has violated MMBA section 3505, 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.)[6] It is well-settled that an employer who makes a pre-impasse unilateral change in an established negotiable policy violates the duty to bargain in good faith. (*NLRB v. Katz* (1962) 369 U.S. 736.) Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1187.)

Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer took action to change policy; (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations; (3) the action was not merely an isolated breach of the contract or practice, but had a generalized effect or continuing impact upon bargaining unit employees' terms and conditions of employment; and (4) the change in policy concerns a matter within the scope of representation. (*Fairfield-Suisun Unified School District* (2012) PERB Decision 2262; *Grant Joint Union High School District* (1982) PERB Decision No. 196; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

[6] 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.)

The transfer of work from bargaining unit employees to employees in another bargaining unit or to non-unit employees is a matter within the scope of representation because it has a significant effect on the wages, hours and working conditions of bargaining unit employees. (*Rialto Unified School District* (1982) PERB Decision No. 209.) The Board has held, however, that not all transfers of bargaining unit work are negotiable. In *Eureka City Schools* (1985) PERB Decision No. 481, the Board held that a change in the distribution of duties between unit and non-unit employees, where there is an established practice of overlapping duties, does not *always* give rise to a duty to bargain. In *Eureka*, the Board stated that:

> In our view, in order to prevail on a unilateral transfer of work theory, the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that unit employees ceased to perform work which they had previously performed or that nonunit employees began to perform duties previously performed exclusively by unit employees. However, where, as here, unit and nonunit employees have traditionally had overlapping duties, an employer does not violate its duty to negotiate in good faith merely by increasing the quantity of work which nonunit employees perform and decreasing the quantity of work which unit employees perform.

(*Id.* at p. 15, emphasis in original, fn. omitted.)

When a transfer of unit work is found to be within the scope of representation, the employer must bargain the decision to transfer work from the bargaining unit employees, not merely its effects on the employees. Although the Board in *Eureka* held that there may be circumstances involving "overlapping duties" where a transfer will not be found negotiable, this rule does not apply where, as a result of the transfer, the employer eliminated work previously performed by the bargaining unit employees and re-assigned it to employees outside the bargaining unit. In such a case, the first of the two exceptions set forth in *Eureka*, i.e., unit

employees cease performing previously performed work, would apply in finding the transfer negotiable. (*Calistoga Joint Unified School District* (1989) PERB Decision No. 744.)

As alleged, after the layoffs were effectuated, the City increasingly began utilizing part-time code enforcement officers to perform the work of the full-time code enforcement officers. There is no dispute that the duties of full-time and part-time code enforcement officers overlap. Because bargaining unit employees "ceased to perform work which they had previously performed," under the Board's decision in *Eureka*, however, the alleged transfer was negotiable. In removing work from the bargaining unit and transferring it to other City employees, the City implemented a change in policy within the scope of representation without first affording the Association adequate notice and an opportunity to bargain over the change. Thus, the Association has established for prima facie purposes that the City breached its duty to bargain by failing to negotiate the transfer of work. (See *Desert Sands, supra,* PERB Decision No. 2092 [Board found violation of the duty to negotiate the transfer of unit work where health technicians performing overlapping duties with employees both within and outside the bargaining unit were laid off].)

In reaching this conclusion, the Board acknowledges that Moore was reinstated on June 27, 2010; and that Moore continued to perform the same code enforcement duties for the City as she did prior to the layoff. The Board also acknowledges that, subsequent to the layoff, the parties engaged in negotiations over a successor agreement. The Board has held, however, that a later reversal or rescission of a unilateral action or subsequent negotiation on the same subject of a unilateral action does not excuse the initial violation. (*Desert Sands, supra,* PERB Decision No. 2092 [Board rejected employer's argument that the reinstatement of bargaining unit employees subsequent to layoff negated the unlawful nature of the transfer of bargaining unit work]; *County of Sacramento* (2008) PERB Decision No. 1943-M; *Amador Valley Joint*

Union High School District (1978) PERB Decision No. 74 (*Amador Valley*).) Neither the subsequent reinstatement of Moore nor the negotiations for a successor agreement undercuts the Association's prima facie case of unlawful transfer of bargaining unit work.[7]

Although the City did not file a statement in opposition to the appeal, we next address its main contentions as expressed in position statements filed during the investigation of the charge to the extent these contentions are not already addressed above and are material to the appeal. First, the City argued that it did not transfer bargaining unit work. Rather, it cut City services. Whether the City absorbed the layoff by cutting services rather than transferring work is a disputed fact. At this stage of the proceedings, we are bound to accept the Association's allegations as true. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489.) It bears mention that the threshold element of a transfer of unit work violation is that the work was indeed transferred. Although we conclude that the Association has met its prima facie burden of pleading a transfer of unit work violation, it will have the burden to prove its case by a preponderance of the evidence at the formal hearing. There can be no unlawful unilateral change violation if, in fact, the City did not transfer the work of the full-time code enforcement officers. Such a transfer cannot be presumed by the overlapping nature of the full-time and part-time code enforcement officer duties in light of the City's

[7] As quoted above, the Board in *Eureka* held that an employer does not violate its duty to negotiate in good faith *merely* by increasing the quantity of work which non-unit employees perform and decreasing the quantity of work which unit employees perform where unit and non-unit employees have traditionally had overlapping duties. Unlike what happened in *Eureka*, all of the unit employees in this case were laid off. Therefore, *Eureka* does not apply. Moore's subsequent reinstatement does not change the basic factual allegations concerning the layoff and transfer of bargaining unit work that form the prima facie case.

We note that in *Eureka*, the Board concluded that the employer did not violate its bargaining obligation under a transfer of unit work theory because there was no evidence the unit employee ceased to perform duties that had previously been assigned to her in the past. At the same time, the Board concluded that the employer did violate its bargaining obligation by unilaterally reducing her hours.

contention that the work of the full-time code enforcement officers was eliminated rather than transferred. The Association will be required to prove that the part-time code enforcement officers began performing the work of the full-time code enforcement officers in addition to their own.

Second, the City argued that the Association waived its right to negotiate over the transfer of unit work by bargaining with the City over the effects of the layoff and entering into a tentative agreement. Waiver is an affirmative defense that must be proven by the party asserting it. (*Regents of the University of California* (2004) PERB Decision No. 1689-H.) Waiver of the right to bargain must be "clear and unmistakable." (*Amador Valley, supra,* PERB Decision No. 74; *Building Material & Construction Teamsters' Union, Local 216 v. Farrell* (1986) 41 Cal.3d 651.) Waiver will not be lightly inferred and any doubts must be resolved against the party asserting it. (*Placentia Unified School District* (1986) PERB Decision No. 595.)

As discussed above, that the City engaged in effects bargaining with respect to its non-negotiable decision to lay off the full-time code enforcement officers does not relieve it of the obligation to negotiate its decision to transfer unit work. Effects bargaining arising out of the layoff decision, on the one hand, and decisional bargaining arising out of the decision to transfer unit work, on the other, are separate and independent obligations.

The City relies on a provision in the tentative agreement copied verbatim from the MOU entitled Management Right to Contract with Outside Vendors. The specific language relied on by the City is "[t]he City will continue to accomplish work internally within the City workforce and assign such work among various City departments." In the course of negotiations, an employee organization may decide to waive its right to bargain a negotiable decision. The City would have PERB accept that the Association did just that, i.e., that the

Association agreed to reserve exclusively to the City the right to transfer unit work to non-unit employees in lieu of recalling unit employees from layoff. Such a waiver will not, however, be lightly inferred. The general language regarding accomplishing work internally before resorting to contracts with outside vendors does not evince a clear and unmistakable waiver of the Association's right to bargain over the transfer of unit work to part-time code enforcement officers. Because doubts must be resolved against the party asserting it, we cannot conclude as a matter of law that the provision in the tentative agreement regarding contracts with outside vendors constitutes a clear and unmistakable waiver. This is especially true in light of the fact that the transfer of unit work was alleged to have occurred after the negotiations concerning the effects of layoff had been completed by a tentative agreement.

Last, the City argued that the time for the Association to lodge an objection to the transfer of unit work was when the part-time non-unit employees first began performing bargaining unit work, relying on footnote 8 in *Eureka*, which states:

> Thus, in a case such as this, in order to establish a prima facie violation of the Act based on an unlawful transfer of unit work theory, the Association should have filed its charge at the time that nonunit employees first began performing unit work, not long after such a practice became established.

(*Eureka, supra,* PERB Decision No. 481, fn. 8, emphasis in original.)

The City contends that it has been using part-time code enforcement officers since 2002, and therefore the Association's objection is untimely. The City's reliance on footnote 8, however, is misplaced because it ignores the salient difference between *Eureka* and this case. Unlike *Eureka*, the present case does not entail an increase in quantity of work performed by non-unit employees and a corresponding decrease in quantity of work performed by unit employees. Here, the alleged violation—the unilateral transfer of all duties performed by the full-time officers—occurred on or about April 1, 2011. As the Association admits, it is not

complaining that part-time officers perform some of the duties of full-time officers. It complains that now they do all of those duties.

In sum, based on the foregoing reasons, the Board concludes that the Association has stated a prima facie violation of the duty to bargain in good faith by the City's transfer of unit work to non-unit employees.

ORDER

The Board REVERSES the Board agent's partial dismissal in Case No. LA-CE-618-M and REMANDS the case to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Members Huguenin, Winslow, and Banks joined in this Decision.