STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MUNICIPAL EMPLOYEES AGENCY FOR NEGOTIATIONS, Charging Party, v. CITY OF LIVERMORE, Respondent.	Case No. SF-CE-1051-M PERB Decision No. 2396-M October 22, 2014

Appearances: Altshuler Berzon by Eric P. Brown, Attorney, for Municipal Employees Agency for Negotiations; E. Kevin Young, Assistant City Attorney, for City of Livermore.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City of Livermore (City) to a proposed decision (attached) by a PERB administrative law judge (ALJ). The complaint and underlying unfair practice charge allege that, on or about April 8, 2013, the City unilaterally eliminated paid meal periods for employees in certain bargaining unit classifications without complying with its duty to bargain in good faith in violation of Meyers-Milias-Brown Act (MMBA)[1] sections 3505 and 3506.5, subdivision (c), and PERB Regulation 32603, subdivision (c).[2] The

[1] The MMBA is codified at Government Code section 3500 et seq. Undesignated section references are to the Government Code.

[2] Section 3505 provides, in pertinent part:

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and

City's conduct is also alleged to have derivatively interfered with guaranteed employee rights in violation of MMBA sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a);[3] and to have denied the Municipal Employees Agency for

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

Section 3506.5, subdivision (c) provides, in pertinent part: A public agency shall not "[r]efuse or fail to meet and negotiate in good faith with a recognized employee organization." PERB Regulation 32603, subdivision (c), makes it an unfair practice for an employer to refuse or fail to meet and confer in good faith. (PERB Regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

[3] Section 3506 provides: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502."

Section 3502 provides, in pertinent part: "Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

Section 3506.5, subdivision (a), provides that "[a] public agency shall not . . . [i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter." PERB Regulation 32603, subdivision (a), makes it an unfair practice for an employer to interfere with employees' guaranteed rights.

Negotiations (MEAN) its right to represent employees in violation of MMBA sections 3503 and 3506.5, subdivision (b), and PERB Regulation 32603, subdivision (b).[4]

The ALJ concluded that the City violated its duty to bargain in good faith when it unilaterally eliminated paid meal periods for employees in certain bargaining unit classifications. By the same conduct, the City interfered with bargaining unit employees' right to participate in the activities of an employee organization of their own choosing and denied MEAN its right to represent employees in their employment relations with the City. Thus, concludes the ALJ, the City's conduct violated MMBA section 3506.5, subdivisions (a), (b) and (c).

The Board has reviewed the formal hearing record in its entirety in its consideration of the issues raised on appeal by the City's statement of exceptions and MEAN's response thereto. The record as a whole supports the proposed decision. The proposed decision is well reasoned and consistent with applicable law. We find the City's exceptions to be without merit. Accordingly, the Board hereby affirms the proposed decision and adopts it as the decision of the Board itself, as supplemented by the following discussion of the City's exceptions.

DISCUSSION

The essential facts are not in dispute and are summarized briefly for purposes of discussion. MEAN represents a unit of miscellaneous employees assigned to various City departments including non-sworn personnel in the Police Department. In or around May 2012,

[4] Section 3503 provides, in pertinent part: "Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies." Section 3506.5, subdivision (b), provides that a public agency shall not "[d]eny to employee organizations the rights guaranteed to them by this chapter." PERB Regulation 32603, subdivision (b), makes it an unfair practice for an employer to deny to employee organizations guaranteed rights.

the City notified all of the City's unions it was proposing to issue Administrative Regulation No. 39 (AR-39) to "establish a more defined policy for the use of meals and rest periods for City employees." Included with AR-39 was Appendix A, a list of the job classifications entitled to the paid meal break benefit under the new policy.[5]

Prior to April 8, 2013, the City had an established past practice of providing paid meal breaks to employees in certain job classifications within the MEAN-represented bargaining unit. This practice dated back to at least the early 1990s. AR-39 *as initially proposed* would eliminate the paid meal break benefit for MEAN-represented employees in the classifications of police clerk, crime analyst, police identification technician, property and evidence technician, crime prevention specialist, information technology technician, senior information technology technician, water resources operator – supervising and water resources operator – senior.

As described in the proposed decision, the City and MEAN met over the proposed policy in May, June, October and November 2012, and February 2013. At the parties' penultimate meeting on November 26, 2012, the City agreed to continue considering which employees would continue to receive the paid meal break benefit. Coming out of the meeting, the City was to provide MEAN with copies of prior memoranda of understanding and MEAN was to provide the City with names and job titles of bargaining unit members that MEAN believed should be added to Appendix A. The City's bargaining notes from the meeting indicate that the City would await MEAN's list of employees. The City would then review

[5] Under the policy as initially proposed, the classifications entitled to the paid meal break benefit were limited to Police Department animal control officer, community service specialist, supervising police clerk, police officer, police sergeant, public safety dispatcher, and supervising public safety dispatcher; and Public Works/Water Resources Department water resources operator – trainee, water resources operator – grade I, water resources operator – grade II, and water resources operator – grade III.

MEAN's list in consultation with the appropriate department heads. On or around December 20, 2012, MEAN sent the City its list.

As a result of MEAN's input, the City agreed to modify the proposed policy by adding the two water resources operator classifications identified by MEAN to Appendix A.[6] In addition, the City agreed to conduct a 60-day study of each of the other classifications identified by MEAN to determine whether they should be "add[ed] back" to the classes assigned to a work schedule that included a paid lunch break. At what turned out to be the parties' final meeting in late February 2013, MEAN was informed that the City intended to proceed with implementation. The date of implementation, according to a follow-up memorandum from the City to MEAN, was April 8, 2013. At the time of implementation, the parties had neither reached agreement nor exhausted their bargaining obligations.

The proposed decision frames two issues for resolution. First, was the unfair practice charge timely filed; second, did the City violate its duty to meet and confer.[7] The City's exceptions can be divided into the following three categories: (1) the City takes exception to seven factual findings; (2) the City takes exception to the legal conclusion that the unfair practice charge was timely filed; and (3) the City challenges the credibility of one of MEAN's witnesses.

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[6] See March 5, 2013, memorandum from the City to MEAN ("The City reviewed the information provided [by MEAN] with the affected departments which resulted in modifying the appendix of AR 39 to include the classifications of Water Resources Senior Operator and Water Resources Supervising Operator as classes assigned to a work schedule that includes a paid lunch period.").

[7] The City takes no exception to the legal conclusion that the City violated its duty to meet and confer when it unilaterally eliminated the paid meal break benefit for employees in certain bargaining unit classifications, discussed on pp. 16 through 20 of the proposed decision under the heading "Negotiability of the Policy Change." Exceptions not urged are waived. (PERB Reg. 32300, subd. (c).)

The aim of each of the City's exceptions is to persuade the Board that the City never "wavered" in its intent to implement the new policy for purposes of upending the proposed decision's timeliness analysis. Under the applicable legal standard in unilateral change cases, the statute of limitations begins to run on the date that the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent. (*The Regents of University of California* (1990) PERB Decision No. 826-H.)

Underlying each of the City's exceptions is a fundamental error. The City errs in making a distinction between the main body of AR-39, which contains the substance of the paid meal break policy, and Appendix A, which contains the classifications entitled to the benefit under the policy. The City relegates Appendix A to the status of an implementation detail whereas, according to the City, the actual policy is confined to the main body of AR-39. The City asserts that, though it was open to changing Appendix A and did, in fact, change Appendix A, it never wavered in its intent to implement the main body of AR-39. Therefore, according to the City, MEAN's unfair practice charge, filed approximately ten months after the City unveiled AR-39 in May 2012 is untimely.

Contrary to the City's argument, AR-39 and Appendix A comprise but one policy. As the ALJ rightly concluded, the City wavered in its intent to *unilaterally* implement this policy throughout the time period in question by retracting proposed implementation dates, meeting with MEAN and considering MEAN's input. The City's wavering intent is most plainly demonstrated by its modification of Appendix A to add two of the job classifications identified by MEAN in December 2012, water resources operator – supervising and water resources operator – senior. MEAN was then informed by the City at a meeting in late February 2013 that it intended to proceed with implementation, and it did so on or around April 8, 2013.

MEAN filed the unfair practice charge on March 12, 2013, after the City made clear in its March 5, 2013, memorandum that the City was not willing to bargain over the policy further.[8] Under well-settled precedent, MEAN's unfair practice charge was timely filed within the six-month limitations period.

Turning to the City's exceptions to the factual findings, we conclude they have no merit. The record as a whole supports the challenged factual findings.[9] Even if the City's exceptions were well founded, none bears on the ultimate issues. Nevertheless, except for those exceptions already addressed in footnote 9, *ante*, we address the City's exceptions to the factual findings next.

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[8] See March 5, 2013, memorandum from the City to MEAN ("This notice is to inform you that the City's new Administrative Regulation (AR) 39, Meals and Rest Periods will be implemented effective April 8, 2013.").

[9] There is arguable, marginal merit to two exceptions. Neither, however, involves matters material to the timeliness issue. The City excepts to the finding that in 1995 Jon Ostlund (Ostlund) "carried a proposal forward by MEAN on behalf of community service specialists, who believed they also deserved a paid meal period." The City argues that there is no evidence that Ostlund had a role in the 1995 negotiations. Ostlund testified that although he had no role in the negotiations, he was a contributor to the preparation of proposals for negotiations. Regardless of whether Ostlund himself carried the proposal forward, the record leaves no doubt that MEAN raised the paid meal break issue with the City in the 1995 negotiations, and the community services specialist classification was thereafter added to the job classifications entitled to the paid meal break benefit.

The City also excepts to the finding that "[l]ater the City produced a list of 14 classifications eligible for the benefit, identified as 'Appendix A.'" The City argues that Appendix A was not produced "later" but was included with AR-39 from the start. The meaning of "later" in this one sentence is unknown, but it can be stricken without consequence. Finding that AR-39 and Appendix A were provided together when the new paid meal break policy initially was proposed in May 2012 changes neither the analysis of the timeliness issue nor the legal conclusion reached.

Exceptions to Factual Findings

The City excepts to the following factual finding: "In 1998, the City issued a revised general order confirming the paid meal breaks for the positions noted, as well as for animal control officers. There is no evidence the City gave notice to MEAN of the revised general order." At the formal hearing, the City introduced into evidence as respondent's Exhibit 3 a copy of General Order 83-01, which shows that it was revised as of March 10, 1998, and confirms the paid meal break benefit for various classifications including animal control officer. There is no evidence in the hearing record that MEAN was given notice of the revised order. Accordingly, there is no merit to this exception.

The City excepts to the following factual finding: "Although the clerical staff ceased receiving the benefit, the City's human resources director agreed the matter should be reserved for contract negotiations. In 2007, a new police chief sought to make a similar change, with a similar outcome following MEAN's protest." The City argues that Ostlund, on cross-examination, "admitted" that he did not recall what the then Human Resources Director, Steve Harmon (Harmon), said. This mischaracterizes Ostlund's testimony. Ostlund was asked by counsel for the City, "[d]id he specifically say, wait until negotiations because it must be a negotiated matter." Ostlund replied, "I don't recall -- No, I don't think he said it in those words." The import of this testimony was not that Ostlund did not recall what Harmon had said, but that Ostlund did not recall nine years later the specific wording he had used.

In support of this exception, the City also relies on the "undisputed" testimony of Audrey Daniels (Daniels), the City's outside labor-relations consultant, about what Harmon once told Daniels, i.e., that Harmon did not believe the paid meal break benefit "needed to be negotiated away." This, however, does not prove what Harmon said at the time in question, and Daniels was not present at that time. When counsel for the City asked Daniels, "[d]id Jon

Ostlund ever tell you that former HR Director Steve Harmon believed the matter should be negotiated," Daniels responded:

> I believe that there was some innuendo to that, but I do not know, you know, where it came from specifically, whether it was Jon Ostlund or if it was Steve or, you know, someone else.

The line of questioning from counsel for the City regarding what Harmon told Daniels drew an objection from MEAN. As a result of the objection, counsel for the City agreed that Daniels' testimony was not being offered for the truth of the matter asserted.[10]

Last, the finding that a new police chief sought to make a similar change in 2007, with a similar outcome following MEAN's protest, finds support in the record. Ostlund testified as follows:

> Q What was the outcome of these meetings?
>
> A The outcome again was the same. The human resources director, Holly Brock-Cohn, felt it was in best interest to wait until negotiations.

The cross-examination of Ostlund did not weaken Ostlund's testimony. Nor does it otherwise controvert the finding that the then new police chief sought to make a similar change to the paid meal break policy in 2007, which effort was then abandoned following MEAN's protest.

> Q Okay. Did Holly Brock-Cohn say, wait until negotiation because it must be negotiated?
>
> A I believe her words were that it would -- it is best to wait until negotiations.
>
> Q It's best until negotiation.

[10] See hearing transcript, volume II, page 63, lines 16-19:

> ADMINISTRATIVE LAW JUDGE GINOZA: So it's not for the truth of the matter?
>
> MR. YOUNG: Nope.

A Yeah.

Q Bus she didn't say the City had to negotiate, did she?

A I don't think, in those words.

Q Okay. In any words, did she say the City has to negotiate the removal of this benefit?

A I think, in the words that I just said, that I think she said it was best.

Q It's best, and that was her belief, correct?

A Yes.

Accordingly, the City's exception to the factual finding regarding the City's prior two attempts to change the paid meal break policy has no merit.

The City excepts to the factual finding that the City twice delayed implementation of AR-39. The City argues that the ALJ "improperly attributed the delaying of the initial implementation of AR-39 to the City." The City claims that it was "willing and ready to move forward with the implementation of AR-39" and that the evidence does not support the conclusion that Daniels was the first to raise the idea of waiting until contract negotiations were over before turning to the issue of the paid meal break policy.[11]

MEAN believed it was critical to the success of contract negotiations to delay meeting over the City's proposal to change the paid meal break policy until after contract negotiations concluded. The City argues as though this fact is in dispute, but it is not. It makes no

[11] The City proposed the new paid meal break policy in May 2012 during contract negotiations, but after the deadline for submission of new proposals under the negotiated ground rules. It was agreed that the parties would conclude contract negotiations before taking up the issue of the proposed change in the paid meal break policy. Contract negotiations concluded sometime in or around the end of September 2012. The City re-started negotiations over the proposed paid meal break policy on October 24, 2012, with an e-mail message from Daniels to Stewart stating: "We need to complete Meals and Rest Period Policy. Do you have time this week."

difference which party raised the issue of delay.[12] Both parties agreed to it. The undisputed facts are that, as initially proposed, there was no implementation date for AR-39; and, the parties' negotiations over the paid meal break policy were put on hold until Fall 2012.

After the parties resumed negotiations in Fall 2012, the City sent MEAN a memorandum dated November 15, 2012 which states, in pertinent part: "[T]he City will be implementing the proposed AR effective December 3, 2012." MEAN responded with a memorandum dated November 16, 2012, which states:

> Thank you for your memo regarding Administrative Regulation 39. We agree that the issue of paid lunch periods has been the subject of discussion for some time. In fact, in MEAN's assessment, the parties negotiated an agreement on the issue many years ago. We differ, it seems, on whether the City may unilaterally terminate paid lunches as contemplated in AR 39. To be clear, MEAN's position is that the City may not do so and is obligated to meet and confer in good faith. On that basis, MEAN objects to the City implementing the plan absent agreement with MEAN or exhaustion of the bargaining obligation.

The next communication from the City was an e-mail message from Risolia sent at 10:26 a.m. on November 16, 2012. It states, in pertinent part:

> Thank you for your e-mail and memo. I have met with Troy Brown this morning. The City will not be implementing the removal of paid lunches for MEAN employees on December 3, 2012 until the City has met with MEAN during the week of November 26, 2012. The City requests your presence at that meeting.

[12] Contemporaneous notes taken by Michaele Risolia (Risolia), a management analyst in the City's human resources/administrative services department, during the parties' June 11, 2012, meeting were entered into evidence at the formal hearing. With respect to how the issue of delay initially arose, the notes state as follows:

> Audrey [Daniels]: What if we delay the implementation of this policy?
>
> Jon [Ostlund]: Delay <u>is</u> <u>essential</u>. Steve [Stewart] – focus needs to be on negotiations.

Contrary to the threat in the City's November 15, 2012, memorandum that "the City will be implementing the proposed AR effective December 3, 2012," it did not. Although the City argues that its decision *not to* implement on December 3, 2012, had nothing to do with the position taken by MEAN in response to the City's prior decision *to* implement on December 3, 2012, the record evidence plainly supports the ALJ's factual finding that "the City conceded for a second time to a delay in implementation in the face of MEAN's assertion of the right to bargain." This exception, therefore, has no merit.

The City excepts to the following factual finding: "What Daniels actually said was that in order to maintain 'fluidity' AR-39 would not include a list at all." The proposed decision relies on this finding to refute the City's contention that Daniel's reference to the paid meal break policy being "fluid" was intended to mean that the City would retain managerial prerogative to unilaterally change the list of job classifications eligible to receive the paid meal break benefit. The City argues that the ALJ erred in attributing his conclusion regarding the City's intent in using the word "fluid" to Daniels because such attribution is "not supported by any testimony provided by Daniels." The ALJ's attribution is, however, supported by more reliable evidence, i.e., the City's own contemporaneous notes taken at the time Daniels' statement was made. According to Risolia's June 11, 2012, bargaining notes, in maintaining that the policy should be "fluid," Daniels said that "listing classes won't be in the policy." Accordingly, the City's exception to the factual finding regarding the City's intent with regard to the word "fluid" has no merit.

The City excepts to the following factual finding: "MEAN met with the City regarding AR-39 for the first time on May 29. Stewart and the other union representatives were told to

consult with their governing boards and return with any proposed changes or revisions."[13] The City argues that it was not open to changes or revisions to AR-39. As explained above, the distinction the City makes between the main body of AR-39 and Appendix A is artificial. AR-39 and Appendix A comprise but one policy. MEAN is challenging the action taken by the City to eliminate the paid meal break benefit established under past practice for employees in certain job classifications. That MEAN's challenge centers on Appendix A rather than on the main body of AR-39 is of no consequence to the unilateral change analysis.

Exceptions to Legal Conclusions

The City excepts to the ALJ's conclusion that the unfair practice charge was timely filed. The City argues that the City never wavered in its intent to implement AR-39. The ALJ's conclusion that the City wavered in its intent to implement the elimination of the paid meal break benefit for employees in certain bargaining unit classifications is amply supported by the evidence.

The proposed decision correctly states the applicable legal standard on the issue of wavering intent:

> The proviso about wavering intent was adopted by PERB in *Regents, supra,* PERB Decision No. 826-H. There PERB identified the need to clarify the law with respect to unilateral changes, holding that the charging party need not file a charge when the employer announces an intention to implement but wavers in its intent to implement, nor may it simply wait for

[13] See hearing transcript, volume I, page 19, lines 15-19, in which Stewart testifies on direct examination as follows:

> Q And how were things left at that May 29th meeting?
>
> A That each bargaining unit representative would take that document, send it to their respective boards and members and get back to the City or maybe meet again and talk about proposed revisions or changes.

> actual implementation to trigger the running of the limitations period. (*Id.* at p. 8.) The clarification can be read as promoting mutual engagement for the purpose of informal resolution – since wavering of intent would often be signaled by the employer's willingness to meet and confer – while heading off premature charge filings, in furtherance of the labor statutes' purposes of promoting dispute resolution and improving employer-employee relations. [14] (Sec. 3500(a).)
>
> In *Omnitrans* (2009) PERB Decision No. 2001-M PERB held that a public employer evinces wavering intent when it solicits "input" or "feedback" on the proposed policy change and indicates a willingness to consider the responses. There the parties discussed changes to the proposed policy [sic] several months, and the employer indicated it was "amenable to making changes" to its proposal in response to the feedback received. (*Id.* at p. 7.) PERB held that the statute of limitations period was not triggered by the employer's first notice of intent to change policy.

(ALJ's proposed decision at pp. 12-13.)

The City does not dispute this standard. As thoroughly analyzed in the proposed decision, the City was willing to consider MEAN's response to the proposed change in the paid meal break policy. The City was amenable to making changes to its initial proposal in response to input and feedback received from MEAN. As confirmed by Risolia on cross-examination:

> Q Good morning, Ms. Risolia. I just have a couple of questions for you to follow up on the questions your Counsel asked you. You testified that MEAN, in the person of Steve Stewart, sent you a list on December 20th of positions that MEAN believed should be added to Appendix A of AR-39; is that correct?
>
> A Correct.

[14] "As a practical matter the rule as applied also encourages constructive engagement by the union under pain of forfeiture as a result of inaction, similar to the rule of waiver of right to bargain by inaction, during the period prior to implementation when negotiations are most propitious."

Q And was the City, in fact, open to making changes to the appendix of AR 39?

A Yes.

Q And had you previously indicated to MEAN that the City was open to making changes to the appendix of AR 39:

A Yes.

Q And did the City, in fact, make changes to the appendix of AR 39 in response to MEAN's input?

A Yes.

Q And when was that done?

A That was done after the list that was received from Steve Stewart on December 20th. We made a change after that.

Q Do you recall what that change was?

A Yes. We reviewed the list, and we went back to the department heads of the affected classes and asked them. And the senior water resources operator and the supervising, I believe is the title, water resources operator were added to Appendix A.

Q Do you recall when that change was communicated to MEAN?

A I don't recall exactly. It was after December, maybe January.

The City argues that MEAN initiated the delay in implementation and provided input to the City on its own impetus without solicitation from the City. The City asserts that these facts make this case distinguishable from *Omnitrans* (2009) PERB Decision No. 2001-M, one of the cases cited in the proposed decision. Regardless of whatever purported variation in facts there may be, the City misses the critical point, which is that the statute of limitations does not begin to run until the employer announces it is no longer amenable to negotiations. Such announcement did not come in this case until the parties met in late February 2013. Prior to

that, not only was the City amenable to making changes to the policy as initially proposed, the City in fact *made* changes to the proposed policy in response to input received from MEAN.

The City relies on *Milpitas Unified School District* (1997) PERB Decision No. 1234 (*Milpitas*) in support of its position that the City did not waver in its intent to implement the new paid meal break policy. In that case, the union alleged that the school district unilaterally changed the work year calendar. The Office of the General Counsel dismissed the unfair practice charge on timeliness grounds because the union failed to provide facts demonstrating that the school district wavered in its decision to implement the policy. On appeal, the Board itself affirmed the dismissal of the charge. The Board concluded that the union failed to show that the school district "ever communicated any change in its firm decision to close school facilities during the winter break." Here, the City did communicate a willingness to consider changes and, in response to feedback received from MEAN, communicated an actual change in its initial decision. The City changed its initial decision to include two water resource operator classifications identified by MEAN – classifications that previously had been excluded under the policy as initially proposed. *Milpitas* does not compel a different result.

Exceptions to Stewart's Testimony

The City argues that Stewart "changed his story" and provided "untruthful" testimony when he testified that Assistant City Manager Troy Brown (Brown) told him in November 2012 that the City would not be implementing AR-39 on December 3, 2012. The City contends that the ALJ was remiss in failing to make a credibility determination regarding Stewart's testimony. The City asserts that "an in-depth credibility assessment of witnesses such as Stewart"[15] must be undertaken.

[15] Ostlund was the only other witness to testify on MEAN's behalf.

The City's exception fails on two counts. First, the City misconstrues the ALJ's statement: "Although the City argues strenuously that Stewart lied about being told directly by Assistant City Manager Brown that the policy would not be implemented (as opposed to Stewart's later concession that it was transmitted through Risolia as an intermediary), Stewart's lack of credibility on this point is immaterial." As MEAN points out in its response to the City's statement of exceptions, whether it was Brown or Risolia who told Stewart that the City would not implement on December 3, 2012, is irrelevant. The fact is that the City did not implement on December 3, 2012, which thus provides further evidence of wavering intent for purposes of the timeliness analysis. Contrary to the City's assertions, the proposed decision does not state that assessing a witness's credibility is unnecessary as a general principle, but, rather, that Stewart's credibility on this specific factual point is immaterial because there is no doubt the City did not proceed with implementation as previously threatened.

Second, a review of the hearing transcript exposes a far less indicting portrayal of Stewart's credibility than that painted by the City in its somewhat sensational depiction of Stewart's testimony. "Changed stories" and "untruthful testimony" are serious charges to level, but the City's accusations are not borne out to the degree the City would have the Board believe. The testimony in question occurred during the cross-examination of Stewart:

> Q At any time, did Troy Brown tell you the City was not going forward with the implementation of AR 39.
>
> A Yes.
>
> Q He specifically said to you that the City would not implement AR 39?
>
> A I'm sorry. Via email.

Q Via email, he specifically told you the City would not implement AR 39?

A Yes.

Q Do you have that email?

A I believe it was one of the documents I looked at previously.

Q Can you show me that email or your Counsel provide you that email?

MR. BROWN: It's Exhibit I. It's the November 16th email.[16]

ADMINISTRATIVE LAW JUDGE GINOZA: You need to establish that with the witness to make sure.

THE WITNESS: The email from Michelle Risolia to me.

BY MR. YOUNG:

Q Okay. So this is the email, Exhibit I, that you're saying is from Troy Brown, directly informing you that the City would not move forward with the implementation of AR 39, correct?

A This is from - -

Q No. I'm asking a simple question, sir.

A Okay.

Q You testified that, through email, Troy Brown directly told you the City would not go forward with the implementation of AR 39, correct?

A He directly told me through this email.

We observe the following: Stewart immediately corrected himself when he testified that he was told that the City was not going forward with implementation of AR-39. He remembered, without prompt, that he was not told by Brown, but was informed by e-mail. At

[16] See e-mail message on page 11, *ante*.

this point in his testimony, Stewart mistakenly believed that Brown had sent the e-mail message. Upon review of the message, he realized that Risolia, not Brown, was the sender. Later during Stewart's cross-examination, Stewart explained that, based on the content of the e-mail message, he had assumed that Risolia had been directed by Brown to inform MEAN that the City was not going forward with implementation on December 3, 2012. Risolia corroborated that assumption on direct examination:

> Q And do you know why December 3rd implementation date was changed?
>
> A The December 3rd implementation date was changed because Troy Brown had wanted us to exhaust all discussion matters prior to implementation, and he asked us to meet with them on November 26th.

Our review of Stewart's testimony reveals a mistake and an assumption on a factual issue of no material import, i.e., how and by whom MEAN was informed that the City was not going forward with the December 3, 2012, implementation date. Stewart corrected his mistake immediately. Stewart was correct in his assumption about Brown's role in retracting the December 3, 2012, implementation date. Notwithstanding Stewart's testimony, the only point of any import in this discussion as it concerns the question of whether the City wavered in its intent to unilaterally implement the proposed paid meal break policy is the following one: The City did in fact withdraw the December 3, 2012, implementation date upon receipt of MEAN's protest. Under the applicable authorities relied on by the ALJ, this fact alone establishes wavering intent.

In summary, the ALJ correctly concluded that the City wavered in its intent to unilaterally implement a change in the paid meal break policy and, based on that conclusion, also correctly concluded that the unfair practice charge was timely filed. As to the core issue of unlawful unilateral change, the ALJ's analysis and conclusion stand.

ORDER

Upon the findings of fact and conclusions of law, and the entire record in this case, it has been found that that the City of Livermore (City) violated the Meyers-Milias-Brown Act (MMBA). The City unilaterally implemented Administrative Regulation No. 39 on or around April 8, 2013, so as to cease its practice of providing a paid meal period for bargaining unit members represented by the Municipal Employees Agency for Negotiations (MEAN), in violation of the MMBA, Government Code sections 3506 and 3506.5, subdivision (c), and Public Employment Relations Board (PERB) Regulation 32603, subdivision (c) (Cal. Code Regs., tit. 8, § 31001 et seq.). By this conduct, the City also interfered with the right of its employees to participate in the activities of an employee organization of their own choosing, in violation of the MMBA, Government Code sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a), and denied MEAN its right to represent employees in their employment relations with a public agency, in violation of the MMBA, Government Code sections 3503 and 3506.5, subdivision (b), and PERB Regulation 32603, subdivision (b).

Pursuant to section 3509, subdivision (a), it hereby is ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with MEAN by unilaterally ceasing its practice of providing a paid meal period for the classifications of police clerk, crime analyst, police identification technician, property and evidence technician, crime prevention specialist, information technology technician, and senior information technology technician.

2. Interfering with employees' right to participate in the activities of an employee organization of their own choosing.

3. Denying MEAN its right to represent bargaining unit employees in their employment relations with the City.

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

1. Rescind Administrative Regulation No. 39 to the extent it eliminates the paid meal period for the classifications of police clerk, crime analyst, police identification technician, property and evidence technician, crime prevention specialist, information technology technician, and senior information technology technician.

2. Make affected bargaining unit employees whole for lost wages and benefits, plus interest at the rate of 7 percent per annum.

3. Within ten (10) workdays following service of this decision, post at all work locations in the City, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent for the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. In addition to the physical posting requirement, the Notice shall be posted by electronic message, intranet, internet site and any other electronic means customarily used by the City to regularly communicate with its employees in the bargaining unit represented by MEAN.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General

Counsel or his/her designee. All reports regarding compliance with this Order shall be served concurrently served on MEAN.

Members Huguenin and Winslow joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-1051-M, *Municipal Employees Agency for Negotiations v. City of Livermore*, in which the parties had the right to participate, it has been found that the City of Livermore (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3506 and 3506.5, subdivision (c), and Public Employment Relations Board (PERB) Regulation 32603, subdivision (c), (Cal. Code Regs., tit. 8, § 31001 et seq.) when it failed to meet and confer in good faith with Municipal Employees Agency for Negotiations (MEAN) by unilaterally implementing Administrative Regulation No. 39 so as to cease its practice of providing a paid meal period for members of MEAN's bargaining unit. This conduct also violated the MMBA, Government Code sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a), by interfering with the right of employees to participate in an employee organization of their own choosing, and MMBA sections 3503 and 3506.5, subdivision (b), and PERB Regulation 32603, subdivision (b), by denying MEAN its right to represent bargaining unit employees in their employment relations with the City.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with MEAN by unilaterally ceasing its practice of providing a paid meal period for the classifications of police clerk, crime analyst, police identification technician, property and evidence technician, crime prevention specialist, information technology technician, and senior information technology technician.

2. Interfering with employees' right to participate in the activities of an employee organization of their own choosing.

3. Denying MEAN its right to represent bargaining unit employees in their employment relations with the City.

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

1. Rescind Administrative Regulation No. 39 to the extent it eliminates the paid meal period for the classifications of police clerk, crime analyst, police identification technician, property and evidence technician, crime prevention specialist, information technology technician, and senior information technology technician.

2. Make affected bargaining unit employees whole for lost wages and benefits, plus interest at the rate of 7 percent per annum.

Dated: _____ CITY OF LIVERMORE

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MUNICIPAL EMPLOYEES AGENCY FOR NEGOTIATIONS, Charging Party, v. CITY OF LIVERMORE, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-1051-M PROPOSED DECISION (4/30/2014)

Appearances: Altshuler Berzon LLP by Eric P. Brown and Daniel T. Purtell, Attorneys, for Municipal Employees Agency for Negotiations; E. Kevin Young, Assistant City Attorney, for City of Livermore.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Municipal Employees Agency for Negotiations (MEAN)[1] filed an unfair practice charge against the City of Livermore (City) under the Meyers-Milias-Brown Act (MMBA or Act)[2] on March 12, 2013. On July 5, 2013, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the City unilaterally eliminated paid meal periods for employees in certain job classifications. This conduct is alleged to violate sections 3503, 3505, 3506, and 3506.5(a), (b), and (c) of the Act, and PERB Regulation 32603(a), (b), and (c).[3]

[1] MEAN changed its name to Association of Livermore Employees sometime after filing its unfair practice charge. The former name will be used herein.

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

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

On July 22, 2013, the City filed its answer to the complaint denying the material allegations and raising a number of affirmative defenses.

On August 21, 2013, an informal settlement conference was held, but the matter was not resolved.

On December 16 and 17, 2013, a formal hearing was conducted in Oakland.

On March 17, 2014, the matter was submitted for decision with the filing of post-hearing briefs.

FINDINGS OF FACT

MEAN is an employee organization, within the meaning of section 3501(a), and an exclusive representative of a bargaining unit of public employees, within the meaning of PERB Regulation 32016(b). The City is a public agency within the meaning of section 3501(c).

MEAN represents a unit of miscellaneous employees assigned to various City departments. Included are non-sworn personnel in the Police Department.

Steve Stewart, a 14-year employee assigned to the Community Development Department, was president of MEAN at the time of this dispute. Jon Ostlund, a 22-year employee, was also a vice president at times relevant to this case. Both have been active in MEAN over the years, and both have served as president of MEAN.

Practice of Paid Meal Periods

Since at least the early 1990s, the City has provided a paid meal break during the work day for certain classifications in MEAN's unit. In 1991, Ostlund, along with other dispatchers (also known as public safety communicators) in the Police Department, received a paid lunch period. In 1995, Ostlund carried a proposal forward by MEAN on behalf of community

service specialists, who believed they also deserved a paid meal period. To conclude their 1995 contract negotiations, the parties memorialized their agreement in a document identifying amendments to the existing memorandum of understanding (MOU). Included in the document were some changes that would not be considered amendments to the MOU. The document stated: "The Police Department will review General Orders and Division Orders which apply to MEAN members in order to clarify current procedures and requirements regarding the following subjects: . . . ." The first subject listed was "lunch and break policy." Below this list was a reference to "specific agreements to be implemented" pertaining to the listed subjects. These agreements were contained in an Appendix B. Appendix B entitled "Issues Regarding Police Department General Orders and Division Orders," indicated that these orders would be modified to state that the classifications of public safety communicator, lead public safety communicator, police clerk (also known as record technician), and community service specialist would be entitled to a paid 30 minute lunch break on paid status while working a regular shift.[4] General orders or similar manuals are universal in police departments, setting forth the command procedures and operating policies within the department. In 1998, the City issued a revised general order confirming the paid meal breaks for the positions noted, as well as for animal control officers. There is no evidence the City gave notice to MEAN of the revised general order.

Over time, additional classifications began receiving the paid meal period, though each new position was formerly filled by an employee in one of the four classifications listed in the

[4] The dispatchers were further allowed to combine their break periods into a one hour paid meal period.

1995 agreement. For example, crime analysts were reclassified from the police clerk position. The police identification technician and property evidence technician were created out of the community service specialist position. Ostlund transitioned from a dispatcher position to an information technology (IT) technician. Beginning also in 2001 certain clerical staff in the Police Department began receiving the paid meal period, though not at the request of MEAN.[5] In 2004, the police chief proposed a policy to revoke the policy for certain classifications, asserting the right to determine unilaterally who was entitled to the benefit. MEAN objected, claiming the benefit had been negotiated by the parties. Although the clerical staff ceased receiving the benefit, the City's human resources director agreed the matter should be reserved for contract negotiations. In 2007, a new police chief sought to make a similar change, with a similar outcome following MEAN's protest. In addition to the employees listed in the general order, six police clerks, two crime analysts, one police identification technician, one property evidence technician, one crime prevention specialist, one IT technician, one senior IT technician and an unspecified number of dispatchers were receiving the paid meal period at the time of the dispute here. In addition, two employees in the Public Works/Water Resources Department, a supervising operator and a senior operator, were also receiving the benefit. All of these positions are in MEAN's bargaining unit.

In 2005, the City, like many other small and medium sized departments across the state, adopted and tailored an off-the-shelf set of general orders known as Lexipol. On at least one occasion, MEAN pointed out inconsistencies between the Lexipol manual and existing policies

[5] As a result of the 9/11 attacks, these employees were required to work through their lunch period.

pertaining to MEAN members. The City worked with the union to resolve those differences. There is no evidence that MEAN ever objected to the implementation of Lexipol or ever affirmatively consented to its adoption, but MEAN's comments to the department suggest it intended to preserve its right to meet and confer over subjects within the manual that were within the scope of representation.

City's May 2012 Proposal to Eliminate Some Paid Meal Periods

In May 2012, while the parties were engaged in contract negotiations, City Administrative Services Director Doug Alessio notified all of the City's unions that the City was proposing to issue a revised administrative regulation intended to clarify the Personnel Rules and Regulations regarding meal periods for City employees. At the time of the memorandum, the time for submitting new proposals had passed under the parties' ground rules. Entitled Administrative Regulation No. 39 (AR 39), the policy stated the general policy was for unpaid meal periods with an exemption for designated personnel in positions requiring "immediate response and attention to service calls at any time during the workday." The only positions identified in the policy were police officers and dispatchers. Later the City produced a list of 14 classifications eligible for the benefit, identified as "Appendix A." Six of the classifications are in MEAN's bargaining unit: (1) animal control officer, (2) community service specialist, (3) supervising police clerk, (4) public safety dispatcher, (5) supervising public safety dispatcher, and (6) water resources operator (four grades). The apparent genesis for the new policy stemmed from members of MEAN's bargaining unit complaining of disparate treatment. The draft policy responded to this concern by providing a rationale for the policy – specifically the need for certain classifications to work for the duration of their meal

break (as identified in the appended list) – and eliminated paid lunch periods for all those not meeting this criterion. The only stated exception was for employees with specific advanced authorization to work during their meal break. As a result of the policy as proposed, the paid meal break would be eliminated for police clerks, crime analysts, police identification technicians, property evidence technicians, crime prevention specialists, IT technicians, senior IT technicians, water resources supervising operator and water resources senior operator.

Alessio sent a May 11, 2012[6] memorandum, addressed individually to Stewart as president of MEAN. Stewart was the union's chief negotiator at the time. Alessio stated: "We are scheduling a meeting with City bargaining units to address any issues and concerns that they may have prior to publishing and implementing the final AR." He also advised Stewart that if he had any questions prior to the meeting he should contact Michaele Risolia or Audrey Daniels. Risolia was a management analyst in the Human Resources/Administrative Services Department reporting to Alessio. Daniels was an outside consultant retained by the City for labor relations matters. Stewart responded to Risolia stating MEAN's desire to meet.

MEAN met with the City regarding AR 39 for the first time on May 29. Stewart and the other union representatives were told to consult with their governing boards and return with any proposed changes or revisions. Stewart understood that as a result of the proposed policy some employees might lose their paid meal period and others might gain one.

At the next meeting on June 11, MEAN informed the City's representatives, Risolia and Daniels, of the history of the benefit. Ostlund recounted his last discussion with one of the former police chiefs in which he asserted the matter was negotiable and the chief agreed.

[6] All dates hereafter are in 2012 unless otherwise indicated.

Daniels disagreed with that statement, asserting that negotiations are not required when the City intends to "break a past practice"; that the City only provides notice when it "starts a new practice." Daniels relied on the 1995 negotiated agreement as evidence the meal benefit policy had been "explicitly excepted and removed from bargaining and moved into the . . . the area of a general order and/or an administrative policy." Daniels added that there was "a list of 20 items that came off the table and went to the police chief and for them to discuss as operational issues [sic]." According to bargaining notes kept by Risolia, Ostlund then noted that MEAN had successfully prevailed against that position twice in the past. Daniels next responded by raising the possibility of delaying the implementation of the policy. Ostlund replied that a delay was "essential." Stewart agreed, noting that trying to resolve the issue in the midst of contract negotiations would be a "distraction." Daniels' last statement in the meeting, according Risolia's bargaining notes, was that the policy would not include a listing of classifications receiving the paid meal period as that "needed to be fluid." Stewart testified that while it was clear at this point in time that the City wanted to eliminate some paid meal periods, it was not clear whether the City intended to implement AR 39. On the latter point, he relied chiefly on Daniels' agreement to delay implementation.

Fall 2012 Meetings

No further events took place in regard to the AR 39 proposal until Daniels sent Stewart an email on October 24, stating, "We need to complete the Meals and Rest Period Policy. Do you have time this week[?]" Stewart replied he was presently busy but would have Ostlund and another representative take the lead on the subject. Daniels answered: "Next week is good. Should I contact [Ostlund] directly? As you know there is little to no flexibility on what

is going on in the [Police Department]." Stewart replied that he would give Ostlund the heads up, noted that Ostlund had the best contacts with affected employees, and acknowledged Daniels' statement on lack of flexibility. Daniels then requested that another staff member arrange a meeting for October 31.

At the October 31 meeting, MEAN asked that certain classifications be added to Appendix A. According to Risolia's notes, they included police clerk, police identification technician, police property room specialist, crime analyst, crime prevention specialist, information technology technician, senior information technology technician and division clerk.

A follow-up meeting was scheduled for November 8, but two days prior Ostlund emailed the City requesting a postponement because MEAN was still "going over elements and reviewing concerns." On November 7, Risolia emailed the following response:

> Thanks for the advanced notice of the meeting cancellation. While the City understands [MEAN's] need to review the proposed AR, please keep in mind that the City proposed this AR earlier in the year and MEAN requested that we allow negotiations to complete before proceeding with this process. The City agreed to [MEAN's] request to the delay. Please know that the City cannot continue to delay the process. So on that note, I propose that when you call or e-mail . . . that we set a meeting and at that meeting we are prepared to have a discussion and are moving forward. I also have to ensure that Audrey Daniel's schedule (a consultant) can accommodate the meeting date and time. . . .

Ostlund replied on November 8, explaining that MEAN never intended to draw out the process for the sake of delay, noting that pushing forward with the new policy had threatened a successful ratification vote because it touched on matters discussed at the bargaining table.

In a November 15 memorandum, Alessio informed MEAN of the City's formal position on AR 39. He recounted the history of the City's initiative to correct inconsistencies in the policy, asserting the proposal was fair. He began: "As you know, the City began its process of discussion and input with all units on May 11, 2012. . . ." He explained the rationale of the policy: to provide the benefit only to those employees required to routinely respond to public safety or health emergencies. He concluded:

> The City has met with [MEAN] on several occasions since May 2012 as well as provided the draft Meal and Rest Period administrative regulation and Appendix A. The City understands that [MEAN] feels there is additional discussion needed. The City continues to be interested in MEAN's input relative to the AR; however, it is necessary that the current inequitable situation ends and the City will be implementing the proposed AR effective December 3, 2012. The implementation of the proposed AR will result in the rescission of paid lunches for City staff, except those classes of employees specifically listed in Appendix A.

Alessio's memorandum constituted the first time the City communicated a proposed implementation date.

In a November 16 memorandum to Alessio, MEAN claimed that the parties differed on whether the City could unilaterally implement the policy in AR 39, and asserted its right to meet and confer over the subject. Risolia responded on behalf of the City in an email the same day. She stated that she had met with Assistant City Manager Troy Brown and that the City would not be implementing AR 39 on December 3 as announced, "until the city has met with [MEAN] during the week of November 26, 2012." In another email, Risolia communicated that the City read MEAN to assert the existence of a negotiated agreement on paid lunch periods. She agreed to allow MEAN the opportunity to produce the agreement if it existed.

The parties next met on November 26. Stewart, Ostlund, and MEAN Treasurer Christine Rodriguez attended for the union. Risolia and Daniels were present for the City. The City agreed to continue considering which employees would continue their paid meal period. In a December 12 email, Risolia summarized the meeting in two points: (1) the City would provide MEAN with copies of prior MOUs, and (2) MEAN would provide the City with names and job titles of members that were regularly required to work through their lunch period (i.e., subject to recall during their meal period). Risolia added that when the list was received, the City would review it in consultation with the appropriate department heads.[7] Stewart understood from this communication that the City was soliciting input as to who should continue receiving the paid meal period. The City's bargaining notes indicate the City proposed an implementation date in February 2013 and confirmed that the City would be awaiting the union's list of employees.

On December 20 MEAN emailed Risolia and Daniels its list that included six police clerks, two crime analysts, one police identification technician, one property and evidence technician, one crime prevention specialist, one information technology technician, and one senior information technology technician in the Police Department. Also included were one senior operator and one supervising operator in the Public Works Department/Water Resources. After receiving the list, department heads were consulted.

The City did not respond to the list until a meeting in late February 2013, at which time Brown informed MEAN that it intended to proceed with implementation. The City agreed to modify the policy by adding the two water resources operator classifications. In addition, the

[7] In one of the fall meetings, Stewart took issue with Daniels' position that the absence of the policy in a negotiated agreement permitted the City to unilaterally implement AR 39 and promised a legal memorandum supporting its position. Daniels later received a memorandum prepared by legal counsel for MEAN dated December 19, and he considered it.

City agreed to conduct a 60-day study of each of the other classifications listed in MEAN's December 20 email. Brown informed MEAN that AR 39 would now be implemented on April 8, 2013. The new policy was implemented close to that date.

Daniels testified that because the City could break a past practice without negotiations and therefore only meeting and consulting was required, the City acted properly after listening to MEAN's concerns and accepting suggestions regarding the classifications listed in Appendix A.

ISSUES

1. Was the unfair practice charge timely filed?

2. Did the City violate its duty to meet and confer by unilaterally eliminating the paid meal policy for certain bargaining unit classifications?

CONCLUSIONS OF LAW

Timeliness of the Charge

A principal dispute in the case is whether MEAN timely filed its charge. If, as claimed by the City, the statute of limitations period commenced running either on May 11, 2012, the date of Alessio's first notice of the policy change, or even June 11, 2012, when Daniels denied negotiability, the charge, which was filed on March 12, 2013, would be untimely.

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to filing of the charge. (*County of Sonoma* (2012) PERB Decision No. 2242-M, p. 12, citing *Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072.) As a general rule, the statute of limitations begins to run when the charging party knows, or should have known, of the conduct underlying the charge. (See *Gavilan Community College District* (1996) PERB Decision No. 1177.)

A more specific rule applies in unilateral change cases. Here the statute of limitations runs on the date that the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent. (*The Regents of University of California* (1990) PERB Decision No. 826-H (*Regents*).) When the charging party has provided sufficient evidence of a timely filing to obtain a complaint, the respondent may seek dismissal of the complaint on statute of limitations grounds at the formal hearing. At the hearing the statute of limitations is treated as a true affirmative defense. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359 (*Los Angeles*).) The respondent has the initial burden of going forward with evidence on the timeliness issue, as well as the burden of proving by a preponderance of the evidence that the charge is untimely. (*Id.* at p. 3.)

The proviso about wavering intent was adopted by PERB in *Regents, supra*, PERB Decision No. 826-H. There PERB identified the need to clarify the law with respect to unilateral changes, holding that the charging party need not file a charge when the employer announces an intention to implement but wavers in its intent to implement, nor may it simply wait for actual implementation to trigger the running of the limitations period. (*Id.* at p. 8.) The clarification can be read as promoting mutual engagement for the purpose of informal resolution – since wavering of intent would often be signaled by the employer's willingness to meet and confer – while heading off premature charge filings, in furtherance of the labor statutes' purposes of promoting dispute resolution and improving employer-employee relations.[8] (Sec. 3500(a).)

[8] As a practical matter the rule as applied also encourages constructive engagement by the union under pain of forfeiture as a result of inaction, similar to the rule of waiver of right to bargain by inaction, during the period prior to implementation when negotiations are most propitious.

In *Omnitrans* (2009) PERB Decision No. 2001-M PERB held that a public employer evinces wavering intent when it solicits "input" or "feedback" on the proposed policy change and indicates a willingness to consider the responses. There the parties discussed changes to the proposed policy several months, and the employer indicated it was "amendable to making changes" to its proposal in response to the feedback received. (*Id.* at p. 7.) PERB held that the statute of limitations period was not triggered by the employer's first notice of intent to change policy.

In *Long Beach Community College District* (2003) PERB Decision No. 1568 (*Long Beach*), PERB held that where an employer entertains the possibility of negotiations, the limitations period does not begin until the employer announces it is no longer amenable to negotiations.

Under these authorities, it must be concluded that the City wavered in its intent to implement the elimination of paid lunch periods for the affected classifications in MEAN's bargaining unit. The City's reliance on Alessio's May 11 memorandum is insufficient because it provided notice of an impending policy change but omitted any implementation date and invited all of the City's unions to "meet" over the subject. (*Long Beach*, *supra*, PERB Decision No. 1568, p. 11.) The City emphasizes testimony by Stewart on cross examination that he understood Alessio's May 11 memorandum to mean that the City had set a date for implementation of the policy. In fact, Stewart based his statement on the memorandum itself, and when provided the opportunity to examine it, retracted his concession that a date had been set because the memorandum did not include one. At most this establishes the first element of the *Regents*' test, the intent to implement, but not the second element, the lack of wavering.

Alternatively, the City relies on Daniels' statement at the June 11 meeting that the City had no obligation to meet and confer over the proposal because it was entitled to break any unwritten past practice without negotiations, and from that point forward the City never signaled any willingness to withdraw the proposal or engaged in anything more than meeting and discussing over the subject. The argument is not convincing. While the City never affirmatively offered MEAN the opportunity to meet and confer, a number of its actions after the meeting suffice to demonstrate that MEAN was reasonable in interpreting the City's actions as wavering on its refusal to bargain.

If the City considers Daniels' statement as a flat refusal to negotiate, or a termination of any further negotiations under *Long Beach, supra,* PERB Decision No. 1568, its position is undermined by the subsequent acts of its agents. Daniels' statement came near the end of the June 11 meeting. It was not only the City's first and only assertion of non-negotiability, it was immediately followed by the City's agreement to MEAN's proposal to postpone implementation. Daniels was not the decisionmaker in the process (he was an outside consultant) as that role was assumed by Brown and Alessio, communicating directly or through Risolia. Risolia refrained from denying negotiability in her communications with MEAN. For example, her November 7 email stated that the City could no longer delay "the process" and so a meeting needed to be scheduled where the parties would be "prepared to have a discussion" in order to move that process forward. Meetings then occurred on October 31 and November 26 where the City received input from MEAN on the contents of Appendix A.

In scheduling the first meeting, Daniels attempted to remind Stewart that the City had "little to no flexibility on what is going on in the [Police Department]." This was not an unequivocal denial of any duty to meet and confer, but a signal of at least some openness on

the issue, and typical in fact of an opening gambit in bargaining. Notwithstanding the announcement for the first time of an implementation date (December 3) in his November 15 memorandum to MEAN, Alessio began by describing the "process" with unions as having begun for the purpose of "discussion and input" and ended by stating the City "continues to be interested in MEAN's input relative to the AR." After a swift and strong reiteration by MEAN of its right to bargain, the City again immediately retracted the proposed implementation date. Although the City argues strenuously that Stewart lied about being told directly by Assistant City Manager Brown that the policy would not be implemented (as opposed to Stewart's later concession that it was transmitted through Risolia as an intermediary), Stewart's lack of credibility on this point is immaterial. The City conceded for a second time to a delay in implementation in the face of MEAN's assertion of the right to bargain.

In response to MEAN's claim that it had documentary evidence of a negotiated agreement as to the policy, the City also agreed to allow MEAN time to search and produce the documentation. Most significantly, the City solicited a list of employees from MEAN whom the union believed should retain the benefit. In response to receipt of the list the City consulted department heads and added the two water resources operator classifications to its Appendix A. This was announced to MEAN after several weeks of no exchanges (November 2012 to February 2013). In February the City restated its intent to implement reductions in the benefit over MEAN's objection. The foregoing evidence demonstrates wavering of intent under the rule of *Omnitrans*.

The City's contention that solicitation of MEAN's list was inconsequential because the City never solicited or accepted any changes to the AR 39 policy itself, as opposed to the Appendix, is unpersuasive. If MEAN intended to negotiate the policy for the purpose of retaining the benefit for all employees under the status quo and the City agreed, the union's

bargaining objective would have been fully achieved. The City's willingness to consider MEAN's list is analogous to an employer agreeing to consider changes to a list of employees slated for layoff. Its stance was inconsistent with Daniels' assertion that the parties were merely engaged in effects bargaining. The City further contends that Daniels told Stewart at the June 11 meeting that Appendix A was designed to allow AR 39 to be "fluid," meaning that the City retained the managerial prerogative to unilaterally change the list. There is no substantiation in the record that such was the import of Daniels' reference to fluidity. What Daniels actually said was that in order to maintain "fluidity" AR 39 would not include a list at all. Alessio would later override that statement by soliciting input on the list.

The City has failed to carry its burden of demonstrating the charge was not timely filed.[9] As MEAN properly observes, to punish MEAN with forfeiture of statutory bargaining rights for attempting to resolve the issue as it did would be contrary to the MMBA's fundamental purposes.

Negotiability of the Policy Change

If an employer makes a unilateral change during bargaining but prior to the completion of bargaining, or during the term of an existing agreement, but without a waiver of the right to bargain from the exclusive representative, the employer violates its duty to meet and confer in good faith. (*Grant Joint Union High School District* (1982) PERB Decision No. 196; *Davis Unified School District, et al.* (1980) PERB Decision No. 116.) Such a unilateral change is inherently destructive of employee rights and is a per se breach of the duty to negotiate in good

[9] The City relied on precedent that the burden of proving timeliness lies with the charging party. In *Los Angeles, supra*, PERB Decision No. 2359, PERB overruled its prior rule in *Long Beach Community College District* (2009) PERB Decision No. 2002 on the burden of proof at the hearing. The decision was issued two days after the parties filed their briefs. Under the state of the record, the charge is timely even if MEAN bore the burden of proof on the ultimate issue.

faith. (*Ibid.*; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802.) The charging party has the burden to establish that (1) the employer breached or altered the parties' written agreement or its own established past practice, (2) the change is not merely an isolated departure from the policy, but amounts to a change of policy, i.e., the change has a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment, (3) the change in policy concerns a matter within the scope of representation, and (4) the policy change was implemented without giving the exclusive representative notice or an opportunity to bargain. (*Grant Joint Union High School District, supra*, PERB Decision No. 196.)

MEAN contends that the City repudiated an unwritten past practice by implementing the elimination of the paid meal period for the affected classifications without fulfilling its obligation to meet and confer.

The City contends that the 1995 agreement concluding contract negotiations constituted a waiver of MEAN's right to meet and confer over meal periods because the parties agreed the subject would not be addressed in the MOU but rather in the Police Department's General Orders. By this action MEAN agreed that the subject would be taken out of the meet and confer process. The City maintains that the agreement to have the General Orders govern the meal period was so clear and unambiguous as to require no interpretation to ascertain the parties' intent, but even if interpretation is necessary, the contract language and the contemporaneous bargaining history supports the City's position.

A charge of unilateral change may be sustained on the basis of the alteration of an existing unwritten past practice. For a past practice to be binding, it must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092; *Riverside Sheriffs Assn. v. County of Riverside* (2003)

106 Cal.App.4th 1285, 1291.) PERB has also described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*County of Placer* (2004) PERB Decision No. 1630-M, pp. 5-6; *Hacienda La Puente Unified School District* (1997) Decision No. 1186.) The burden is on MEAN to allege facts showing that the City breached an established past practice. (*San Francisco Unified School District* (2009) PERB Decision No. 2057.)

The City does not dispute the applicability of these principles here, nor that it ceased its past practice of providing paid meal periods for the affected classifications.[10] Rather it simply relies on the claim that MEAN agreed in 1995 to waive its right to meet and confer over the subject of paid meal periods by allowing the subject to be addressed in the General Orders. With the City's defense raised in this posture, it must demonstrate that the union waived its statutory right to meet and confer by the 1995 agreement, and that this was achieved through "clear and unmistakable" language, because such waivers are not lightly inferred. (*Long Beach, supra,* PERB Decision No. 1568, p. 14, citing, inter alia, *Amador Valley Joint Unified School District* (1978) PERB Decision No. 74 and *Oakland Unified School District* (1982) PERB Decision No. 236.)

This is not simply a question of whether MEAN agreed to "remove" matters concerning the subject from the MOU. Even assuming an agreement to have the subject addressed exclusively outside of the MOU that is the most to which the language of the 1995 agreement admits. The agreement provided that the Police Department would "review" General Orders applying to MEAN members in order to "clarify current procedures and requirements." One of

[10] The City does dispute MEAN's contention that a past practice amounted to an implied term of the MOU because it contradicts its view that the 1995 agreement explicitly negated the benefit as a term of the MOU. MEAN only invokes the implied-term argument to advance a more novel claim that no unilateral alteration of an unwritten past practice can be achieved by an employer during the term of an existing MOU even if notice and opportunity to bargain has been provided. This issue need not be resolved for the purposes of decision here.

the subjects to be clarified was the "lunch and break policy." Below this language was a reference to "specific agreements to be implemented" contained in an Appendix B, which included the City's promise to modify the General Orders to state that the positions of public safety communicator, lead public safety communicator, police clerk, and community service specialist would be entitled to the paid lunch break. It should be remembered that Ostlund prepared a proposal for those negotiations to extend the benefit to community service specialists. In 1998, the General Orders were modified to reflect this policy, with the existing policy expanded to include community service specialists. The City identifies no language that indicates MEAN agreed forever to waive its right to meet and confer over the subject of paid meal periods, nor did it present any bargaining history to support that claim.

Aside from further arguing that nothing demonstrates that the past practice was incorporated as an implied term of the MOU – which it need not have been in order to be enforceable – the City asserts: "Daniels provided undisputed testimony that the City believed, in order to cease providing a past practice, it was required to provide notice to MEAN, and meet and consult on the effects the change would have on MEAN members, allow MEAN to discuses their concerns, and then make the change, which is what the City did." Of course, Daniels was incorrect at the time on the point of law that a regular and consistent established past practice on a negotiable subject may be changed unilaterally by the employer. Since the City's position is that it never engaged in meeting and conferring over the proposed policy, and because its implementation occurred in the face of MEAN's demand to bargain, the finding of an unlawful unilateral imposition necessarily follows upon completion of the waiver analysis.

Accordingly, the City violated the MMBA by failing to meet and confer over its proposal to eliminate the paid meal period for the affected classifications, interfered with bargaining unit members' right to participate in the activities of an employee organization of

their own choosing, and denied MEAN its right to represent employees in their employment relations with the City, in violation of section 3506.5(a), (b), and (c).

REMEDY

Pursuant to section 3509(a), PERB under section 3541.3(i) is empowered to:

> take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

The City has violated the MMBA by unilaterally modifying AR 39 so as to cease its practice of providing a paid meal period for members of MEAN's bargaining unit. The affected classifications were police clerk, crime analyst, police identification technician, property and evidence technician, crime prevention specialist, information technology technician, and senior information technology technician. The traditional remedy in a unilateral change case is appropriate.[11] (*Rio Hondo Community College District* (1983) PERB Decision No. 292.) The City will be ordered to cease and desist from its unilateral action, restore the status quo that existed at the time of the unlawful conduct, and make employees whole for any losses suffered plus interest at the rate of 7 percent per annum as a result of the unlawful conduct.

As a result of the above-described violation, the City has also interfered with the right of employees to participate in an employee organization of their own choosing, under section 3506, and has denied MEAN its right to represent employees in their employment relations with a public agency, under section 3503. The appropriate remedy is to cease and desist from such unlawful conduct. (*Rio Hondo, supra,* PERB Decision No. 292.)

[11] If any other classification not identified herein was denied the benefit as a result of implementation of AR 39, they, too, shall be covered by the remedy.

Finally, it is the ordinary remedy in PERB cases that the party found to have committed an unfair practice is ordered to post a notice incorporating the terms of the order. Such an order is granted to provide employees with a notice, signed by an authorized agent that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, it is appropriate to order the City to post a notice incorporating the terms of the order herein at its buildings, offices, and other facilities where notices to bargaining unit employees are customarily posted. Posting of such notice effectuates the purposes of the MMBA that employees are informed of the resolution of this matter and the City's readiness to comply with the ordered remedy.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the City of Livermore (City) violated the Meyers-Milias-Brown Act (MMBA). The City unilaterally modified Administrative Regulation No. 39 so as to cease its practice of providing a paid meal period for bargaining unit members represented by Municipal Employees Agency for Negotiations (MEAN), in violation of Government Code sections 3505 and 3506.5(c) and Public Employment Relations Board (PERB or Board) Regulation 32603(c) (Cal. Code of Regs., tit. 8, § 31001 et seq.). By this conduct, the City also interfered with the right of its employees to participate in the activities of an employee organization of their own choosing, in violation of Government Code sections 3506 and 3506.5(a) and PERB Regulation 32603(a), and denied MEAN its right to represent employees in their employment relations with a public agency, in violation of Government Code sections 3503 and 3506.5(b) and PERB Regulation 32603(b).

Pursuant to section 3509, subdivision (a) of the Government Code, it hereby is ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with MEAN by unilaterally ceasing the practice of providing a paid meal period for the classifications of police clerk, crime analyst, police identification technician, property and evidence technician, crime prevention specialist, information technology technician, and senior information technology technician.

2. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

3. Denying MEAN its right to represent employees in their employment relations with the City.

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

1. Rescind the revision of Administrative Regulation No. 39 to the extent it eliminates the paid meal period for the affected classifications.

2. Make affected bargaining unit employees whole for lost wages and benefits, plus interest at the rate of 7 percent per annum.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the City, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable

steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on MEAN.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and

proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-CE-1051-M, *Municipal Employees Agency for Negotiations v. City of Livermore*, in which the parties had the right to participate, it has been found that the City of Livermore (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3505 and 3506.5(c) and Public Employment Relations Board (PERB) Regulation 32603(c) (Cal. Code of Regs., tit. 8, § 31001, et seq.), when it failed to meet and confer in good faith with Municipal Employees Agency for Negotiations (MEAN) by unilaterally modifying Administrative Regulation No. 39 so as to cease its practice of providing a paid meal period for members of MEAN's bargaining unit. This conduct also violated Government Code sections 3506 and 3506.5(a) and Regulation 32603(a) by interfering with the right of bargaining unit members to participate in an employee organization of their own choosing, and Government Code sections 3503 and 3506.5(b) and Regulation 32603(b) by denying MEAN its right to represent employees in their employment relations with the City.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with MEAN by unilaterally ceasing the practice of providing a paid meal period for the classifications of police clerk, crime analyst, police identification technician, property and evidence technician, crime prevention specialist, information technology technician, and senior information technology technician.

2. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

3. Denying MEAN its right to represent employees in their employment relations with the City.

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

1. Rescind the revision of Administrative Regulation No. 39 to the extent it eliminates the paid meal period for the affected classifications.

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

2. Make affected bargaining unit employees whole for lost wages and benefits, plus interest at the rate of 7 percent per annum.

Dated: _____ CITY OF LIVERMORE

By: _____
Authorized Agent