STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 101, Charging Party, v. CITY OF SAN JOSE, Respondent.	Case No. SF-CE-837-M PERB Decision No. 2341-M December 6, 2013

Appearances: Beeson, Tayer & Bodine by Andrew H. Baker, Attorney, for American Federation of State, County and Municipal Employees, Local 101; Renne, Sloan, Holtzman & Sakai by Charles D. Sakai and Genevieve Ng, Attorneys, for City of San Jose.

Before Huguenin, Winslow and Banks, Members.

DECISION

BANKS, Member: This case comes before the Public Employment Relations Board (PERB or Board), pursuant to PERB Regulation 32635,[1] on appeal by the American Federation of State, County and Municipal Employees, Local 101 (Local 101) from the PERB Office of the General Counsel's dismissal of Local 101's first amended unfair practice charge (FAC). This dispute arose in early 2011 during negotiations for successor agreements between the City of San Jose (City) and Local 101, which represents two of the City's bargaining units, referred to as the Municipal Employees Federation (MEF) and Confidential Employees Organization (CEO) bargaining units. The FAC alleged that the City violated section 3505 of the Meyers-

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

Milias Brown Act (MMBA)[2] and PERB Regulation 32603, subdivisions (c) and (e), by bargaining in bad faith in negotiations and during the impasse resolution procedures authorized by the City's local rules.[3]

The Board has reviewed the entire record in this matter, including Local 101's initial charge and FAC, the City's responses thereto, the warning and dismissal letters issued by PERB's Office of the General Counsel, and Local 101's appeal of the dismissal and the City's response thereto. We have also reviewed Local 101's request to take administrative notice of, and to supplement the record of this appeal with, the May 10, 2013 decision and final order of the Superior Court of Santa Clara County in separate writ proceedings captioned *Deisenroth v. City of San Jose* (Case No. 1-12-CV-224197) (*Deisenroth*). Having received no objection from the City, and for the reasons discussed below, we find good cause for granting Local 101's request. On the supplemented record before us, we conclude that the FAC states a prima facie case that the City failed to bargain in good faith, and we therefore reverse the dismissal and remand the matter to the Office of the General Counsel for issuance of a complaint.

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

[3] Local 101's initial unfair practice charge, filed June 1, 2011, and its January 18, 2012 appeal of the Board agent's dismissal, both allege violations of section 3505 of the MMBA and "PERB Regulation *32604 (c) and (d)*" (emphasis added). Because the cited regulations pertain to unfair practices *by employee organizations*, the intended regulation and subdivisions are presumably PERB Regulation 32603, subdivisions (c) and (d), which prohibit a public *employer* subject to the MMBA from "[r]efus[ing] or fail[ing] 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" and, from "[failing] to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507," respectively.

FACTUAL BACKGROUND[4]

The MEF and CEO are chapters affiliated with Local 101, which represents employees in two of the City's eleven bargaining units. As of Fiscal Year 2011-2012, the CEO unit included approximately 177 employees, including Administrative Assistants and Administrative Analysts. The MEF included approximately 1,602 employees, ranging from relatively well-paid Senior and Supervising Public Safety Dispatchers to "the vast majority" of part-time employees, who, according to the City "might only work a few hours a week" and therefore earn "significantly lower salaries" than those of the Public Safety Dispatchers.

As of early 2011, when the present dispute arose, MEF employees were covered by a Memorandum of Agreement (MOA) set to expire on June 30, 2011.[5] CEO unit employees were covered by a separate MOA, which was set to expire on September 17. At the City's request, the parties agreed to bargain simultaneously for successor MOAs covering both units. Aside from the different expiration dates of the MOAs, all other factual allegations are the same for the negotiations affecting both units, unless otherwise specified.

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[4] The following narrative recites the material factual *allegations* included in the FAC and supporting materials, as supplemented by the City's responses where appropriate. Because this matter comes before the Board following dismissal for failure to state a prima facie case, we are not concerned here with making findings of fact or weighing the parties' conflicting allegations. (*San Juan Unified School District* (1977) EERB Decision No. 12 [prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Golden Plains Unified School District* (2002) PERB Decision No. 1489 (*Golden Plains*).) PERB regulations require that the respondent "shall be apprised of the [charging party's] allegations, and may state in its position on the charge during the course of the [Office of the General Counsel's] inquiries." (PERB Reg. 32620(c).) The Office of the General Counsel may consider additional facts provided by a respondent when these additional facts are provided under oath in compliance with PERB regulations, complement without contradicting the facts alleged in the charge, and are undisputed by the charging party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994; *Riverside Unified School District* (1986) PERB Decision No. 562a.)

[5] Unless otherwise indicated, all dates are for 2011.

In the months before negotiations began, the San Jose City Council convened a series of public meetings to discuss a significant shortfall in the City's budget for Fiscal Year 2011-2012. The stated purpose of these meetings was to obtain information from staff and to give direction to the City's negotiators for obtaining economic concessions from the various employee organizations representing City employees in an effort to close the budget shortfall. On November 18, 2010, the City Council approved a recommendation from City Manager Debra Figone (Figone) that the City adopt a "direction" memo, setting forth the City's objectives in upcoming contract negotiations with all employee organizations representing the City's employees, including the MEF and CEO. The City's overriding goal was to achieve an ongoing 10 percent reduction in "total employee compensation," which the City defined as the total budgeted cost of employee pay and benefits, including salaries, healthcare costs and retirement benefits.[6] As discussed in the direction memo and other correspondence provided by the City, the City hoped to achieve this goal through the following measures:

- Ongoing Base Pay Reduction: A 12.16 percent reduction in base pay for all employees in the MEF and CEO bargaining units, including a "roll back" of a 2 percent general wage increase received by employees in these units in Fiscal Year 2010-2011 under the existing MOAs.

- Pay Scale Restructuring: Reducing, by half, the amount of pay separating each step in the salary scale, from approximately 5 percent to 2.5 percent and increasing the corresponding number of steps at each level in the pay range.

[6] In response to several information requests, the City provided Local 101's negotiators with a document called "Understanding Changes to Total Compensation," which gave several examples whereby the City could achieve its target of a 10 percent total compensation savings, depending upon varying formulas for cutting each of the components making up "total compensation," *i.e.*, salaries, retirement benefits, and healthcare costs for employees and their dependents.

- Healthcare "Cost Sharing": Decreasing the City's share and, correspondingly, increasing the employee share of premiums for healthcare insurance for all employees and their dependents from 90/10 to 85/15.

- Increased Co-Payments for Employee Healthcare: Redesigning the HMO plan design to increase employee co-payments as follows: for office visits from $10 to $25, for generic and brand name prescription drugs from $5/$10 to $10/$25.

- Reduced Healthcare and Dental Payments-in-Lieu: Reducing the amount of payments to employees who have other healthcare and/or dental coverage.

- Eliminating Healthcare Dual Coverage: Making any employee who receives healthcare coverage as a dependent of another City employee or retiree ineligible for family coverage under the City-paid healthcare coverage plan.

- Eliminating Disability Leave Coverage and Benefits: Under the parties' existing MOAs, employees were eligible for up to a maximum of nine months disability leave benefits.

- Reducing Overtime Costs: No longer permitting paid time off to be considered "time worked" for the purpose of calculating the 40-hour per week threshold for overtime.

- Eliminating Employer Subsidy for Public Transit: Cancelling the City's practice of providing employees with the "ECO-Pass" used on public transportation.

- Eliminating Sick Leave Pay Out: Eliminating the practice of converting unused sick leave to monetary payments for separating employees.

On this last point, Figone's memo noted that, in previous negotiations, the issue of eliminating compensation for accrued sick leave had caused "very strong reactions among employees," some of whom "consider this benefit to be 'vested' and not subject to change."

However, Figone noted that, "this program can be modified *through the negotiations process*" (emphasis added).

The City also sought other, less specifically-defined measures for achieving additional costs savings. The "direction" memo observed that "retirement reform" for current and future employees should include, but not be limited to, creating a second tier of pension and retiree healthcare benefits for new hires. The memo also proposed renegotiating the proportionate "cost/risk" equation between the City and its employees in retirement benefits and creating "[o]ptions to current employees" for changing the City's Supplemental Retiree Benefit Reserve (SRBR) program, which redistributes any "excess" contributions paid into a plan to retirees.

On December 17, 2010, the City's Director of Employee Relations Alex Gurza (Gurza) notified Local 101 that the City faced a projected budget shortfall of $115 million for the Fiscal Year 2011-2012 General Fund operating budget of approximately $819 million.[7] In light of its budget shortfall, the City informed Local 101 that it would be seeking significant economic concessions during the upcoming contract negotiations, including a 10 percent reduction in total compensation for employees in each of the City's eleven bargaining units, including MEF and CEO. By the City's own estimates, its package proposal, later identified as Package A, would recover $16,813,574 in cost savings from the MEF unit, which would include $14,743,346 in base pay reductions and $2,070,228 through redistributing healthcare costs. The City projected that it would recover $2,225,218 in total cost savings from the CEO unit, which would include $1,997,815 in savings from reductions in base pay and $227,403 in healthcare costs reform.

[7] These figures are significantly higher than the City's "2011-2012 Preliminary General Fund Forecast," which was apparently relied on to prepare the November 10, 2010 "direction" memo, which had projected a shortfall of less than $70 million.

Negotiations (January 2011-April 18, 2011)

On January 19, the parties' representatives met briefly to discuss ground rules. Approximately one week later, the City Council provided further "direction" to the City's negotiators regarding "retirement reform" and some of the other issues identified in the previous memo from the City Council, including further details on reducing the disability leave supplement and eliminating the sick leave payout provisions of the existing MOAs.

The parties met again on February 8 and 16, at which time Local 101 made several requests for information, though neither side presented proposals at either of these meetings.[8] At the February 16 meeting, the City reiterated its plan to achieve the objectives listed in the "direction" memo previously adopted by the City Council.

Between February 8 and April 18, Local 101 and the City met approximately 11 times and exchanged information and various proposals and counterproposals. Over the course of several meetings, the City presented its initial bargaining proposals, which corresponded exactly to the objectives outlined in the "direction" memo previously approved by the City Council. Specifically, the City proposed: (1) a 10 percent total compensation reduction in addition to rolling back the 2 percent general wage increase received by MEF and CEO unit employees in 2010-2011; (2) doubling the number of steps in each salary range while cutting in half, from 5 percent to 2.5 percent, the amount of increase between each step; (3) elimination of the City's sick leave payout provision included in the then-current MOAs; and (4) a proposed "Side Letter" that would defer discussion of "retirement reform" to mid-term bargaining during the future MOAs. On March 21 and 28, the City also explained, with

[8] Among its other allegations, the FAC alleged that the City failed to respond to Local 101's requests for various categories of information. Because the Office of the General Counsel dismissed this allegation and it was not raised in Local 101's appeal, we do not address it below. (PERB Reg. 32635.)

the aid of a document it had prepared called "Understanding Changes to Total Compensation," that with additional proposed cuts to employee healthcare benefits, the City would achieve its desired 10 percent reduction in "total compensation" for both the MEF and CEO units.

On April 4, Local 101 presented a package proposal responding to all of the City's initial proposals. Local 101's counterproposal would accept the 10 percent reduction in wages proposed by the City but rejected the City's proposal to shorten the duration of the MOA from three to two years. Local 101 rejected the City's proposal to "roll back" the 2 percent wage increase agreed to under the existing MOAs. Local 101 accepted some, rejected others and proposed counters for some of the City's proposed cuts to employee healthcare benefits. Local 101's counter would also accept, in principle, the City's proposal to eliminate sick leave payout but would limit it to employees who had accrued 15 years of service as of July 9 at a reduced payout rate. Local 101 rejected the City's proposed "Side Letter Agreement" to revisit the subject of "retirement reform" during the term of the MOA.

After the City's negotiators caucused for approximately ten minutes, the City's Deputy Director of Employee Relations Gina Donnelly (Donnelly) allegedly responded to Local 101's proposal as follows:

> There are some things that are very, very important to the City that are not in here, so … we … will probably [counter with a] one-year [proposal]. The reason I raise that as an option is that in a one year [agreement], some of the things on the must-have list for the City are things you simply can't propose to us or that we recognize you can't sell … to your members … .

On April 11, the City responded with a revised proposal, which was identical in every respect to its previous proposal, except that: (1) instead of eliminating disability leave entirely it would reduce eligibility from nine to a maximum of three months; (2) it no longer included language that would make Local 101 responsible for all costs of arbitration; and (3) it modified language that would have eliminated all safety language from the parties' MOAs.

On April 18, Local 101 countered with its second "package" proposal.[9] Local 101's April 18 package proposal accepted the City's proposed 10 percent pay cut but on the condition that wages would "snap back" to previous levels upon expiration of the MOAs. Local 101's proposal would also accept, in principle, the City's demand to eliminate sick leave payouts but with the modification that payouts would continue at a reduced rate for employees who had 15 or more years of service as of July 9. Local 101's counterproposal would also accept some of the City's proposed health maintenance organization (HMO) redesign to shift healthcare and dental costs from the City to its employees.

At the April 18 meeting, Local 101 also proposed changes to what it characterized as "non-economic" subjects. The proposed changes included modifying the scope of the arbitration clause to include disciplinary matters, modifying grievance procedure timelines, permitting unit employees to use City email accounts for union communications, modifying the vacation approval process, and modifying layoff procedures. Local 101 contends that the City rejected each of these proposals without explanation.[10] In a declaration submitted with the FAC, Local 101's chief negotiator Charles Allen (Allen) recounted one exchange in which Donnelly allegedly stated that the City was "not in a financial position to give the Union 'sweeteners.'" In response, Allen allegedly asserted that some of these proposals, including

[9] At this point in negotiations, the parties had exchanged two rounds of comprehensive or "package" proposals, which consisted largely of each party's previous proposals on individual subjects bundled together into a "package."

[10] In its response to the FAC, the City disputed Local 101's characterization of these proposals as "non-economic," and asserted that some of the proposed changes would entail substantial economic costs to the City. It is not clear from the documentation provided to the investigating Board agent whether the City articulated this concern to Local 101 *during negotiations*. In its response to Local 101's appeal, the City makes the additional argument that it did, in fact, respond to all of Local 101's "non-economic" proposals. As discussed below, the Office of the General Counsel generally accepted Local 101's allegation that the City neither offered an explanation for its rejection of the union's "non-economic" proposals nor presented counterproposals on these subjects.

proposed changes to the grievance and arbitration procedures, involved no additional costs to the City. According to Allen's declaration, Donnelly ignored this remark and the City "consistently rejected the Unions' proposals in this area" and similarly "refused to discuss in detail any of the subjects addressed by the proposed Side Letters."

After reviewing Local 101's April 18 revised package proposal, Charles Sakai (Sakai), counsel for the City, pointed out that Local 101's proposed "snap back" language was inconsistent with the City's demand for an *ongoing* wage reduction of 10 percent. The City then declared impasse. Local 101's bargaining team caucused briefly and returned to offer additional concessions in line with the City's demands, by modifying its previous proposal from a three-year to a two-year term and eliminating the "snap back" language.

Local 101 alleges that, instead of responding to this concession, Donnelly asked about the subject of "retirement reform," one of three subjects, along with employee compensation and healthcare benefits, comprising "total employee compensation," and a subject the City had previously identified as a source of major concessions. Local 101 alleges that its negotiators stated that they were prepared to negotiate over this subject, and that they attempted to engage the City in dialogue to determine what concerns had prompted the City's open-ended "Side Letter" proposal. Local 101 further alleges that the City refused to discuss or offer a "substantive" proposal on this subject. Instead, the City's negotiators stated that they were not prepared to negotiate retirement reform, declared for a second time that day that negotiations were at impasse, and invoked the mediation provisions included in the City's Employer-Employee Relations Resolution (EERO). Allen allegedly asserted that negotiations were not at impasse and objected to the presence of a mediator for future negotiations.

Impasse and Mediation (May 2-May 31, 2011)

Local 101 objected that negotiations were not deadlocked but eventually agreed, under protest, to resume negotiations with a mediator present. The parties met again, with a mediator, on May 2 and May 12, with additional meetings scheduled for May 16 and 17. However, at the May 12 meeting, the City presented its last, best and final offer (LBFO) for both the MEF and CEO units.

The City's LBFO consisted of two options, designated "Package A" and "Package B." Local 101 alleges, and the City does not dispute, that the Package A option deviated in only a few respects from the City's initial bargaining proposals or from the bargaining objectives stated in the "direction" memo. It included a base pay reduction of approximately 12.16 percent beginning in the pay period in which the MEF and CEO agreements expired; a "roll back" of the 2 percent general wage increase previously agreed to under the existing agreements for the MEF and CEO units; a restructuring of the pay scale to double the number of steps and to reduce, by half, the size of pay increases received at each step in the range; a reduction in the City's contribution for healthcare costs from 90 percent to 85 percent, and a corresponding increase in employee contributions effective October 1; redesign of the City's HMO plan, including several co-payments, ranging in amount from $10 to $100 to take effect October 1; elimination of dual healthcare and dental coverage for employees also covered as a dependent of another City employee or retiree effective October 1; an end to calculating paid time off towards weekly overtime eligibility; and, an end to City-provided mass transit passes and vouchers, effective January 1, 2012. The "Package A" option included language that would eliminate all sick leave payouts to separating MEF and CEO employees, effective January 1, 2012.

The City's LBFO option designated "Package B" was identical to the Package A option, except that it was for two years, instead of one year, and on the subject of sick leave payouts, it proposed a "Side Letter" that would defer discussion of this subject to mid-term modifications under the future MOAs. As with the City's other proposed side letters, the language included in the Package B option would permit either party to reopen negotiations over sick leave compensation at any time during the term of the future MOAs.

In a letter accompanying its LBFO, the City stated that if Local 101 failed to accept one of the two LBFO options by May 24, the City's negotiators would present the Package A option to the City Council on May 31 and, pending approval, impose the terms included therein for both the MEF and CEO units. On May 17, Gurza submitted a memorandum to the Mayor and the City Council recommending approval of the terms included in the City's one-year Package A option for the MEF and CEO units.

After receiving no response from Local 101 to the City's LBFO, on May 31 the City Council approved imposition of the one-year LBFO option identified as Package A. The terms included in Package A were imposed, effective June 1, for the MEF unit and Local 101 filed the present charge the same day. Because the City's MOA with the CEO unit was not set to expire until September 17, imposition of the terms included in Package A for the CEO unit was deferred until September 18.

Elimination of Sick Leave Payouts and the *Deisenroth* Litigation (January 1, 2011-Present)

As noted above, the City's one-year "Package A" LBFO included language whereby, "[e]ffective January 1, 2012, no employee shall be eligible for a sick leave payout." Based on its request for administrative notice and to supplement the record, Local 101 apparently alleges that, in accordance with the terms included in Package A and imposed June 1 and September 18, as of January 1, 2012, the City ceased paying MEF and CEO employees for

unused sick leave upon their separation from employment. On May 9, 2012, Lorie Deisenroth (Deisenroth), a retiring member of the MEF unit, brought a petition for writ of mandate in the Superior Court for Santa Clara County alleging that, as a 30-year employee of the City, her right to compensation for unused sick leave at separation had vested, and that the City had unlawfully interfered with this right by refusing to pay her for unused sick leave upon her retirement on March 31, 2012.

After hearing the matter on November 27, 2012, on May 10, 2013, the Superior Court issued its final statement of decision and order, in which it found that, as of January 1, 2012, the City had ceased making payments for accrued sick leave to separating employees, including Deisenroth, regardless of their accumulated years of service. The Superior Court concluded that the City's refusal to pay sick leave to Deisenroth unlawfully impaired vested rights and issued a peremptory writ of mandate directing the City and all persons acting pursuant to its control and direction to provide Deisenroth with all sick leave compensation that had accrued to her on or before December 31.

PROCEDURAL HISTORY

On June 1, 2011, Local 101 filed a charge which alleged that the City had failed to meet and confer in good faith before declaring impasse, had failed to participate in good faith in post-impasse mediation, and had adopted and/or imposed terms included in a "final offer," without first exhausting the good-faith meet-and-confer and impasse resolution process included in the City's local rules. Specifically, Local 101 alleged that the City's surface bargaining was evidenced by a "take-it-or-leave-it" approach to negotiations. It also alleged that the City's declaration of impasse was made in bad faith, was premature and/or was otherwise invalid, because the deadlock in negotiations was predicated on proposals that unlawfully conditioned agreement over mandatory subjects on prior agreement to non-

mandatory subjects. The allegedly non-mandatory proposals identified by Local 101 included several "Side Letter" proposals pertaining to employee retirement benefits, elimination of the SRBR program, and the parties' procedures for layoffs. The common feature of these "Side Letter" proposals which Local 101 found objectionable was that, rather than containing "substantive" terms, each proposed to defer discussion of that subject to reopener negotiations after the future MOAs took effect.

On July 8, the City responded to Local 101's charge by generally denying all material allegations, asserting various affirmative defenses, and providing the investigating Board agent with several exhibits of documents purportedly refuting some or all of the allegations included in the charge. The City specifically denies that its imposition of terms included any of its proposed side letters concerning retirement reform, changes to layoff procedures, elimination of sick leave payouts, and changes to SRBR benefits. The City maintains that, while "there is not yet PERB case law on point," various private-sector authorities recognize "reopener" proposals as mandatory subjects of bargaining, and that, as with other mandatory subjects of bargaining, parties are privileged to insist to impasse on their "reopener" proposals.

On July 27, the Office of the General Counsel issued a warning letter which identified two distinct legal theories included in the charge: (1) surface bargaining; and (2) insisting to impasse on non-mandatory subjects of bargaining, *i.e.*, the City's "reopener" proposals. The Office of the General Counsel found insufficient facts to support the surface bargaining allegation because, as explained in the warning letter, the City's proposals concerned mandatory subjects of bargaining and a party may lawfully engage in "hard bargaining" by insisting, even to impasse, on its positions concerning mandatory subjects. The Office of the General Counsel also observed that the City had made some concessions on non-economic

matters and, that Local 101 had failed to allege facts demonstrating that the City could achieve its desired cost savings by agreeing to Local 101's economic proposals.

The Office of the General Counsel also rejected Local 101's second theory. It essentially agreed with the City, that a proposal to defer negotiations of a mandatory subject to mid-term modifications is itself a mandatory subject and that, even in the face of requests by Local 101 for "substantive bargaining" on these subjects, the City was authorized to insist to impasse on proposals to defer discussion of retirement benefits, SRBR, layoff procedures, and sick leave payouts to separating employees.

On August 22, Local 101 filed the FAC. The FAC reiterated Local 101's allegation that the City had adopted a "take-it-or-leave-it" approach to negotiations, which Local 101 argued was demonstrated by the identity or near identity between the terms included in its publicly-announced bargaining objectives, its opening proposals, and the terms ultimately imposed on the MEF and CEO units. The FAC also alleged that the City made proposals that were "predictably unacceptable," as evidenced by a statement made by Donnelly to the effect that the City recognized that some of its "must-have" items were things that Local 101 could not "sell" to its members. As additional evidence of the City's bad faith, the FAC alleged that the City *both* failed to explain its rejection of Local 101's non-economic proposals *and* refused to make proposals or counter-proposals on other subjects, including retirement reform.

On September 23, the City filed and served its response to the FAC, in which it again asserted a general denial and raised various affirmative defenses. The City denied that its conduct amounted to complete inflexibility without explanation, since it had met with Local 101 approximately eleven times and had allegedly provided explanations for its bargaining demands. Although it did not file a counter-charge, the City also asserted that Local 101's negotiators' acted in bad faith by cancelling and showing up unprepared for

meetings and engaging in other dilatory tactics, by reneging on a prior agreement to proceed to mediation after the City's April 18 declaration of impasse, and by failing to offer timely responses or counterproposals. The City's response reiterated that its imposition of terms did not include the proposed "Side Letters" on retirement reform or other subjects.

On December 29, the Office of the General Counsel dismissed the FAC. The dismissal letter stated that existing case law would not support Local 101's allegation of "take-it-or-leave-it" bargaining, because numerous authorities hold that a party may insist on its position without giving concessions, "even if the reasons for insisting on a particular position or contract term are questionable, if the belief is sincerely held." The Office of the General Counsel also concluded that the statement attributed to Donnelly failed to demonstrate that the City's demands were "predictably unreasonable," even if they were "predictably unacceptable" to Local 101.

The dismissal letter acknowledged that Local 101 had sufficiently alleged that the City had failed to offer explanations for rejecting certain proposals and that it had likewise failed to offer counterproposals on other subjects. However, the Office of the General Counsel treated these allegations as *one* indicator of bad faith and therefore insufficient to state a prima facie case of surface bargaining which, according to the Office of the General Counsel, requires the presence of *more than one indicia* of bad faith.

The dismissal letter did not specifically address Local 101's revised allegations that the City's tactic of first raising the specter of sweeping changes to employee retirement benefits, but then refusing to offer a substantive proposal on this subject, was either a per se refusal to bargain or a separate indicator of bad faith. However, in its previous warning letter, the Office of the General Counsel had advised Local 101 that a reopener proposal concerning a

mandatory subject is itself a mandatory subject and in the Office of the General Counsel's view, an employer may lawfully bargain to impasse and "implement" such a proposal.

Local 101's appeal followed on January 18, 2012. It recites four categories of factual allegations to demonstrate that the FAC sufficiently stated a prima facie case of surface bargaining: (1) from the beginning of negotiations and continuing through the impasse resolution process, the City presented its key bargaining proposals on a "take-it-or-leave-it" basis and, specifically, the City's delay of a few months in implementing its proposal to eliminate sick leave payouts was "the *only* deviation" in key economic terms from the City's initial proposals; (2) the City failed to provide any rationale for its peremptory rejection of Local 101's non-economic proposals or for its refusal to provide proposals or counterproposals on these subjects *and* on the economic subject of retirement reform; (3) the City's negotiators acknowledged that some of its "must have" bargaining demands were patently unacceptable and that Local 101 could "never sell them to its members"; and (4) after announcing at the outset that it would seek significant concessions relating to "retirement reform," the City refused to offer a substantive proposal on that subject and instead insisted to impasse that this subject be "continued" to reopener talks during the terms of the future MOAs. Local 101 argues that the City's refusal to engage in "substantive" discussion on these reopener or "Side Letter" subjects deprived Local 101 of the ability to engage in the full give-and-take of concessionary bargaining. The appeal also argues that the City's refusal to offer "substantive" language on retirement reform constitutes dilatory tactics and/or demonstrates that its negotiators lacked authority, either of which would supply an additional indicator of bad faith.

After obtaining an extension of time, the City filed and served its response to Local 101's appeal on February 21, 2012. The City's response asserts that its "hard bargaining" tactics were lawful, that its negotiators provided explanations for the City's

rejection of Local 101's proposals, and that its negotiators had full authority to enter into tentative agreements on all subjects. The City's response also reiterates that no "Side Letter" proposals were imposed.

On May 13, 2013, Local 101 filed with PERB's Office of Appeals a request to take administrative notice and to supplement the record in this matter with the May 10, 2013, final decision and order of the Superior Court for the County of Santa Clara in the writ proceedings captioned *Deisenroth v. City of San Jose*. The City has raised no objection to this request.

DISCUSSION

Overview and Summary of Decision

Local 101's charge alleges that the City failed and refused to bargain in good faith during negotiations for successor MOAs and during the impasse resolution procedures required by the City's local rules. From its investigation, the Office of the General Counsel determined that the facts alleged by Local 101 supported only one possible indicator of the City's bad faith—its alleged refusal to offer explanations and/or counterproposals when rejecting Local 101's proposals. The Office of the General Counsel dismissed the charge for failure to state a prima facie case, reasoning that PERB case law requires the charging party to allege facts supporting "*more than one indicia*" of the respondent's bad faith in a surface bargaining charge.

We reverse the dismissal on several grounds. First, the appropriate test for surface bargaining is the "totality of circumstances" or "totality of conduct" test. Some authorities, including some PERB decisions, have included language suggesting that factual allegations supporting only one indicator of the respondent's bad faith are *usually* insufficient to state a prima facie case. (*Oakland Unified School District* (1996) PERB Decision No. 1156, p. 2; Kirsten L. Zerger, et al., eds., *California Public Sector Labor Relations* (Matthew Bender,

1012) § 10.04[2] ["*Unless the conduct is egregious*, the mere presence of one of these indicia alone is insufficient to establish bad faith." Emphasis added.]; John E. Higgins, Jr., et al., eds., *The Developing Labor Law*, Sixth Edition (BNA, 2012) Vol. I: 922-923, citing Archibald Cox, *The Duty to Bargain in Good Faith*, 71 *Harv. L. Rev.* 1401, 1421 (1958) ["Any single factor, standing alone, is *usually* insufficient to support [a finding of surface bargaining], but its 'persuasiveness grows as the number of issues increases.'" Emphasis added.].) In our view, however, a rigid adherence to such a categorical rule is ultimately inconsistent with the "totality of circumstances" test long used by PERB when assessing surface bargaining allegations. It fails to account for the potentially detrimental effect that one indicator, by itself, may have on the course of negotiations or the parties' bargaining relationship (*State of California, Department of Personnel Administration* (1989) PERB Decision No. 739-S) and its formulaic nature detracts from the ultimate question raised in every surface bargaining case – whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S.).

Second, regardless of how many indicators are needed to state a prima facie case of surface bargaining, the Office of the General Counsel's investigation of *this case* failed to consider *all* of the relevant factual allegations in the charge, including those that suggested several indicators of bad faith *other than* the one identified in the warning and dismissal letters. (*Oakland Unified School District* (1982) PERB Decision No. 275, p. 15 [requiring analysis of *totality* of facts and circumstances for surface bargaining allegation]; *Seattle-First National Bank v. NLRB* (9th Cir. 1981) 638 F.2d 1221, 1225, 1226-1227.) As explained below, the City's alleged insistence to impasse on various "Side Letter" proposals, *regardless* of whether these proposals were imposed, suggests a tactic of "piecemeal" or "fragmented" bargaining that

arbitrarily limited the range of possible compromises by declaring certain mandatory subjects of bargaining off limits for discussion until complete agreement has been reached on all other subjects. (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270 (*San Bernardino*), p. 80; *Visiting Nurse Servs. v. NLRB* (1st Cir. 1999) 177 F.3d 52, 59.) The FAC clearly alleges that the City refused to discuss or propose language on the subject of "retirement reform," even after the City itself had identified this subject as a source of "significant" concessions necessary to achieve its goal of a 10 percent reduction in "total employee compensation."

Third, PERB case law has expressly left open the possibility that, *in addition to* serving as an indicator of bad faith, the kind of piecemeal bargaining tactics alleged here by Local 101 may *also* constitute a per se violation of the duty to bargain. (*Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton*), pp. 21-27, esp. 24.) The FAC alleges that, over the objection of Local 101, the City insisted to impasse on various "Side Letter" proposals, whereby discussion of "retirement reform" and other mandatory subjects of bargaining would be deferred until after the parties had reached complete agreement on all other subjects. While Local 101 will have the burden of proving this allegation through competent and credible evidence before an administrative law judge (ALJ), at this stage of the proceedings, we find that it has alleged sufficient facts to state a viable theory that the City has refused *outright* to meet and confer promptly regarding matters within scope, as required by the MMBA. (§ 3505.)

Additionally, Local 101 has alleged sufficient facts to support an inference that the City adopted a "rush to impasse" strategy as a way to obtain concessions from its employees, without engaging in a sincere effort to reach agreement with their representative. (*Regents of the University of California* (1985) PERB Decision No. 520-H (*UC Regents*), pp. 14 and 25,

fn. 13.) Local 101 has alleged, among other things, that the parties exchanged only two rounds of comprehensive or "package" proposals before declaring impasse; that even as the City was declaring impasse, Local 101 was offering *additional* concessions in line with the City's bargaining demands but that the City flatly refused to explore the possibility of compromise; and, that the terms included in the City's LBFO differed in only insignificant respects from its well-publicized bargaining demands and opening proposals. While we emphasize that we do not rule on the merits of these allegations, we believe they sufficiently state a viable "rush to impasse" theory that should have been considered as a separate indicator of bad faith in support of Local 101's surface bargaining allegation. (*Golden Plains, supra*, PERB Decision No. 1489; *City of Pinole* (2012) PERB Decision No. 2288-M (*Pinole*), pp. 11-12.)

Finally, the FAC alleges that, as part of its LBFO Package A option, the City insisted on and imposed a proposal to eliminate all sick leave payouts to employees separating from the MEF and CEO units, effective January 1, 2012. On the basis of this allegation and the facts included in the *Deisenroth* decision, we conclude that Local 101 has alleged sufficient facts to state a prima facie case that the City has violated its duty to bargain in good faith by insisting to impasse and imposing an arguably illegal subject of bargaining. In accordance with the "totality of circumstances" analysis required by our case law, these allegations of separate, contemporaneous unfair labor practices, and their potential impact on negotiations, must be analyzed as additional indicators of the City's alleged bad faith. (*Beaumont Unified School District* (1984) PERB Decision No. 429 (*Beaumont*), p. 9.)

Legal Standard for Alleged Violations of the Duty to Bargain in Good Faith.

Section 3505 of the MMBA requires the governing body of a public agency or its designated representative to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of . . . recognized employee

organizations," and to "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." (MMBA, § 3505.) That same section defines the term "[m]eet and confer" as a

> 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.

The test generally used to determine whether good faith bargaining has occurred is the "totality of circumstances" or "totality of conduct" analysis, which looks to the entire course of negotiations, including the parties' conduct at and away from the bargaining table, to determine whether they have negotiated with the requisite intention of reaching an agreement. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro Valley*), pp. 4-5; *In re Atlas Mills, Inc.* (1937) 3 NLRB 10.) Because ascertaining compliance with the duty to bargain in good faith requires an inquiry into the respondent's motive during the bargaining process, a matter which is generally not susceptible to direct evidence, surface bargaining allegations must be determined from an examination of the "totality of circumstances" or "entire course of conduct" in which the negotiations took place. (*NLRB v. Reed & Prince Mfg. Co.* (1st Cir. 1953) 205 F.2d 131, 134, *cert. denied* (1953) 346 U.S. 887 (1953); see also *Seattle-First National Bank v. NLRB, supra,* 638 F.2d 1221, 1225, 1226-1227.)

However, certain forms of conduct have such potential to frustrate negotiations or undermine the authority of the bargaining representative that they are deemed unlawful without any determination of the respondent's subjective intent. (*Pajaro Valley, supra,* PERB Decision No. 51.) Examples of per se violations include an employer's refusal to provide the exclusive

representative with necessary and relevant information upon request (*Stockton, supra,* PERB Decision No. 143, pp. 18-19), an outright refusal to bargain over a mandatory subject (*Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services District* (1975) 45 Cal.App.3d 116, 118; *Sierra Joint Community College District* (1981) PERB Decision No. 179 (*Sierra*)), a pre-impasse unilateral change to terms and conditions of employment (*Stockton, supra,* PERB Decision No. 143, pp. 19-21), by-passing the representative and dealing directly with employees over negotiable matters (*City of San Diego (Office of City Attorney)* (2010) PERB Decision No. 2103-M, p. 7), and insisting to impasse on non-mandatory subjects of bargaining. (*Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista*), pp. 19-23.)

The "totality of circumstances" analysis used for surface bargaining allegations requires an examination of all the evidence relevant to the respondent's subjective intent, including its conduct constituting separate, contemporaneous unfair labor practices, whether committed at or away from the bargaining table. PERB thus follows private-sector authority in considering any separate per se violations as additional factors in support of an allegation that the respondent also engaged in an overall course of conduct amounting to bad-faith bargaining. (*Stockton, supra,* PERB Decision No. 143, pp. 23-24; *Atlanta Hilton & Tower* (1984) 271 NLRB 1600; *Radisson Plaza Minneapolis* (1992) 307 NLRB 94, 95, 109.)

Once a party has requested bargaining over a matter within the scope of representation, the "mutual obligation" set forth in the MMBA requires the other party to "meet and confer promptly," and to continue doing so "for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement." (MMBA, § 3505.) This obligation to "meet and confer *promptly*" is absolute. (*Dublin Professional Fire Fighters, Local 1885, supra*, 45 Cal.App.3d 116, 118.) An unreasonable delay in responding to a request

to bargain over a particular subject is treated as an outright refusal to bargain, a per se violation requiring no finding of subjective bad faith. (*Stockton, supra,* PERB Decision No. 143; *Sierra, supra,* PERB Decision No. 179.) PERB has also found a per se refusal to bargain when one party fails to provide an explanation for its bargaining position. (*San Mateo County Community College District (*1993) PERB Decision No. 1030 (*San Mateo*).) Because such conduct involves a refusal to negotiate, rather than the absence of good faith, it is not a defense to point to other, ostensibly "mitigating" facts, such as whether agreement was reached on other subjects of bargaining. (*Sierra, supra*, at pp. 6-7.)

With this framework in mind, we now turn to Local 101's factual allegations and the Office of the General Counsel's dismissal of the charge.

Allegations that the City's "Side Letter" Proposals Constituted "Piecemeal" Bargaining.

Local 101 alleges that, after the City announced that it would seek significant concessions in employee retirement benefits and other terms of employment, it then steadfastly refused to make substantive proposals on these subjects and instead insisted to impasse on proposed "Side Letters" that would defer discussion of these subjects to reopener talks under the agreements then being negotiated. Local 101 argues that the City's insistence on these reopener proposals, and its alleged refusal to engage in substantive discussion of these subjects until agreement had been reached on all others, would require Local 101 to negotiate the "Side Letter" subjects "in isolation" from all others and at a time when the range of possible compromises would be severely limited.

The Office of the General Counsel rejected this allegation, although it offered various reasons for doing so, as the legal theories asserted and authorities cited by Local 101 evolved during the investigation of the charge. In response to Local 101's initial charge, which argued that the City's "Side Letter" proposals included permissive subjects of bargaining, the Office

of the General Counsel observed that, "There does not appear to be any PERB authority that stands for the proposition that . . . re-opener clauses are permissive subjects of bargaining."[11] The warning letter also cited decisions by the National Labor Relations Board (NLRB) and the federal courts which, according to the Office of the General Counsel, had found reopener proposals to be within the scope of mandatory subjects. As explained in the warning letter, the Office of the General Counsel further reasoned that, because the City's "Side Letter" proposals affected retirement benefits, sick leave compensation, and the notice and selection procedures for layoffs—all of which are unquestionably mandatory subjects of bargaining—proposals to reopen negotiations on these same subjects must likewise be mandatory subjects. Moreover, because mandatory subjects are part of the routine "give-and-take" or "horse trading" of collective bargaining, the City therefore acted lawfully when it insisted on proposals to defer discussion of these matters to reopener negotiations.[12]

The FAC did not reiterate Local 101's previous argument that the City's "Side Letter" proposals involved permissive subjects of bargaining and it was therefore unnecessary for the Office of the General Counsel to retrace each step of its previous analysis. However, it appears from the dismissal letter that the Office of the General Counsel relied on the same reasoning to reach the same conclusion. In response to Local 101's allegations that, "the City failed to make any substantive proposals on [retirement benefits]" and instead "insisted to

[11] Alternatively, the warning letter asserted that, even if reopener proposals are permissive subjects of bargaining, the initial charge failed to allege facts demonstrating that Local 101 had sufficiently objected to the "re-opener" nature of the City's proposals.

[12] Similarly, the City's response to the initial charge argued, by way of analogy, that a proposal to *defer* negotiations until a comprehensive agreement is in place is but "the flip side" of a proposal for a waiver or zipper clause that would *foreclose* the duty to bargain during the life of the agreement. The City reasons that, because it is well-settled that zipper clauses are mandatory subjects of bargaining, reopener proposals affecting mandatory subjects must also be within the scope of negotiable subjects.

impasse on a reopener side letter proposal" on this subject, the Office of the General Counsel's dismissal letter states:

> Facts in the record show that on April 11, 2011, the City provided the Union with a "Side Letter Agreement" proposal, which addresses negotiations over pensions and retiree healthcare benefits for current and future employees. The parties had an opportunity to discuss this proposal during the April 11, 2011 bargaining session and there are no facts to show that the City refused to discuss such proposal. While the Charging Party subsequently solicited a proposal on "Retirement Reform," the facts show that a City proposal was already made in the form of a reopener provision.

The dismissal letter thus treats the City's proposals to defer discussion of "Retirement Reform" and other subjects as mandatory subjects of bargaining, which the City was authorized to insist on, even to the point of impasse.[13] Although not explicitly stated, the reasoning of the warning and dismissal letters seems to rest on the premise that conditional bargaining over mandatory subjects is not, nor ever can be, a violation of the duty to bargain. We disagree with this premise both as a general statement of the law and as applied to the facts and circumstances alleged in the present dispute.

Parties to negotiations may propose, and *mutually agree* to, ground rules or other arrangements governing the time and place of their negotiations, including proposals whereby some topics will be discussed before others. (*Southwestern Community College District* (1998) PERB Decision No. 1282; *Compton Community College District* (1989) PERB Decision No. 728.) Additionally, we assume, for the purposes of this appeal, that parties may lawfully propose reopener clauses and include such provisions in their agreements.

[13] Because we adopt the reasoning of private-sector authorities prohibiting "piecemeal" bargaining tactics, we need not decide the broader issue of whether "reopener" proposals are appropriately characterized as mandatory subjects of bargaining nor whether the City's "Side Letter" proposals in this case should be so classified.

(*Clovis Unified School District* (2002) PERB Decision No. 1504, p. 5; *Speedtrack, Inc.* (1989) 293 NLRB 1054, 1054-1055 (*Speedtrack*); *CJC Holdings, Inc.* (1994) 315 NLRB 813, 816 (*CJC Holdings*), enf'd. (5th Cir. 1996) 97 F.3d 114.) Parties may not, however, refuse *to discuss* a mandatory subject, once the other party has demanded bargaining on that subject. (MMBA, § 3505.) This prohibition extends to conduct that unreasonably delays discussion of a mandatory subject, once the other party has submitted a proposal and solicited a response. (*Stockton, supra*, PERB Decision No. 143; *San Bernardino, supra,* PERB Decision No. 1270, pp. 80-83; *Gonzales Union High School District* (1985) PERB Decision No. 480 (*Gonzales*); *San Mateo, supra*, PERB Decision No. 1030.)

The question presented here is whether *insisting* on a proposal to defer discussion of a particular subject to future reopener negotiations constitutes an unreasonable delay, and thus a refusal to bargain, over that subject. A related question is whether a party may insist on proposals that condition, not only *agreement*, but even a *willingness to engage in substantive discussion*, over a particular subject on prior agreement over other mandatory subjects. We hold that a party may not refuse to discuss a mandatory subject by insisting on a "proposal" that postpones negotiations on certain mandatory subjects until agreement on all others is secured.

Although parties may generally condition their *agreement* on one or more subjects of bargaining on prior agreement over others, it is another matter when one party refuses even to *discuss* a particular subject of bargaining until agreement has been reached on others. In several cases, PERB has rejected the assertion that a party may refuse to discuss other subjects until the parties have agreed on grounds rules, which we regard as a mandatory subject of bargaining. (*Stockton, supra*, PERB Decision No. 143; *San Bernardino, supra*, PERB Decision No. 1270.) In each of these cases, the respondent's refusal to *discuss* other subjects served either as evidence of bad faith in support of a surface bargaining allegation, or of a per se refusal to bargain. The

reasoning of these cases is controlling for the allegations included in Local 101's charge. If a party may not delay negotiations, by refusing to discuss other subjects until agreement is first reached on one particular subject, a party may not achieve the same result simply by casting its refusal as a "proposal" to defer discussion over a particular subject to an indefinite, future date when negotiations over all, or nearly all, other subjects have been concluded.

The Office of the General Counsel's dismissal letter stated that the City's "Side Letter Agreement" proposal of April 11, 2011 "addresses negotiations over pensions and retiree healthcare benefits for current and future employees" and thus did not, as alleged by Local 101, "fail[] to make any substantive proposals on the subject." We see the matter differently. Of critical importance here is the *exclusively* reopener nature of the City's "Side Letter" proposals. Unlike, for example, a proposal to adjust employee compensation by a definite amount or percentage during the first year of an agreement followed by reopener wage negotiations in subsequent years (*CJC Holdings, supra* 315 NLRB 813, 816-817; *Speedtrack, supra,* 293 NLRB 1054, 1054-1055), the City's "Side Letter" proposals would not fix any term or condition of employment. They are also unlike a management rights or similar discretionary proposal, in that, rather than authorizing one party to act unilaterally with respect to a particular subject of bargaining (*NLRB v. American Nat'l Ins. Co.* (1952) 343 U.S. 395), they defer any meaningful negotiations on the subject of the "Side Letter" to a later date.[14] Although they purport to address retirement benefits or other subjects of bargaining, their only "substantive" provision is the reopener language itself.

[14] The facts, as alleged here, are distinguishable from those in our recent decision in *Los Angeles Unified School District* (2013) PERB Decision No. 2326, which is under judicial review. There, we held that an employer may insist to impasse on a proposal to retain complete discretion over a particular subject of bargaining, but may not impose such a proposal at impasse. Here, by contrast, Local 101 alleges that the City's side letter proposals on retirement reform and other subjects would neither fix any substantive terms nor retain discretion over the "Side Letter" subjects.

While PERB may not sit in judgment of the substantive terms included in a proposal, nor require parties to make concessions on any particular subject (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 (*Placentia*); *Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229), we cannot agree with the view stated in the dismissal letter that, as a matter of law, the City has satisfied its duty to bargain by simply presenting proposals which would fix no terms of employment, nor retain discretion over a particular subject, and which, in fact, would do nothing more than defer discussion of the subjects concerned to an unspecified future date after all other subjects have been settled by the parties' MOAs. While we do not decide the merits of Local 101's allegation here, we hold that, by alleging that the City has insisted to impasse on language that would do nothing more than reopen subjects of bargaining after all others have been agreed to, Local 101 has raised a viable theory that the City has refused or unreasonably delayed negotiations on mandatory subjects, including employee retirement benefits.

In addition to the delay on substantive negotiations resulting from the City's refusal to budge from its "Side Letter" proposals, Local 101 has alleged that, by making discussion of certain subjects dependent on the agreement over all, or nearly all, other subjects being negotiated, Local 101 would be forced to negotiate the "Side Letter' subjects "at a time of the City's unilateral choosing" and "in isolation" from all other subjects which might otherwise form the basis of a compromise. As alleged here, the City's "Side Letter" proposals suggest "piecemeal" or "fragmented" bargaining tactics.

In the private sector, the NLRB has developed an extensive body of decisional law on so-called "piecemeal" or "fragmented" bargaining tactics, whereby one party insists on negotiating certain subjects in isolation from others, or seeks to impose arbitrary limits on the range of possible compromises it will consider. (*Whitesell Corp.* (2011) 357 NLRB No. 97 [employer's refusal to discuss "core" issues until "noncore" issues were resolved "contravenes [the] duty to

bargain in good faith because it excludes the opportunity for the 'horse trading' that characterizes good-faith bargaining"]; *Trumbull Memorial Hospital* (1988) 288 NLRB 1429, 1470 [refusal to discuss economic matters until non-economic matters resolved]; *Sartorius, Inc.* (1997) 323 NLRB 1275, 1286 [insistence on negotiating and implementing production incentive bonus proposal separate from contract negotiations].) The NLRB's prohibition against "piecemeal" or "fragmented" bargaining tactics is a corollary of the well-settled rule against unilateral changes in the absence of overall impasse in negotiations. (*NLRB v. Katz* (1962) 369 U.S. 736.) As explained by the First Circuit Court of Appeal, because "[c]ollective bargaining involves give and take on a number of issues. [T]o permit the employer to remove, one by one, issues from the table [would] impair the ability to reach an overall agreement through compromise on particular items [and] would undercut the role of the Union as the collective bargaining representative." (*Visiting Nurse Services* (1998) 325 NLRB 1125, 1130-1131, enforced by *Visiting Nurse Services v. NLRB* (1st Cir. 1999) 177 F.3d 52, 59.)

Similarly, in *E. I. Du Pont de Nemours & Co.* (1991) 304 NLRB 792 (*E. I. Du Pont*), the employer proposed establishing a new "site service operator" classification with various changes to the pay scale, schedules, duties, cross-training requirements, job bidding and promotion track procedures, and seniority rules of the bargaining unit. The employer admitted that its site service operator proposal affected mandatory subjects of bargaining, but characterized it as a "non-contractual" proposal to be negotiated separately from other "contractual" subjects then under negotiation for the parties' agreement. The employer expressed its desire to fill the new classification promptly and stated that, while it was willing to consider any input or counterproposals offered by the union, implementation could not await full resolution of all subjects under negotiation for the parties' successor agreement. The employer refused to consider any compromises that involved changes to "contractual" subjects

and, after concluding that the union had nothing further to offer, it filled the site service operator position while the parties were still bargaining over their successor agreement. The NLRB found that, by refusing even to consider the union's proposed "horse trade," the employer had "unreasonably reduced the flexibility of collective bargaining and narrowed the range of possible compromises" in violation of its duty to bargain. (*Id.* at p. 802.) The rule that emerges from the private sector cases is that a party may not condition its willingness even to *discuss* a particular mandatory subject on prior agreement over other subjects.

In *City of Santa Rosa* (2013) PERB Decision No. 2308-M, PERB took notice of the NLRB's decisional law explaining why piecemeal bargaining, or any negotiating conduct that "'reduces the flexibility of collective bargaining and narrows the range of possible compromises by rigidly and unreasonably fragmenting negotiations' violates the duty to bargain in good faith." (*Id.* at p. 5.) Because of the limited factual record before us in *City of Santa Rosa*, we did not determine whether the employer had engaged in improper piecemeal bargaining by "refusing to discuss economic issues until non-economic issues are settled, or unilaterally changing one term while engaged in negotiations on other terms." However, we expressed general agreement with the reasoning of the private-sector decisions cited there and we find that same reasoning persuasive for the issues raised by the present appeal.

By its own account, the City sought to obtain "significant" economic concessions from Local 101, including a 10 percent reduction in "total compensation" for all employees in the MEF and CEO bargaining units. The City defined "total compensation" as the sum of employee salaries, retirement benefits and healthcare costs. Moreover, a document provided to Local 101 by the City's negotiators acknowledged that the amount in cost savings sought by the City could be achieved through various combinations of concessions, depending upon the relative value of each of these three sources making up "total compensation." Yet, by

allegedly insisting on its proposal to defer discussion of "retirement reform," and thereby making discussion of this subject conditional upon agreement over all, or nearly all, other subjects, the City allegedly removed one-third of the "total employee compensation" formula from discussion and significantly reduced the range of possible compromises that Local 101 could propose to meet the costs-savings demanded by the City.

Such a scenario is inimical to collective bargaining. If the employer may refuse to engage in meaningful discussion of one or more matters within scope simply by characterizing its refusal as a "reopener proposal," then it controls not only the substantive terms of its own proposals, but also what subjects the union may propose as part of a possible compromise. Such conduct disregards the statutory requirement that the duty to bargain involves a *mutual* obligation to meet and confer at reasonable times, and eliminates any meaningful role for the bargaining representative. (*FirstEnergy Generation Corp.* (2012) 358 NLRB No. 96 (*FirstEnergy*); *Whitesell Corp.*, *supra*, 357 NLRB No. 97.) Although Local 101 will bear the burden of proving its allegations before an ALJ, we find that the facts and circumstances, as alleged by Local 101, support an inference that the City has engaged in "piecemeal bargaining" tactics whose intended or actual effect was to limit the range of possible compromises. Accordingly, even if we were to endorse the "more than one indicia" rule, we would still reject its application here because Local 101's allegation that the City engaged in "piecemeal bargaining" tactics clearly implicates a *separate* indicator of bad faith, i.e., *in addition to* the one indicator identified in the warning and dismissal letters.

Moreover on the facts, as alleged by Local 101, the subject of retirement reform was arguably of such significance to the parties' negotiations that the City's alleged refusal even to discuss or offer a substantive proposal on this subject until all other terms had been settled would so frustrate negotiations or so limit the range of possible compromises that, even

without additional indicators of bad faith, this allegation alone states a prima facie case of surface bargaining. (*State of California, Department of Personnel Administration, supra,* PERB Decision No. 739-S.) Although we emphasize that we do not decide the merits at this stage of the proceedings, Local 101's factual allegations clearly implicate the sort of "piecemeal bargaining" scenarios expressly condemned by the NLRB and by PERB's own decisional law, albeit with a different terminology. (*Stockton, supra*, PERB Decision No. 143; *San Bernardino, supra*, PERB Decision No. 1270.)

Although the dismissal letter also cites various private-sector cases for the proposition that a reopener clause is a mandatory subject of bargaining, and, presumably, that parties may therefore insist to impasse on reopener proposals, the authorities relied on are inapposite. In *McAllister Bros. Inc.* (1993) 312 NLRB 1121, the NLRB considered whether, at impasse, an employer may impose terms of employment consistent with its last, best offer, even when those terms are significantly less favorable to the union and employees than those included in the parties' previous collective bargaining agreement. However, *McAllister Bros.* recites no facts to indicate that either of the parties had proposed that certain subjects of bargaining be deferred to reopener negotiations, or, assuming that such a proposal had been presented, that it remained an outstanding issue of dispute at the time impasse was declared.

Similarly, in *United States Pipe & Foundry Co. v. NLRB* (5th Cir. 1962) 298 F.2d 873 (*U.S. Pipe & Foundry*) the NLRB considered whether three unions representing separate bargaining units of the same employer may lawfully demand that their respective agreements terminate on the same date in order to maximize their bargaining power in future negotiations. The NLRB dismissed the employer's charges that the unions had insisted on an improper subject of bargaining and a split panel of the Fifth Circuit Court of Appeal affirmed the NLRB's

decision. The case generally stands for the proposition that the duration of a collective bargaining agreement is a mandatory subject and that, like other mandatory subjects, a party may insist to impasse on a proposal for the contract to terminate on a particular date. The case is thus unremarkable and, in fact, in accord with the law governing California public sector labor relations. (*Placentia, supra,* 57 Cal.App.3d 9, 24 [employer's demand for three-year contract not evidence of bad faith even where it had agreed to one-year contract with representative of another bargaining unit].) However, lawful "hard bargaining" over the duration of a contract is not the same as demanding that substantive negotiations on a mandatory subject be *postponed altogether* until *after* the contract takes effect and all other terms have been fixed. Nor does *U.S. Pipe & Foundry* hold that one party may announce that it wishes to make significant changes to particular subjects of bargaining, only then to refuse to discuss those subjects until negotiations on all other matters have concluded.

Similarly inapposite is *Lion Oil Co.* (1957) 352 U.S. 282, in which the U.S. Supreme Court interpreted the terms "termination," "modification," and "expiration" within the context of section 8(d) of the National Labor Relations Act to conclude that, even when a collective bargaining agreement remains in effect, unless otherwise expressly and voluntarily waived, a union retains the right to strike over "reopener" subjects of bargaining. (*Id.* at pp. 293-294.) In reaching this result, the Court observed that, "Unions would be wary of entering into long-term contracts with machinery for reopening them for modification from time to time, if they thought the right to strike would be denied them for the entire term of such contract, though they imposed no such limitations on themselves." (*Id.* at p. 289.) The Court further explained that, in "recogniz[ing] a duty to bargain over modifications when the [parties'] contract itself

contemplates such bargaining, . . . [i]t would be anomalous . . . at the same time [to] deprive the union of the strike threat which, together with the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory settlements." (*Id.* at pp. 289, 290-91, internal quotations omitted.) *Lion Oil* thus demonstrates judicial recognition of a federal policy of promoting stable labor relations through collective bargaining agreements that permit modification of certain subjects during the course of such agreements. However, the Court's opinion says nothing about *how* the reopener provisions under consideration in that case made their way into the parties' agreement, much less whether the employer had bargained to impasse to *avoid* any substantive discussion of those subjects until some future date after the contract would take effect.

Assuming, for the sake of argument, that reopener proposals affecting mandatory subjects of bargaining are themselves mandatory subjects of bargaining (*Speedtrack, supra*, 293 NLRB 1054, 1054-1055), this conclusion does not dispose of the issues presented by this appeal. Regardless of whether the City's "Side Letter" proposals are characterized as mandatory or permissive subjects, Local 101's allegation is that the *practical effect* of these proposals was to forestall meaningful discussion of what are unquestionably mandatory subjects, including employee retirement benefits. (*County of Sacramento* (2009) PERB Decision No. 2044-M.) The NLRB has considered this issue and likewise determined that the *mandatory nature* of a proposal to reopen negotiations does not authorize a party to insist on that proposal, when the result is to obstruct or arbitrarily limit the range of possible compromises. As explained in *FirstEnergy, supra,* 358 NLRB No. 96, the statutory duty to bargain is not fulfilled by insisting on an offer to discuss a mandatory subject *after* the collective bargaining agreement has taken effect and the bargaining representative has lost its

leverage to propose alternatives or, where applicable, to exercise its right to strike. (*Speedtrack, supra*, 293 NLRB 1054, 1055; *Lion Oil, supra,* 352 U.S. 282, 290-91.)[15]

The policy concerns raised by Local 101 and discussed in the private sector decisional law are more consistent with our own case law than the position adopted in the dismissal letter, particularly where, as here, the "proposal" is to defer discussion of major economic subjects, while the union is engaged in concessionary bargaining in an attempt to meet a predetermined amount in cost savings to avoid layoffs and service cuts. We agree with the NLRB that, "postponing or removing from the area of bargaining—to the very end of negotiations—[the] most fundamental terms and conditions of employment" necessarily "reduce[s] the flexibility of collective bargaining, narrow[s] the range of possible compromises, and . . . rigidly and unreasonably fragment[s] negotiations." (*Patent Trader, Inc.* (1967) 167 NLRB 842, 853, enforced by *NLRB v. Patent Trader, Inc.* (2d Cir. 1969) 415 F.2d 190, modified on other grounds (2d Cir. 1970) 426 F.2d 791, internal quotations and citations omitted.)

We conclude that Local 101 has stated a viable theory that, by proposing and insisting on its "Side Letter" proposals, the City has engaged in improper fragmented or piecemeal bargaining tactics in violation of its duty to bargain. (*Golden Plains, supra,* PERB Decision No. 1489.) We therefore reverse the dismissal, and remand the matter for issuance of a complaint regarding the City's alleged refusal to discuss certain mandatory subjects of bargaining, including employee retirement benefits, layoff procedures and sick leave compensation, except as mid-term modifications to the parties' future collective bargaining

[15] Although we are concerned here with how insisting on a reopener clause may improperly restrict the scope of negotiations, rather than with the union's right to strike upon reaching impasse on reopener subjects, we agree with the general sentiment expressed by the NLRB in *Speedtrack* that "[i]n determining what freedom of action the parties may have . . . during . . . reopener periods, we must avoid imposing conditions that would turn reopener bargaining into little more than a charade that would barely differentiate it from the kinds of discussion that may lawfully occur even in the absence of a reopener." (*Id.* at p. 1055.)

agreements. We now turn to whether this allegation should be analyzed as an indicator of bad faith or as a separate per se violation.

Piecemeal Bargaining as Indicator of Bad Faith and as Per Se Allegation

Although PERB has generally analyzed "piecemeal bargaining" and factually-similar scenarios under a "totality of circumstances" analysis (see, e.g., *San Bernardino, supra,* PERB Decision No. 1270, p. 80), both the private-sector authority on which we rely and our own cases have recognized that, under appropriate circumstances, such tactics may constitute a separate per se violation of the duty to bargain. In *Stockton, supra,* PERB Decision No. 143, the Board considered whether a school district had violated its duty to bargain by refusing to discuss any "substantive" subjects of bargaining until the parties' previously-agreed upon ground rules had been re-negotiated to accommodate the concerns of the district's newly-selected chief negotiator. In affirming the ALJ's conclusion that the district had violated its duty to bargain, the Board analyzed the employer's refusal to discuss other subjects of bargaining as an indicator of bad faith under the "totality of conduct" test. However, the Board also suggested, without deciding, that the unreasonable delay in negotiations that resulted from the employer's position may also constitute a per se violation of the duty to bargain. (*Stockton*; see also *San Mateo, supra*, PERB Decision No. 1030.)

Since *Stockton* was decided, no Board decision has held that such conditional bargaining tactics may only appropriately be analyzed under the totality of circumstances test used for surface bargaining allegations. In *Gonzales, supra,* PERB Decision No. 480, the Board found *Stockton* factually distinguishable, but did not disagree with the view expressed there that insisting on negotiating or re-negotiating one subject in a manner that "prevent[s] discussion of the substantive issues of wages, hours, and terms and conditions of employment"

may constitute a per se violation of the duty to bargain. (*Gonzales, supra,* adopting ALJ's proposed dec. at pp. 2, 47-49.)

Meanwhile, the NLRB and the federal courts have expressly adopted the view that a refusal to discuss a mandatory subject of bargaining until other terms have been negotiated and included in a collective bargaining agreement may constitute *both* an indicator of bad faith in support of a surface bargaining allegation *and* an independent per se violation of the duty to bargain. In *Radisson Plaza Minneapolis* (1992) 307 NLRB 94, while the parties were in negotiations for a first contract, the union learned of several changes to employee job assignments and contacted the employer's labor relations official to discuss the matter. The employer's spokesperson responded that "as long as there is no collective-bargaining agreement in effect, I won't meet with the Union to bargain over these items." The union took no further action on the matter, either to object to the employer's refusal to meet or to reiterate or clarify its demand to bargain. The ALJ concluded, however, that "in the face of such a clear and unequivocal refusal" to negotiate over one subject of bargaining until agreement had been reached on all others, no further action by the union was necessary except the filing of a charge. The ALJ explained that the employer's position was *both* an independent per se violation of the duty to bargain and one, among several other, indicators of the employer's bad faith in support of a separate surface bargaining allegation. (*Radisson Plaza Minneapolis, supra,* 307 NLRB 94, 109.) The NLRB affirmed the decision and expressly agreed with the ALJ's reasoning that, in the face of the union's request, the employer's refusal to meet and confer about certain employee working conditions until agreement was reached on all others was *both* an indicator of the employer's lack of good faith under the "totality of circumstances" test, *and* an independent, per se violation of the duty to bargain. (*Id.* at p. 95.) On review, the Eighth Circuit Court of Appeal affirmed the NLRB's view that the respondent's commission of

contemporaneous unfair practices is part of the totality of circumstances to consider in a surface bargaining case. (*Radisson Plaza Minneapolis v. NLRB* (8th Cir. 1993) 987 F.2d 1376, 1380-1381.)

The factual allegations of the present charge fall squarely within the holding of *Radisson Plaza Minneapolis, supra,* 307 NLRB 94, and similar private sector cases. (See *FirstEnergy, supra,* 358 NLRB No. 96; *Whitesell Corp., supra*, 357 NLRB No. 97.) The City's "proposals" for "Side Letters" would have the same practical effect as the employer's outright refusal in *Radisson Plaza Minneapolis* to discuss employee job assignments "as long as there is no collective-bargaining agreement in effect." (*Radisson Plaza Minneapolis, supra,* at p. 109.) We conclude that Local 101 has stated *both* a surface bargaining allegation which rests, in part, on the City's alleged refusal to discuss mandatory subjects of bargaining until negotiations for the parties' agreement were concluded, *and* a separate allegation that the City has committed a per se violation of its duty to bargain relative to those same facts.

Allegations that the City has "Rushed to Impasse" to Evade its Bargaining Obligations

Impasse is the point in negotiations at which the parties have considered each other's proposals and counterproposals and genuinely attempted to narrow the gap of disagreement, but have, nonetheless, exhausted the prospects for concluding an agreement, so that, absent a change in circumstances, further discussion would be fruitless. (*Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124, p. 5; *Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*).) If impasse resolution procedures are exhausted but negotiations remain deadlocked, the same rules as are applicable in private-sector impasses apply. Either party may decline requests for further bargaining, the employer may implement terms and conditions reasonably contemplated in its last, best and final offer, and the union may exercise its right to strike. (*Modesto, supra,* at p. 39 [upon reaching "second impasse" a "NLRA-type

impasse exists"]; *Atlas Tack Corp.* (1976) 226 NLRB 222, 227; *County Sanitation District No. 2 of Los Angeles v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564; see also *Charter Oak Unified School District* (1991) PERB Decision No. 873 (*Charter Oak*).) However, a bona fide impasse exists only if the employer's conduct is free of unfair labor practices; its right to impose terms and conditions at impasse is therefore dependent on prior good-faith negotiations *from their inception through exhaustion of statutory or other applicable impasse resolution procedures.* (*Temple City Unified School District* (1990) PERB Decision No. 841, overruled on other grounds by *Charter Oak.*) A premature, unfounded, or insincere declaration of impasse may serve as evidence of bad-faith bargaining. (*UC Regents, supra,* PERB Decision No. 520-H, pp. 14 and 25, fn. 13.) The Board applies the same legal standard to determine whether a party has failed to negotiate in good faith before impasse and while engaged in the statutory or any other applicable impasse resolution procedures. (*Ventura County Community College District* (1998) PERB Decision No. 1264; *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 200.)

We understand the FAC to allege that, while the City employed dilatory tactics with respect to those subjects included in its "Side Letter" proposals, its overall strategy was to move negotiations as rapidly as possible to impasse and the imposition of terms as a way to obtain concessions without first bargaining in good faith to bona fide impasse or agreement. In support of this allegation, Local 101 alleges the following: (1) that the parties had exchanged only two rounds of comprehensive or "package" proposals when the City declared impasse on April 18; (2) that the City's declaration of impasse came immediately after Local 101's request for a substantive proposal on retirement benefits as opposed to a rejection of a particular proposal; (3) that, after the City declared impasse, Local 101 made *additional concessions* in line with the City's demands, including offers to eliminate the "snap back" language from Local 101's wages

proposal and to reduce the term of the MOAs from three to two years, but that the City refused to explore the possibility of compromise; and (4) that the City's LBFO, most of whose terms were imposed on the MEF and CEO units, effective June 1, differed in only minor respects from the City's publicly-announced bargaining demands and its opening proposal.

Because the pace of negotiations is influenced by many factors, including the conduct of both parties to the negotiations (*University of California, Lawrence Livermore National Laboratory* (1995) PERB Decision No. 1119-H), the totality of circumstances to consider in determining whether a party has rushed to impasse may include the number of times the parties met and the number of proposals exchanged, the number of matters agreed to both before the first declaration of impasse and during any mediated negotiations, as well as any significant concessions offered or agreed to before the respondent's "final" or "second" declaration of impasse. (*Ventura, supra,* PERB Decision No. 1264; *Seattle-First National Bank v. NLRB, supra,* 638 F.2d 1221, 1226-1227.) Here, the City presented proposals on various subjects at meetings in February and early March, which were then collected and re-presented as a comprehensive or "package" proposal on March 21. On April 4, Local 101 responded with its own package proposal consisting of its previously-presented language. One week later, the City presented a second package proposal, which Local 101 characterizes as "nearly identical" to the City's initial package proposal. Local 101 then responded with its second package proposal on April 18, which, it alleges, met most of the City's demands for concessions in employee compensation and healthcare costs, and which was modified to make additional concessions, including elimination of the "snap back" language on wages and a shorter duration of the MOAs. At this point, the City declared impasse, after each side had offered two package proposals, and without responding to concessions included in Local 101's modified second package proposal.

As with other factors, the ultimate determination of good or bad faith turns, not on a formula for the number of meetings that must occur or the number of proposals that must be exchanged before a bona fide impasse exists, but on the effect of a party's conduct on the course of negotiations. (*UC Regents, supra,* PERB Decision No. 520-H.) The Office of the General Counsel's dismissal letter correctly observes that the duty to bargain does not require a party to make concessions and that a party need not explore the possibility of compromise when the concessions offered are not sufficiently "significant" to justify further discussion.

The problem here, however, is determining whether the last-minute concessions Local 101 offered at the April 18 meeting were sufficiently "significant" to compel a response by the City or at least an attempt to explore the possibility of compromise. Although the City offered detailed explanations of its formula for "total employee compensation," which was ostensibly used to determine the amount of cost savings behind the City's bargaining demands, its refusal to discuss or offer a substantive proposal on retirement benefits, which comprised one third of the formula, makes it difficult to add up the constituent parts and thus evaluate the significance of Local 101's concessions on wages and healthcare costs. Local 101's allegation that the City refused to respond to last-minute concessions on wages and instead insisted that negotiations had reached impasse, when coupled with the allegation that the City adamantly refused to discuss, in "substantive" monetary figures, its need for concessions in retirement benefits, raises an inference that the City was intent on reaching impasse and imposing concessionary terms, without explaining its opposition "in sufficient detail to permit the negotiating process to proceed on the basis of mutual understanding." (*Jefferson School District* (1980) PERB Decision No. 133, p. 11.) While Local 101 will bear the burden of proving its allegations at trial, it has stated a prima facie case of surface bargaining based on a

"rush to impasse" theory. (*Golden Plains, supra,* PERB Decision No. 1489; *Pinole, supra,* PERB Decision No. 2288-M, pp. 11-12.)

The City's Alleged Insistence on a "Prohibited" Subject of Bargaining

Allegations that the respondent has committed separate, contemporaneous unfair labor practices at or away from the bargaining table are part of the totality of circumstances considered when determining the respondent's subjective good or bad faith for a surface bargaining charge. (*Beaumont, supra,* PERB Decision No. 429, p. 9; *State of California (Department of Personnel Administration)* (2003) PERB Decision No. 1516-S, pp. 4-6.) Here, we consider the allegation that the City's elimination of sick leave payouts to separating employees is a "prohibited" or "illegal" subject of bargaining and that, by including this proposal in its LBFO, and then imposing it on the MEF and CEO units, the City committed a per se violation of its duty to bargain. We first review the legal standard for allegations involving prohibited subjects of bargaining, before turning to the allegations included in the FAC and points raised by Local 101's appeal, as supplemented by the *Deisenroth* litigation.

It is a per se violation of the duty to bargain to insist to impasse on a proposal and/or to impose terms that include non-mandatory subjects of bargaining. (*Chula Vista, supra,* PERB Decision No. 834; *San Mateo, supra*, PERB Decision No. 1030; *Lake Elsinore School District* (1986) PERB Decision No. 603.) The category "non-mandatory" subjects includes both "permissive" subjects and "illegal" or "prohibited" subjects. Although not required to do so, parties may, by mutual agreement, bargain over and include in their agreements proposals involving permissive subjects. However, an employer may not insist on acceptance of a proposal containing a permissive subject of bargaining over a "clear and express refusal by the union to bargain" over the matter. (*Lake Elsinore.*) To state a prima face case of insistence to impasse on a permissive subject, the charging party must therefore allege facts demonstrating

that it objected to bargaining over the permissive matter. (*Travis Unified School District* (1992) PERB Decision No. 917.)

By contrast, illegal subjects involve matters prohibited by external law or public policy and may not be negotiated or included in a collective bargaining agreement, even if the parties were to agree to do so. Generally, where a proposal would deviate from an inflexible standard set by external law, it may be characterized as a prohibited, "illegal" or nonnegotiable subject of bargaining. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865.) Because they cannot be included in a collective bargaining agreement, prohibited subjects may not serve as the lawful basis for a declaration of impasse nor be imposed by the employer upon reaching a deadlock in negotiations, even assuming good-faith bargaining and exhaustion of any applicable impasse resolution procedures. (*Berkeley Unified School District* (2012) PERB Decision No. 2268 (*Berkeley*), pp. 3-9, esp. fn. 3.) Unlike permissive subjects, there is no parallel requirement that a party object to bargaining over a prohibited subject. (*Id.* at pp. 3-9.) While parties are obliged to discuss whether a subject is mandatory or permissive (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375), a negotiating party does not waive its right to refuse to negotiate over a prohibited subject by failing to object that a matter might be prohibited. (*Berkeley, supra*, at p. 3, fn. 3.)

A charging party who alleges that a proposal contains an illegal subject of bargaining need not establish with certainty that the matter is prohibited by external law to state a prima facie case and thus avoid dismissal at the investigative stage. (*Golden Plains, supra,* PERB Decision No. 1489; *Chula Vista Elementary School District* (2003) PERB Decision No. 1557; *Eastside Union School District* (1984) PERB Decision No. 466 (*Eastside*).) Because an investigating Board agent is not empowered to rule on the ultimate merits (PERB Regs. 32620

and 32640), "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." (*Eastside*, *supra*, at p. 7.) A complaint should therefore issue to test a novel theory or competing theories of law, so long as the theory advanced is "viable," i.e. non-frivolous. (*Pinole, supra,* PERB Decision No. 2288-M, pp. 11-12; see also *County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 6 [where a local rule is reasonably susceptible of the interpretation offered by the charging party, a complaint should issue].)[16]

The FAC alleged that the City's April 11 package proposal included language that would eliminate sick leave payouts to all separating MEF and CEO employees, regardless of circumstances, effective July 1.[17] It further alleged that the "Package A" option of the City's LBFO "was identical to the City's April 11 package proposal, except that the proposal to eliminate the sick leave payout provisions was moved from an effective date of July 1, 2011, to January 1, 2012 . . . ." While the effective date of this change in policy thus occurred after December 29, when the charge was dismissed, the FAC alleged that the City's firm decision to impose this term on the MEF and CEO units occurred on June 1. Where an employer's change in policy is alleged to be an unfair labor practice, the operative date for the alleged violation

[16] Because allegations that a proposal contains an illegal subject require interpreting statutory, decisional, regulatory, or other authority outside PERB's jurisdiction and special expertise in labor relations, the Board is necessarily cautious about rejecting such claims, particularly when the area of external law is itself unsettled. (*Pinole, supra,* PERB Decision No. 2288-M.)

[17] The City's May 12 LBFO also offered, as part of the two-year "Package B" option, a "Side Letter" proposal on sick leave compensation that included no substantive terms other than a provision to revisit this subject as a mid-term modification to the future MOAs. However, Local 101 alleges, and the City does not dispute, that the one-year "Package A" option, which was adopted by the City Council and imposed on the MEF and CEO units, included the more definite language to eliminate all sick leave payouts to separating employees, effective January 1, 2012.

and for statute of limitations purposes is generally the date the employer made a firm decision to change the policy, even if the change itself is not scheduled to take effect until a later date. (*Anaheim Union High School District* (1982) PERB Decision No. 201; *Eureka City School District* (1992) PERB Decision No. 955; *Clovis Unified School District* (2002) PERB Decision No. 1504.) The FAC thus includes sufficient facts to allege that, on or about May 31, 2011, the City made a firm decision to impose terms on the MEF and CEO units.

In separate proceedings, the Superior Court of Santa Clara County concluded that the City's refusal to pay Deisenroth, a retiring member of the MEF bargaining unit, sick leave compensation that had accrued to her on or before December 31, 2011, was unlawful because it retroactively interfered with a vested employee right. Although the necessary factual allegations pertaining to the City's proposal to eliminate sick leave compensation were therefore included in the FAC, the legal theory underlying this allegation—that the City's proposal to eliminate sick leave compensation was an illegal or prohibited subject of bargaining—was not set forth in the FAC nor considered by the Office of the General Counsel. In fact, the legal theory was only clearly articulated to PERB *after* the charge was dismissed and as part of the present appeal.

However, under PERB's "fact pleading" standard, the charging party's duty is to provide a clear and concise statement of *facts* relevant to the charge. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249-M, pp. 14-15.) The charging party need not include all of its evidence, nor spell out the legal theories of the charge. (*County of Inyo* (2005) PERB Decision No. 1783-M, p. 2.) Thus, the only additional "facts" necessary for this allegation that were, even arguably, omitted from the FAC were "facts" pertaining to whether the City's proposal to eliminate sick leave compensation violates an immutable standard set by external law. In this regard, Local 101 has requested that we take notice of, and supplement

the record of this appeal with the Court's decision in the *Deisenroth* litigation, a request we now consider.

The Board's authority includes the power and duty to investigate unfair practice charges and to take any action and make any determinations as the Board deems necessary to effectuate the policies of the MMBA. (MMBA, § 3509; PERB Reg. 32320(a)(2).) When deciding appeals, the Board reviews the entire record de novo and is free to reach different factual and legal conclusions from those in the decision being reviewed. (*Woodland Joint Unified School District* (1990) PERB Decision No. 808a; *Santa Clara Unified School District* (1979) PERB Decision No. 104.) Although the Board's review of a dismissal is generally confined to the factual allegations and legal contentions identified in the appeal (PERB Reg. 32635(a); *South San Francisco Unified School District* (1990) PERB Decision No. 830), as part of its review, the Board may supply the appropriate legal theories for the factual allegations included in a charge (*Los Banos Unified School District* (2007) PERB Decision No. 1935; *Los Angeles Community College District* (1994) PERB Decision No. 1060, p. 9), or even consider legal issues not raised by the parties, when necessary to correct or prevent a mistake of law. (*Apple Valley Unified School District* (1990) PERB Order No. Ad-209a; *Mt. Diablo Unified School District* (1983) PERB Decision No. 373; *State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, pp. 6-7.)

Additionally, the Board may, upon a showing of "good cause," consider "new" supporting evidence or previously unalleged theories, as permitted by the Board's regulations and decisional law, and as may be consistent with standards of due process. (PERB Reg. 32636(b).) The Board has generally found "good cause" when the new information or allegations presented on appeal were not available to the charging party through the exercise of reasonable diligence *before* the charge was dismissed. (*Sacramento City Teachers Association*

(Ferreira) (2002) PERB Decision No. 1503, p. 2; see also PERB Reg. 32410; *San Mateo Community College District* (1985) PERB Decision No. 543, pp. 2-3.) Finding good cause to consider new evidence on appeal is particularly appropriate where facts have emerged that were not available to the charging party when the charge was dismissed, because, under PERB's regulations, a charging party has no opportunity to amend a dismissed charge unless and until the decision is reversed and the matter remanded for further proceedings. (PERB Regs. 32621 and 32647; *Pittsburg Unified School District* (1984) PERB Decision No. 318a.)

The Superior Court's opinion in *Deisenroth* was issued after the dismissal of the FAC and arguably establishes new law or clarifies existing law for the issues raised in the present appeal, which constitutes good cause for considering new charge allegations or new supporting evidence. (PERB Reg. 32635(b).) Because the underlying facts prompting the *Deisenroth* litigation—the effective date of the City's proposal to eliminate all accrued sick leave compensation did not occur until after December 29, 2011, when Local 101's charge was dismissed, the "evidence" included in the *Deisenroth* opinion was not previously available to Local 101 through the exercise of reasonable diligence. At the same time, because Local 101's FAC already included the essential facts for alleging that the City had imposed its proposal to eliminate sick leave payouts, and because the City has not objected to Local 101's request to supplement the record before us, we see no reason now to ignore the legal significance of the *Deisenroth* opinion for the issues of external law raised by this appeal.[18] The City will not be prejudiced by our consideration of the *Deisenroth* litigation for this appeal because it will have

[18] While we do not fault the Office of the General Counsel for failing to consider a legal theory that was not articulated, neither do we think the Board should ignore that theory now that it has become apparent through the *Deisenroth* litigation, particularly when it bears on the central issue of this charge—whether the City acted in bad faith in negotiations and impasse resolution proceedings. (*Beaumont, supra,* PERB Decision No. 429, p. 9; *State of California (Department of Personnel Administration), supra,* PERB Decision No. 1516-S, pp. 4-6.)

full opportunity to respond to this allegation and to be heard on any other matters related to this charge at the hearing. Accordingly, we find that Local 101's request to take notice of the *Deisenroth* opinion is supported by good cause and we consider the *Deisenroth* opinion part of the record of the present appeal.

On the supplemented record before us, we understand Local 01's allegation to be that the City has insisted to impasse and/or imposed a proposal in its Package A LBFO that interfered with vested employee rights to accrued sick leave compensation and therefore contains an "illegal" or prohibited subject of bargaining. Because our regulations prohibit a determination on the merits without a hearing, and because the legal issues raised by the *Deisenroth* proceedings lie outside the Board's expertise and jurisdiction, we do not attempt here to resolve the contending legal theories raised by the *Deisenroth* litigation, nor determine for ourselves whether the Superior Court's decision was correctly decided. (*Eastside, supra*, PERB Decision No. 466; *Pinole, supra,* PERB Decision No. 2288-M, pp. 12-13.)

Accordingly, we do not decide whether the City's proposal interferes with vested employee rights to accrued sick leave compensation, nor whether the City could have lawfully implemented this proposal through agreement with the employees' representative. Rather, for the purposes of this appeal, we regard the *Deisenroth* opinion as supporting a viable legal theory that the City has insisted to impasse on and/or imposed its proposal to eliminate sick leave compensation for all separating MEF and CEO employees, regardless of circumstances, and that, because the terms of this proposal allegedly violate an immutable standard under external law, the City's conduct violated its duty to bargain. (*Pinole, supra*, PERB Decision No. 2288-M, pp. 11-12; *Berkeley, supra,* PERB Decision No. 2268, pp. 3-9, fn. 3.) On remand, the complaint shall include Local 101's allegation that the City insisted on and/or imposed an illegal subject of bargaining when it imposed, as part of its Package A LBFO,

language to eliminate sick leave payouts to separating employees. As with Local 101's "piecemeal bargaining" allegation, this allegation may also serve as evidence in support of Local 101's allegation of surface bargaining.

Conclusion

The dismissal of the FAC is reversed and the matter remanded for issuance of a complaint. The complaint shall include allegations that the City has engaged in surface bargaining by identifying retirement benefits as a source of significant economic concessions and then insisting to impasse on a proposal to defer all substantive discussion of that issue to reopener negotiations; by failing and refusing to offer a "substantive" proposal on retirement benefits or an explanation of its position, when specifically requested to do so; by rejecting, without explanation, Local 101's non-economic proposals pertaining to grievance procedures, layoff notice and selection procedures, vacation approval procedures, and union access to and employee use of the City's email system; by insisting that negotiations are deadlocked and refusing to explore the possibility of compromise, even as Local 101 was offering additional concessions on wages and other terms and conditions of employment; and, by insisting to impasse and/or imposing, as part of its LBFO, language to eliminate all sick leave payouts to separating employees regardless of circumstances, an allegedly prohibited subject of bargaining. The above allegations that the City refused to offer a substantive proposal on retirement benefits, and that it insisted on and/or imposed a prohibited subject of bargaining shall also be considered as allegations of separate, per se violations of the City's duty to bargain.

ORDER

It is hereby ORDERED that the dismissal of the First Amended Charge in Case No. SF-CE-837-M is REVERSED and the matter REMANDED to the Office of the General Counsel for issuance of a complaint in accordance with this decision.

Members Huguenin and Winslow joined in this Decision.