STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1245, Charging Party, v. CITY OF ROSEVILLE, Respondent.	Case No. SA-CE-757-M PERB Decision No. 2505-M November 30, 2016

Appearances: Leonard Carder by Amy Endo, Attorney, for International Brotherhood of Electrical Workers, Local 1245; Renne Sloan Holtzman Sakai by Timothy G. Yeung and Erich W. Shiners, Attorneys, for City of Roseville.

Before Winslow, Banks and Gregersen, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the International Brotherhood of Electrical Workers, Local 1245 (IBEW) to the May 28, 2014 proposed decision of a PERB administrative law judge (ALJ) which dismissed the complaint and IBEW's unfair practice charge against the City of Roseville (City). The complaint alleged that, beginning October 18, 2010 and continuing through July 5, 2011, the City violated the Meyers-Milias-Brown Act (MMBA) and PERB Regulations[1] by failing and refusing to meet and confer in good faith with IBEW for a successor memorandum of understanding (MOU) and by interfering with organizational and employee rights guaranteed by the MMBA. The complaint further alleged that, during this

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

same time period, the City discriminated against IBEW-represented employees for their exercise of rights protected by the MMBA.

After a formal hearing and briefing by the parties, the ALJ concluded that IBEW had failed to prove any of the above allegations and dismissed the case. IBEW excepts to the dismissal of the bad faith bargaining allegation and its derivative allegations that the City interfered with protected rights. IBEW also excepts to the ALJ's refusal to consider several matters which were alleged in IBEW's unfair practice charge, but which were not included in the complaint or were not identified as evidence of the City's bad faith in negotiations.

The Board has reviewed the entire record, the proposed decision, IBEW's exceptions, and the City's response in light of applicable law. Based on this review, we affirm the ALJ's dismissal of the bad faith bargaining allegation but conclude that the City violated the MMBA and PERB Regulations by unilaterally imposing terms and conditions of employment that were inconsistent with its pre-impasse proposals.

PROCEDURAL HISTORY

On October 6, 2011, IBEW filed an unfair practice charge alleging that the City had bargained in bad faith, and had unilaterally imposed an MOU in violation of MMBA section 3505.4.[2] On November 14, 2011, the City filed a position statement denying these allegations.

On January 13, 2012, IBEW amended its charge to allege that the City had interfered with the rights of IBEW and employees and had discriminated against IBEW-represented

[2] Effective January 2012, former section 3505.4 was renumbered as section 3505.7, without substantive changes. In relevant part, the provision prohibits an MMBA employer from unilaterally implementing an MOU, even after bargaining in good faith to impasse and exhausting impasse resolution procedures. (See *City of Santa Rosa* (2013) PERB Decision No. 2308-M, p. 4, and *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M (*Fresno Co. IHSS Public Authority*), pp. 22-23, 37-40.)

employees for their exercise of protected rights, in violation of MMBA section 3506.[3] On January 27, 2012, the City amended its position statement in response to these allegations.

On July 17, 2012, PERB's Office of the General Counsel issued a complaint alleging that the City had failed and refused to bargain in good faith, interfered with the rights of bargaining unit employees, denied IBEW its right to represent employees, and discriminated against IBEW-represented employees in violation of MMBA sections 3503, 3505, 3506, and 3509, subdivision (b), and PERB Regulation 32603, subdivisions (a), (b) and (c). No allegations in the original or amended charge were dismissed.

On August 13, 2012, the City answered the complaint by denying some of its allegations, admitting others, and asserting various affirmative defenses.[4]

On October 5, 2012, the parties met for an informal settlement conference but failed to resolve the dispute and, on April 24, 2013, the ALJ convened a formal hearing.

On July 3, 2013, both parties filed post-hearing briefs. On July 11, 2013, IBEW filed a reply brief and, on July 18, 2013, the City filed its own reply brief.

On May 28, 2014, the ALJ issued her proposed decision.

On June 17, 2014, IBEW filed its exceptions, and the City responded on July 10, 2014, at which point the filings were complete and the matter placed on the Board's docket.

[3] In relevant part, section 3506 prohibits public agencies from interfering with, intimidating, restraining, coercing or discriminating against public employees because of their exercise of rights guaranteed by section 3502 to participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

[4] As discussed below, the City's answer specifically avers that on July 20, 2011, the City Council approved a "Master Memorandum of Understanding" with IBEW which unilaterally implemented the terms of the City's April 6, 2010 last, best and final offer (LBFO).

FACTUAL SUMMARY

On October 18, 2010, the City and IBEW began negotiations for a successor to their 2007-2010 MOU, which was due to expire on December 31, 2010. The 2007-2010 MOU provided that the City would make the 8 percent Employer Paid Member Contribution (EPMC) on behalf of IBEW's bargaining unit members to the California Public Employees' Retirement System (CalPERS). Among the City's initial 17 proposals was language that would require IBEW's bargaining unit members to assume full responsibility for the 8 percent EPMC. IBEW made 19 proposals at this first session and requested cost information on the City's proposals.

Negotiations resumed on October 28, November 1, 8, 15, 22 and 29, December 6, 13, and 14, 2010, January 13 and 31, March 2, 10, and 23, and April 6, 2011. At their November 1, 2010 meeting, IBEW rejected the City's proposal to shift to employees the 8 percent EPMC. At the seventh bargaining session on November 29, 2010, the City revised its EPMC contribution proposal so that employees would gradually assume the full cost of the EPMC over three years as follows: 3 percent in 2011, an additional 3 percent in 2012, and an additional 2 percent in 2013. On December 6, 2010, at the eighth bargaining session, IBEW rejected the City's three-year phased-in EPMC proposal.

On December 13, 2010, IBEW offered a one-year MOU with a 3 percent EPMC paid by employees and a 3 percent wage increase. On December 14, 2010, the City rejected this proposal and, on January 13, 2011, the City countered by proposing a one-year MOU with employees paying 4 percent EPMC for the entire 2011 calendar year.

On January 31, 2011, the parties met for their twelfth bargaining session and discussed the potential for impasse. They also worked on a compromise based on the City's January 13th proposal for IBEW to take to its members. On February 3, 2011 they signed a tentative agreement which included an "annualized" 4 percent EPMC contribution from

employees.[5] However, on February 17, 2011, IBEW members voted overwhelmingly to reject this proposal.

On March 2, 2011, the parties met for their thirteenth bargaining session. In addition to exchanging MOU proposals, the City proposed bargaining separately over "Other Post-Employment Benefits" (OPEB). No agreement was reached.

On March 10, 2011, the parties met again. IBEW proposed a two-year MOU, including a 3 percent wage increase and a two-year phase-in for employee payment of the full 8 percent EPMC. The parties also discussed options for moving forward absent an agreement, including continued bargaining, impasse and deferring negotiations to the fall.

On March 23, 2011, the parties' fifteenth meeting, the City proposed that employees pay an annualized 4 percent EPMC for 2011 and 6 percent for 2012. It again proposed bargaining OPEB separately. When no agreement was reached, the City declared impasse.

On April 6, 2011, the City presented its LBFO, which included the following provision:

> Effective the first day of the pay period in July 2011, IBEW-represented employees will pick up equivalent to four percent (4%) of the employee annualized contribution to PERS for calendar year 2011 (up to the full 8% depending on when Council takes action).

(Joint Exh. 28, p. 1.)

From April 6 to July 20, 2011, the parties met three times for mediation but reached no agreement. On July 20, 2011, the City Council approved the City's LBFO and adopted a resolution rescinding Ordinance 10-87, which had required the City to pay the full 8 percent EPMC. Beginning with the August 2011 pay period, the City withheld 8 percent of IBEW-represented employees' wages to pay the EPMC.

[5] Both parties understood the City's "annualized" 4 percent EPMC proposal to require employees to pay 4 percent of the EPMC for the entire 2011 calendar year, regardless of the effective date of the agreement. Thus, the amount of employee payments would increase proportionally the longer it took to reach agreement.

On September 28, 2011, IBEW requested negotiations for a successor MOU. The parties met in late November 2011 and reached agreement on April 25, 2012. The new MOU provided, inter alia, that employees pay the full 8 percent EPMC, effective July 20, 2011.

PROPOSED DECISION

Although the ALJ decided several issues,[6] only two are before the Board:

1. Whether the City failed to meet and confer in good faith, as alleged in the complaint.

2. Whether various matters alleged in the charge, which were neither dismissed nor identified in the complaint as evidence of bad faith, should be considered under PERB's unalleged violations doctrine.

Surface Bargaining

The ALJ determined that IBEW did not prove its allegations that the City had failed to prepare for bargaining sessions on October 18 and November 15, 2010. The ALJ also determined that IBEW had not shown that the City's statements in negotiations amounted to a threat to declare impasse or were intended to subvert the bargaining process, or that the City was "merely going through the motions" of bargaining. In addition, the ALJ determined that, rather than displaying a "take-it-or-leave-it" attitude with its 8 percent EPMC proposal, "the City continuously revised its proposal … and eventually [reduced] its employee contribution by half." (Proposed dec., p. 16.) From these determinations, the ALJ concluded that IBEW had failed to demonstrate that the City engaged in surface bargaining.

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[6] The ALJ also considered whether the case was settled by the parties' 2012 MOU and concluded that the case was not moot because the successor MOU did not clearly resolve the unfair practice issues or explicitly waive IBEW's right to pursue the charge. (Proposed dec., p. 11.) After concluding that IBEW had failed to demonstrate that its bargaining unit members were treated differently from other City employees, the ALJ dismissed IBEW's group discrimination allegation. (*Id*. at p. 19.) Because no party has excepted to the ALJ's rulings on these issues, they are not before us. (PERB Reg. 32300, subd. (c); *City of Torrance* (2009) PERB Decision No. 2004-M, p. 12.)

Unalleged Violations

IBEW's briefing before the ALJ argued that the City had made regressive proposals, prematurely declared impasse, failed to participate in impasse procedures in good faith, unilaterally imposed an MOU whose terms were not reasonably comprehended by the City's LBFO, and unilaterally changed the EPMC contribution rate in January 2012. The ALJ refused to consider each of these contentions, reasoning:

> An unfair practice complaint informs the parties of the specific allegations in dispute and establishes the parameters of the formal hearing. All other factual allegations in the charge, whether formally dismissed or overlooked, are not at issue in the hearing.

(Proposed dec., p. 20.) The ALJ noted that a charging party may move to amend the complaint either before or during the formal hearing. (PERB Regs. 32647 and 34648.) A formal motion to amend the complaint gives notice of any new or different allegations and provides the respondent an opportunity to amend its answer, if necessary. (PERB Reg. 32649.)

The ALJ also noted that under PERB's "unalleged violations" doctrine, a Board agent may consider matters not included in the original or amended complaint, if certain criteria are met. (Proposed dec., pp. 20-21.) The ALJ determined that, although IBEW's "unalleged violations" were closely related to the complaint's surface bargaining allegation, they failed to satisfy the other criteria. According to the proposed decision, only one of the several "unalleged violations" was mentioned in IBEW's opening statement at the hearing and the remaining matters were raised for the first time in IBEW's post-hearing brief. (*Id*. at pp. 22-23.) The ALJ noted that IBEW had argued in its opening statement that the City had implemented terms not reasonably comprehended by its LBFO, but she deemed the claim not fully litigated. She also observed that IBEW had not raised this issue in its case-in-chief, but during cross-examination. The ALJ concluded that IBEW's failure to amend the complaint or to indicate at the hearing

that it intended to pursue these "unalleged violations" precluded a finding that the City had adequate notice and opportunity to defend against these matters. (*Ibid*.)

IBEW'S EXCEPTIONS AND THE CITY'S RESPONSE

IBEW argues that the ALJ erred by considering only those indicators of bad faith specifically identified as such in the complaint and by refusing to consider evidence corresponding to four other indicators of bad faith, as alleged in IBEW's amended unfair practice charge. The indicators of bad faith which the ALJ refused to consider were: (1) making predictably unacceptable proposals; (2) prematurely declaring impasse; (3) unilaterally implementing an MOU; and (4) implementing terms and conditions of employment not reasonably comprehended by the City's LBFO. IBEW argues that these four indicators of bad faith were encompassed by the complaint under the rubric "[b]y the acts and conduct included in, *but not limited to*, those described in Paragraph 4." (Emphasis in original.) IBEW argues that the ALJ erred by concluding that IBEW failed to prove that the City engaged in surface bargaining.

The City takes no exceptions to the proposed decision and urges PERB to adopt the ALJ's rule regarding unalleged matters in surface bargaining cases. Responding to IBEW's exceptions, the City urges that: (1) the ALJ properly determined that the four indicia of surface bargaining alleged in the unfair practice charge but not specifically identified in PERB's complaint as evidence of bad faith were "unalleged" and therefore could not be considered unless they met the criteria for unalleged violations under PERB decisional law; (2) the ALJ correctly declined to consider allegations which were not specifically set forth in the complaint and which did not meet the criteria for unalleged violations; and (3) the ALJ properly concluded that IBEW failed to prove any of the complaint allegations.

The City contends that allegations in surface bargaining charges are often neither dismissed by PERB nor included in the ensuing complaint, making their status uncertain. It

urges the Board to adopt the rule articulated by the ALJ whereby only those indicia of bad faith identified as such in the complaint may be considered and all other factual allegations in the charge, whether formally dismissed or overlooked, are not at issue in the hearing.

DISCUSSION

The ultimate issue for decision is the whether the ALJ correctly concluded that IBEW failed to establish that the City had bargained in bad faith during negotiations for a successor agreement in 2011. IBEW does not except to the ALJ's findings or conclusions regarding the four indicators of bad faith specifically identified in paragraph 4 of the complaint. Instead, it contends the ALJ should have considered other indicators of bad faith, which were either alleged in the charge but not specifically identified in the complaint, or which were included in the complaint, but under a different theory of liability. Thus, to determine whether the City engaged in surface bargaining as alleged in the complaint, we must first determine the scope of issues properly before the ALJ and the Board.

We begin by considering the MMBA's provisions requiring parties to meet and confer in good faith and agency and judicial precedent involving bad faith or surface bargaining allegations. We then review our regulations and decisional law governing the contents of a complaint before addressing the City's proposed rule and the ALJ's refusal in this case to consider various indicia of bad faith which were alleged in IBEW's unfair practice charge but not specifically identified as such in the complaint. After determining the issues properly before us, we review the evidence in support of the four "unalleged" indicators of bad faith which, IBEW contends, warrant reversal of the proposed decision.

Per Se and Surface Bargaining Violations of the Duty to Meet and Confer in Good Faith

MMBA section 3505 requires the representatives of public agencies and recognized employee organizations to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment." It is an unfair practice for a public agency or its

representatives to "refuse or fail to meet and negotiate in good faith with a recognized employee organization." (MMBA, § 3506.5, subd. (c); PERB Reg. 32603, subd. (c).)

In determining whether a party has violated this duty, PERB utilizes either a "per se" or "totality of the conduct" test, depending on the conduct involved and its effect on negotiations. (*Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton*), pp. 21-27; *Muroc Unified School District* (1978) PERB Decision No. 80 (*Muroc*), pp. 13-14.)[7] While per se violations generally involve conduct that is contrary to the procedures for bargaining or the express language or purposes of the statute, irrespective of intent, the respondent's state of mind is at the center of a bad-faith or surface bargaining allegation. (*Fresno Co. IHSS Public Authority, supra,* PERB Decision No. 2418-M, p. 13; *Gonzales Union High School District* (1985) PERB Decision No. 480, adopting proposed dec. at pp. 38-40.) In surface bargaining cases, the Board looks to the entire course of negotiations, including the parties' conduct at and away from the table, to determine whether the respondent has bargained in "good faith," which our precedents describe as a subjective intent to reconcile differences and reach agreement. (*City of San Jose* (2013) PERB Decision No. 2341-M, pp. 19, 22; *University of California, Lawrence Livermore National Laboratory* (1995) PERB Decision No. 1119-H, p. 3; *NLRB v. A-1 King Size Sandwiches, Inc.* (11th Cir. 1984) 732 F.2d 872, 873.) Thus, allegations of separate unfair practices either at or away from the table may serve as evidence of bad faith.

[7] Although *Stockton* and other cases discussed herein involved interpretation of the Educational Employment Relations Act (EERA), section 3540, et seq., where California's public-sector labor relations statutes are similar or contain analogous provisions, agency and court interpretations under one statute are instructive under others. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1087-1091.) Private-sector precedent under the National Labor Relations Act (NLRA), 29 U.S.C. section 151 et seq., and California's Agricultural Labor Relations Act (ALRA), Labor Code sections 1140-1166.3, also provide persuasive authority for interpreting similar provisions in the PERB-administered statutes. (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 311; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 618.)

(*City of San Jose, supra*, at pp. 21, 23, 32, 37-39, 43-46, 49-50; see also *In Re Summa Health Sys., Inc.* (2000) 330 NLRB 1379; cf. *Temple City Unified School District* (1990) PERB Decision No. 841, pp. 2-4.)

However, other conduct may appear entirely proper when viewed in isolation and will only support an inference that the charged party was bargaining without the requisite intent to reach agreement when placed in the narrative history of negotiations. (*Muroc, supra,* PERB Decision No. 80, pp. 13-14; *Pajaro Valley Unified School District* (1978) PERB Decision No. 51, pp. 4-5.) A party may violate its bargaining obligation by simply attending meetings, passing proposals and "going through the motions" of bargaining, if, in fact, it has no real intent to reconcile differences or reach agreement. (*Mt. Diablo Unified School District* (1983) PERB Decision No. 373, p. 24; *Muroc, supra*, PERB Decision No. 80, p. 13; *NLRB v. Reed & Prince Mfg. Co.* (1st Cir. 1953) 205 F.2d 131, 134 cert. denied (1953) 346 U.S. 887.)

Because the respondent's state of mind is rarely susceptible to direct evidence, labor boards and the courts have identified various forms of conduct that may serve as evidence or "indicia" of the respondent's lack of good faith in negotiations. (*Fresno Co. IHSS Public Authority, supra,* PERB Decision No. 2418-M, pp. 14-15; *City of San Jose, supra*, PERB Decision No. 2341-M, pp. 18-20.) However, such indicators are neither required elements of surface bargaining, nor are they exhaustive of the kinds of conduct that may demonstrate a lack of good faith in negotiations. (*City of San Jose, supra,* at p. 19, and authorities cited therein.)

We next consider how the above decisional law affects PERB practice and procedure for investigating and framing surface bargaining allegations in unfair practice complaints.

Requirements of a PERB Complaint and the City's Proposed Rule in Surface Bargaining Cases

PERB Regulations direct a Board agent to issue a complaint "if the charge or the evidence is sufficient to establish a prima facie case." (PERB Reg. 32640, subd. (a).) A complaint must set forth the conduct alleged in the charge which, in the opinion of the Office

of the General Counsel, is sufficient to state a prima facie case of an unfair practice. (*Ibid*.; *San Diego Unified School District* (1991) PERB Decision No. 885 (*San Diego*), p. 60; *California State University* (1990) PERB Decision No. 853-H, pp. 8-9.) However, resolution of surface bargaining allegations is notoriously fact dependent. (*A-1 King Size Sandwiches, Inc.* (1982) 265 NLRB 850, 858.) Under the totality of circumstances test described above, the indicia of bad faith are not required for surface bargaining allegations in the way that, for example, evidence of "protected activity" or "adverse action" is essential to stating a prima facie case of discrimination. The indicia of bad faith are more in the nature of "factors" that *may* support an inference of unlawful motive than required elements. (See. e.g., *Hartnell Community College District* (2015) PERB Decision No. 2452 (*Hartnell*), pp. 20-22; *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), pp. 5-7.)

Consequently, a complaint alleging surface bargaining will typically state that, by the totality of its conduct, *including but not limited to*, the conduct described in the complaint, the respondent has failed and refused to meet and confer in good faith. This or similar language complies with PERB Regulations and decisional law. It identifies the specific acts or indicia that are sufficient to state a prima facie case, while also giving the respondent notice that, under the totality of conduct test, these acts or indicia are not exhaustive of the evidence the charging party may present at hearing to prove the surface bargaining allegation. (PERB Reg. 32640, subd. (a); see also *City of Selma* (2014) PERB Decision No. 2380-M, p. 15.)

Aspects of PERB's process for investigating unfair practice allegations also make it unrealistic to require that a complaint alleging surface bargaining list every possible indicator of bad faith that may be presented at the hearing. A charge must include a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. (PERB Reg. 32615, subd. (a)(5); *Antelope Valley Hospital District* (2011) PERB Decision No. 2167-M, p. 2; *West Side Healthcare District* (2010) PERB Decision No. 2144-M, pp. 2-4.) Under PERB's

fact pleading standard, the charging party must include the essential facts (often described as the "who, what, when, where and how" of the charge) with sufficient specificity to permit the Board agent to determine whether "the facts as alleged in the charge state a legal cause of action and [whether] the charging party is capable of providing admissible evidence in support of the allegations." (*Eastside Union School District* (1984) PERB Decision No. 466, p. 7.) However, PERB does not require the charging party to identify or provide all of its evidence in the charge. (*County of Inyo* (2005) PERB Decision No. 1783-M, p. 2; see also *National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M, p. 6, fn. 5.)

Nor would it be fair or practical to do so, since PERB Regulations do not provide for pre-hearing discovery in unfair practice cases. (PERB Reg. 32150, subd. (a); *King City High School District Association, CTA/NEA; King City Joint Union High School District; et al. (Cumero)* (1982) PERB Decision No. 197, p. 26.) Since the key issue in surface bargaining cases is the respondent's state of mind, a matter which is best known by the respondent and one which the charging party can often establish only through indirect or circumstantial evidence (*Fresno Co. IHSS Public Authority, supra*, PERB Decision N. 2418-M, pp. 14-15), it is unrealistic to expect that a surface bargaining charge include all possible evidence of the respondent's intent or motive in negotiations. Because the Office of the General Counsel's pre-complaint investigation relies primarily on information obtained from the charging party (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 9), a complaint will identify only those facts that are sufficient to state a prima facie case and leave to the parties and the hearing officer to inquire fully into all issues and determine what probative and competent evidence of the respondent's state of mind will be introduced and considered. (PERB Regs. 32170, subds. (a), (h), (i), 32176, 32180, 32207.)

Additionally, PERB Regulation 32620 requires an investigating Board agent to "advise the charging party in writing of any deficiencies in the charge in a warning letter, unless

otherwise agreed by the Board agent and the charging party, prior to dismissal of any allegations contained in the charge." (PERB Reg. 32620, subd. (d).) The purpose of the regulation is to provide notice and opportunity to correct "any" deficiencies before "any" allegation is dismissed. (*Hartnell, supra,* PERB Decision No. 2452, p. 31; *County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 8; *County of Alameda* (2006) PERB Decision No. 1824-M, pp. 4-5.)

In light of the above, we agree with IBEW that the ALJ's refusal to consider matters alleged in the charge but not included in or identified as evidence of bad faith in the complaint was contrary to the language and purpose of our Regulations. For the same reasons, we also decline the City's invitation to adopt this rule. By restricting a charging party to only those indicia of bad faith specified in the complaint, where other indicia have been alleged in the charge but not included in the complaint, PERB would effectively dismiss charge allegations without notice of deficiencies to the charging party. Even if we were inclined to adopt this rule, which we are not, we could not do so, because we may not disregard or change our Regulations through decisional law. (*Regents of the University of California* (2014) PERB Decision No. 2398-H, p. 36; *State of California (Department of Corrections & Rehabilitation)* (2009) PERB Order No. Ad-382-S, pp. 4-5; *UPTE, CWA Local 9119 (Hermanson, et al.)* (2006) PERB Decision No. 1829-H, pp. 3-5.)

We also note that the rule, as applied by the ALJ and urged by the City, is inherently one-sided. Our decisional law recognizes that the charging party's conduct is *also* part of the totality of circumstances in a surface bargaining case, regardless of whether the respondent has filed a countercharge. (*City of San Jose, supra*, PERB Decision No. 2341-M, p. 41; *Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M (*Kings IHSS Public Authority*), pp. 6, fn. 6, and 14-15; *Compton Community College District* (1989) PERB Decision No. 720, pp. 15-16; *NLRB v. Reed & Prince Mfg. Co*., *supra*, 205 F.2d 131,

134.) In all fairness, we could not require the charging party to confine its case to only those indicia set forth in the complaint, without also requiring the respondent to place its cards on the table and identify in its answer to the complaint all indicia of good faith or other evidence it will introduce at hearing to rebut any inference of bad faith.[8] Thus, as a general rule, we conclude that a complaint alleging surface bargaining need identify only those factual allegations that, in the opinion of the Office of the General Counsel, are sufficient to state a prima facie case, while other facts, which are probative of the respondent's conduct or state of mind during negotiations and which were alleged in the charge, may be established through competent evidence at hearing and appropriately considered, without amending the complaint.

There is an important caveat to this rule. Where conduct allegedly constitutes *both* evidence of the respondent's bad faith *and* a separate unfair practice, the essential facts for each theory of liability should be stated in the complaint and identified as separate unfair practices. (*Fresno Co. IHSS Public Authority, supra*, PERB Decision No. 2418-M, pp. 18-20; *City of Clovis* (2009) PERB Decision No. 2074-M, p. 9.) A respondent is entitled to notice of the issues in dispute, so that it can preserve documents and secure witnesses, or expect repose as to those unfair practice allegations that are dismissed, withdrawn, abandoned or otherwise disposed of during the Office of the General Counsel's investigation. (PERB Regs. 32620, subd. (c), 32630, 32640, subds. (a), (b).) Identifying the essential factual allegations and the theories of liability in a complaint is necessary to provide adequate notice and ensure a full and

[8] The point is not merely hypothetical. The City's post-hearing brief before the ALJ argued, for the first time, that IBEW had waived its right to pursue this action based on retirement benefits language in the parties' 2012 MOU. While the City's answer to the complaint asserted a boilerplate affirmative defense of waiver by contract or bargaining conduct, the City did not mention this defense in its opening statement or otherwise flesh it out at the hearing. This omission is curious, since, in its opening statement and subsequent briefing, the City has argued that the dispute over EPMC pickup is "the driving force behind this whole case" as demonstrated by IBEW's requested back pay remedy. (Reporter's Transcript (R.T.), 13:14-15; City Response to Exceptions, p. 1.)

fair adjudication of the issues, including an opportunity for the respondent to raise any affirmative defenses specific to each theory of liability. (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1187 (*Hacienda La Puente*), p. 4; *San Mateo Community College District* (1985) PERB Decision No. 543, adopting proposed dec. at p. 43; see also *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668 (*Tahoe-Truckee*), pp. 6-9, 12.)

However, when the factual allegations supporting a surface bargaining allegation involve only conduct that is not itself unlawful, the totality of conduct test and longstanding PERB practice and procedure dictate that the charging party be allowed to put on all competent, probative, and non-cumulative evidence concerning the respondent's conduct and state of mind during negotiations, as alleged in the charge, *regardless* of whether such evidence corresponds to factual allegations or indicators of bad faith identified in the complaint. (PERB Regs. 32170, subds. (f), (h), (i), 32176, 32178, 32180; see also *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 15; and *San Francisco Community College District* (1979) PERB Decision No. 105 (*San Francisco*), p. 19.)

We next apply the above standard to each of the indicia of bad faith discussed in IBEW's exceptions to determine whether the ALJ properly refused to consider the matter.

IBEW's Allegations that the City Made Predictably Unacceptable Proposals and Prematurely Declared Impasse Were Properly Before the ALJ Without Amendment to the Complaint

IBEW's amended charge alleged that the City had engaged in surface bargaining and identified eight separate "indicia" of the City's alleged bad faith during the 2010-2011 successor negotiations. The City responded to each of these allegations in its position statement. PERB's Office of the General Counsel determined that the charge alleged sufficient facts to state a prima facie case of surface bargaining and, accordingly, issued a complaint on

that theory. Paragraphs 3 and 4 of the complaint set forth the relevant time period but identified only four examples or indicia of bad faith.[9] Paragraph 5 of the complaint then alleged that "[b]y the acts and conduct included in, *but not limited to*, those described in paragraph 4, the [City had] failed and refused to meet and confer in good faith … ." (Emphasis added.) In our view, the complaint was sufficient to put the City on notice that it stood accused of surface bargaining and that, in accordance with well-settled Board law, this allegation would be decided based on the totality of competent, probative and non-cumulative evidence put on at hearing regarding the City's state of mind, including matters alleged in the charge, but not specifically identified in the complaint. Consequently, we conclude that those indicia of bad faith alleged in the charge which are not independent unfair practices and thus, if proven, would not expand the scope of the City's liability, were reasonably contemplated by the complaint. Two of the excluded indicia meet these criteria: The allegations that the City made predictably unacceptable proposals and that it prematurely declared impasse.

Contrary to the proposed decision, we find it unnecessary and improper to require the charging party to move to amend the complaint to identify indicators of bad faith alleged in the charge but not set forth in the compliant, when such evidence is offered solely to support a surface bargaining allegation alleged in the complaint. A motion to amend the complaint is appropriate to add or amend factual allegations that are *essential* to an unfair practice allegation, or to add a theory of liability not identified in the complaint. Here, however, the complaint already identified the theory of liability, the City's alleged failure and refusal to

[9] These included: (1) the City's alleged failure to prepare for bargaining on October 18, 2010 and inability to explain its financial proposal presented that day; (2) the City's alleged failure to prepare for bargaining on November 15, 2010 and failure to provide financial data concerning its funding; (3) the City's alleged evasive bargaining tactics and threats of premature impasse on October 18, 2010 and January 13, 2011; and (4) the City's alleged insistence on October 18, 2010, November 29, 2010 and March 2, 2011 that employees surrender 8 percent of their wages to pay the EPMC previously paid by the City.

meet and confer in good faith. (*City of Selma, supra* PERB Decision No. 2380-M, p. 15.) It also included various factual allegations about the City's conduct and state of mind during negotiations which the Office of the General Counsel determined were sufficient to state a prima facie case of surface bargaining. (PERB Reg. 32640, subd. (a); *County of Fresno* (2014) PERB Decision No. 2352-M, p. 4.) Because the purpose of a complaint is to set forth the essential allegations and issues for hearing, not to identify or provide all of the charging party's evidence before hearing, no amendment to the complaint was necessary.[10]

With the exception of allegations of separate unfair practices (discussed below), we likewise disagree with the ALJ that PERB's unalleged violations doctrine is implicated simply because IBEW never moved to amend the complaint. As its name suggests, the unalleged violation doctrine applies when, if proven, factual allegations presented at hearing but not included in the complaint would constitute a separate unfair practice *in addition to* the theories of liability set forth in the complaint. (*Santa Clara Unified School District* (1979) PERB Decision No. 104 (*Santa Clara*), pp. 18-19; *Santee Elementary School District* (2006) PERB Decision No. 1822, pp. 8-9.) Because surface bargaining was alleged in paragraph 5 of the complaint, there was no *additional* or *unalleged* surface bargaining violation to consider in this case. Although recognized as *evidence* of bad faith, making predictably unacceptable proposals and prematurely declaring impasse are not independent unfair practices. (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270, p. 83; *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 22; *Regents of the*

[10] It may be, as the City argues, *preferable* for a complaint to identify all of the relevant indicia of bad faith in a case to avoid speculation as to what issues will be litigated at the hearing. (City Post-Hearing Brief, pp. 15-16.) However, given the comprehensive and fact-dependent nature of PERB's totality of circumstances test, it is often not possible or practical to do so and, moreover, we hold that it is not necessary to do so, so long as the complaint identifies the factual allegations that are sufficient to state a prima facie case and identifies all pertinent theories of liability raised by the charging party's allegations.

University of California (1985) PERB Decision No. 520-H, pp. 14 and 25, fn. 13.)[11] Consequently, even if proven, these allegations would not result in additional liability beyond what was already set forth in the complaint. Thus, the issue is not whether these unalleged indicia constitute separate, unalleged *violations*, but whether the Board should consider these matters as *additional evidence* in support of *the same course of conduct* and theory of liability as was alleged in the complaint. (*San Diego, supra,* PERB Decision No. 885, pp. 37-39; *Regents of the University of California* (2012) PERB Decision No. 2302-H (*Regents*), proposed dec. at p. 16; *Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, pp. 9-10.)

Alternatively, even if IBEW's allegations of predictably unacceptable proposals and premature impasse were not alleged in the complaint, these two allegations were nonetheless appropriate for consideration by analogy to the unalleged violations doctrine. Although the complaint is the operative document for framing the issues for hearing, the Board has reasoned, by analogy to the unalleged violations doctrine, that conduct which constitutes an essential element of an unfair practice, but which was not alleged in the complaint, may still be considered, if it is related to the claims in the complaint, and if the parties have had full opportunity to litigate the issues. (*Regents, supra*, PERB Decision No. 2302-H, proposed dec. at p. 15; *San Diego, supra,* PERB Decision No. 885, pp. 37-39.) In determining whether the parties have had full opportunity to litigate the issues, an important consideration is whether

[11] In *County of Riverside* (2014) PERB Decision No. 2360-M, we explained that an employer's unilateral implementation of terms and conditions of employment following a premature declaration of impasse is an unlawful unilateral change, i.e., a per se violation of the duty to bargain. (*Id*. at pp. 11-12.) Although the premature declaration of impasse is thus a necessary precondition for this category of per se bargaining violation, the two acts are nevertheless distinct and give rise to different theories of liability. (*Ibid*.; *City of Selma, supra,* PERB Decision No. 2380-M, pp. 13-15.) They are analyzed under different tests and involve different remedies. (*Kings IHSS Public Authority, supra,* PERB Decision No. 2009-M, pp. 9-11; *County of Riverside, supra*, at pp. 11-12, 24-25; see also *City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 13-14.)

the conduct, although not alleged in the complaint, *was alleged in the unfair practice charge*. Thus, in *San Diego,* the Board concluded that evidence of the charging party's protected activity, which was not alleged in the complaint, was properly considered by the ALJ as evidence of the same pattern of discriminatory conduct as had been alleged in the charge and complaint.[12] (*Id*. at pp. 37-38.)

As discussed above, not all evidence of the respondent's bad faith must be included in a surface bargaining complaint. A more apt analogy here is to the so-called "nexus factors" used in PERB discrimination cases. Like a surface bargaining allegation in which the respondent's motive is at issue, an allegation of discrimination requires a showing of unlawful purpose, intent or motive. (*Novato, supra,* PERB Decision No. 210, pp. 5-6; *Hartnell, supra,* PERB Decision No. 2452, pp. 21-22.) Notwithstanding the requirement that a complaint "state with particularity the conduct which is alleged to constitute an unfair practice" (PERB Reg. 32640), like the recognized indicia of bad faith in surface bargaining cases, PERB discrimination complaints typically omit the specific nexus factors or any other facts alleged in the charge to establish unlawful motive, since these factors, like the indicia of bad faith in surface bargaining, are not themselves required elements of the allegation, nor exhaustive of the kinds of conduct that may demonstrate unlawful motive, intent or purpose.[13]

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[12] Because protected conduct is not itself an unfair practice, but *an element* of an unfair practice, the *San Diego* Board observed that the unalleged violations doctrine was inapplicable and that it was *analogizing* to the doctrine. Consequently, the six-month statute of limitations for unfair practices, which must be met for unalleged *violations* (see *County of Riverside* (2010) PERB Decision No. 2097-M, p. 8, fn. 5), does not apply to *evidence* in support of an unfair practice. (*San Diego, supra*, at pp. 38-39.) The same is true when untimely or dismissed allegations are used to show motive in a timely allegation of surface bargaining. (*Rio School District* (2008) PERB Decision No. 1986, p. 10, fn. 7; *San Mateo County Community College District* (1993) PERB Decision No. 1030, p. 12, fn. 7.)

[13] In PERB decisions too numerous to cite, the Board has stated that nexus may be shown by "any other facts that might demonstrate the employer's unlawful motive." (See, e.g., *Hartnell, supra*, PERB Decision No. 2452, p. 22; and *Contra Costa Community College District* (2006) PERB Decision No. 1852.) Thus, in *Contra Costa, supra*, PERB Decision

Citing *J. R. Norton Co. v. Agricultural Labor Relations Bd.* (1987) 192 Cal.App.3d 874 (*Norton*), the City argues that the phrase "but not limited to" provides insufficient notice of the issues and that, if indicia of bad faith are alleged in the charge but not expressly included in the complaint, then they may only be considered under the unalleged violations doctrine. The City's reliance on *Norton* is misplaced. In that case, the Agricultural Labor Relations Board's (ALRB) Office of the General Counsel issued a complaint alleging that an agricultural employer had violated Labor Code section 1153, subdivisions (a) and (c), by laying off a group of employees because of their support for their union.[14] (*Id*. at pp. 886-887.) Following a hearing, an ALJ concluded that the employer had violated ALRA, as alleged in the complaint, by laying off employees because of their protected union activities. On review, the ALRB rejected the ALJ's conclusion that the layoff had been unlawfully motivated, finding that it was the result of mechanical failure of machinery. The ALRB concluded that the employer had violated the same provisions of ALRA by failing and refusing to rehire the employees later in the harvesting season when the new machines were put into operation. (*Id*. at p. 887.) Thus, the ALRB's finding of liability, while based on the same statutory provisions as those alleged in the complaint, pertained to *an entirely different set of facts* than those identified in the complaint. Unsurprisingly, the California Court of Appeal reversed the ALRB on this issue. The appellate court explained: "Where evidence is introduced on one issue set by the pleadings, its

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No. 1852, the ALJ properly considered testimony by the respondent's agent at the hearing which contained direct evidence of unlawful motive. Not only was this testimony not identified in the complaint but, by definition, it did not exist until the hearing. However, no motion to amend the complaint was necessary for the ALJ to rely on this evidence to find that the respondent had acted with an unlawful motive when it refused to hire the charging party.

[14] Labor Code section 1153, subdivision (a), makes it unlawful for an agricultural employer to interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed by the ALRA. Subdivision (c) makes it unlawful for an agricultural employer "[b]y discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization."

introduction cannot be regarded as authorizing the determination of some other issue not presented by the pleadings." (*Id*. at p. 888.)

PERB precedent is fully in accord with *Norton* and due process requirements in administrative proceedings. Under *Tahoe-Truckee*, allegations that are neither alleged nor fully litigated cannot be sustained as unfair practices. (*Tahoe-Truckee, supra*, PERB Decision No. 668, pp. 5-10.) Where the complaint identifies facts supporting an allegation of unlawful conduct, and evidence at the hearing includes other facts allegedly constituting an additional violation or a separate unfair practice, for the unalleged matter to be considered, the charging party must either amend the complaint pursuant to PERB Regulations or meet the criteria for unalleged violations. (*Ibid*.; see also *City of Modesto* (2009) PERB Decision No. 2022-M, pp. 4-5; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, pp. 31-32; cf. p. 28, fn. 29.) Although they involve different presumptions and allocate the burden of proof differently, both processes ensure notice of the issues and guard against potential prejudice to the respondent. (PERB Reg. 32648; *Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, pp. 37-38; *City of Modesto, supra*, PERB Decision No. 2022-M, pp. 4-5; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C, pp. 14-17.)[15]

[15] The language of PERB Regulation 32648 governing amendments at hearing and the policy favoring liberal amendment of pleadings make it the respondent's burden to show that a proposed amendment would result in undue prejudice. (*Monterey Peninsula, supra,* PERB Decision No. 2381, pp. 37-38; *San Diego, supra*, PERB Decision No. 885, pp. 62-63.) Thus, absent a showing of undue prejudice, a timely amendment closely related to the allegations in a pending complaint should be allowed in order to serve the principles of economy and finality. (*Cloverdale Unified School District* (1991) PERB Decision No. 911, pp. 23-24; *Inglewood Unified School District* (1990) PERB Decision No. 792, pp. 6-7; *Riverside Unified School District* (1985) PERB Decision No. 553, pp. 4-8.) By contrast, the more elaborate test for considering unalleged violations *presumes* prejudice, unless *the charging party* can show otherwise by meeting each of the *Tahoe-Truckee* criteria. (*Tahoe-Truckee, supra*, PERB Decision No. 668, pp. 5-10; *County of Riverside* (2006) PERB Decision No. 1825-M, p. 10.)

But, unlike *Norton*, in the present case, the essential facts for stating a prima facie case of surface bargaining were set forth in the complaint and the only liability that could result from considering IBEW's additional allegations of predictably unacceptable proposals and premature declaration of impasse is the same surface bargaining allegation already identified in the complaint. Thus, unlike *Norton*, no separate or additional liability is implicated by consideration of these matters not specifically identified in the complaint. Under these circumstances, it would serve no practical purpose to require further "notice" or to impose additional formalities, when the charging party merely seeks to present probative evidence of matters which were previously alleged in the unfair practice charge and which support an allegation clearly set forth in the complaint. In the words of the California Supreme Court, so long as the respondent is informed of the substance of the charge and afforded the basic, appropriate elements of procedural due process, it cannot complain of a variance between administrative pleadings and proof. (*Stearns v. Fair Employment Practice Com.* (1971) 6 Cal.3d 205, 213; see also PERB Reg. 32645; *County of Riverside, supra,* PERB Decision No. 2097-M, pp. 6-9; and *NLRB v. Fant Milling Co.* (1959) 360 U.S. 301, 306-307.)

For all the above reasons, we conclude that IBEW's allegations that the City insisted on predictably unacceptable proposals, and that it prematurely declared impasse, were reasonably contemplated by the complaint, and that the ALJ erred by refusing to consider these allegations,

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In addition to the criteria for considering unalleged violations, some Board decisions have included language suggesting that a charging party should be punished for its failure to amend the complaint at or before hearing by refusing to consider the unalleged matters at all. (See, e.g., *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, p. 23.) We take a different view. The consequence for failing to amend a complaint is that the charging party must satisfy a different and significantly more difficult set of hurdles under the *Tahoe-Truckee* standard to have the matter considered. The *Tahoe-Truckee* standard thus already ensures that charging parties are not rewarded for employing "stealth" litigation tactics and, absent compelling evidence of bad faith or deliberate abuse of process, no further sanction is necessary. (*City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19.)

except as unalleged violations. We consider the substance of these allegations and their effect, if any, on the result below, after first determining whether the other two indicia of bad faith discussed in IBEW's exceptions were properly excluded from consideration as unalleged violations that failed to meet the *Tahoe-Truckee, supra*, PERB Decision No. 668, criteria.

To Be Considered, Indicia of Bad Faith that Constitute Separate Unfair Practices Must Be Set Forth in the Complaint or Satisfy the Unalleged Violations Criteria

As for IBEW's allegations that the City unilaterally implemented an MOU and that the imposed terms were not reasonably contemplated by the City's LBFO, the rule is necessarily different. These allegations may not only serve as evidence of bad faith in support of IBEW's surface bargaining allegation; if proven, they would also constitute their own, independent per se violations of the duty to bargain. Although a Board agent or the Board itself may disregard minor defects or variations between the complaint allegations and the issues framed at the hearing or actually litigated by the parties,[16] an additional theory of liability necessarily affects the scope of any Board-ordered remedy and substantially affects the rights of the parties. (*City of Pasadena, supra*, PERB Order No. Ad-406-M, p. 14; *San Francisco, supra,* PERB Decision No. 105, p. 19.)

A charging party who wishes to litigate allegations of per se bargaining violations or other independent unfair practices not identified in the complaint must either amend the complaint to identify the additional theories or satisfy the notice requirement and other criteria of PERB's unalleged violations doctrine. (*Hacienda La Puente, supra,* PERB Decision No. 1187, p. 4; *San Ramon Valley Education Association, CTA/NEA (Abbot and Cameron)* (1990) PERB Decision No. 802, pp. 14-15.) Because of their potential to increase the City's

[16] PERB Reg. 32640, subd. (a); *County of Riverside, supra,* PERB Decision No. 2097-M, pp. 6-9; *State of California (Department of Social Services)* (2009) PERB Decision No. 2072-S (*State of CA (DSS)*), pp. 3-4; *Compton Unified School District* (2003) PERB Decision No. 1518, p. 3; *Eastside Union School District* (1992) PERB Decision No. 937, pp. 4-5.

liability beyond what was set forth in the complaint, we next consider whether IBEW's allegations that the City unilaterally implemented an MOU in violation of MMBA section 3505.7, and that its unilaterally imposed terms were not reasonably contemplated by the City's LBFO warrant consideration as unalleged violations. Because IBEW's allegations that the City unilaterally implemented an MOU and that it imposed terms not reasonably contemplated by its LBFO, if proven, would constitute separate per se violations of the City's duty to bargain, and because these theories of liability were not set forth in the complaint, they may be considered only as unalleged violations.

The Board will consider an unalleged violation when: (1) adequate notice and opportunity to defend has been provided to the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (*State of CA (DSS), supra,* PERB Decision No. 2072-S, pp. 3-4; *Santa Clara, supra,* PERB Decision No. 104, pp. 18-19; *County of Riverside, supra,* PERB Decision No. 2097-M.) An unalleged violation must also have occurred within the limitations period applicable for matters alleged in the complaint and the evidence justifying application of the unalleged violations doctrine should be expressly stated, so that all parties are aware of the basis for finding that an unalleged violation can be heard without any unfairness. (*Fresno Co. Superior Court, supra,* PERB Decision No. 1942-C, pp. 14-15, 17.)

Appropriateness of Unalleged Violation: Unilateral Implementation of MOU

Unlike IBEW's allegations that the City insisted on predictably unacceptable proposals and prematurely declared impasse, its allegation that the City unilaterally imposed an MOU was included in the complaint. Paragraph 9 alleges that "On or about July 20, 2011, Respondent informed employees that it implemented terms as part of a new Memorandum of Understanding

that would require employees, instead of Respondent, to pay the Employer Paid Member Contribution amounting to 8% of the bargaining unit members' wages." However, the Office of the General Counsel only identified this paragraph as part of IBEW's group discrimination theory, but not as an independent violation of the MMBA's prohibition against unilateral implementation of an MOU.[17] Thus, while the complaint arguably includes the essential facts for an allegation that the City independently violated MMBA section 3505.7, it does not identify the pertinent theory of liability and IBEW did not move to amend the complaint. We may therefore consider the allegation only if it satisfies the *Tahoe-Truckee* criteria. Our examination of the record indicates that IBEW did not sufficiently put the City on notice of the issue.

The illegal MOU allegation was raised in IBEW's opening statement. IBEW counsel asserted that, "after the City declared impasse, it proceeded to unilaterally implement a new memorandum of understanding that required employees represented by Local 1245 to pick up the entire employer-paid member contribution" which "amounted to eight percent of the employees' wages." (R.T., 10:28-11:5.) IBEW's counsel then requested a remedial order requiring "the City to pay damages in an amount equal to the lost EPMC benefit for the time period beginning August 6th, 2011, which is when the City unilaterally implemented its EPMC terms, through May 2nd, 2011, when the parties reached a successor agreement." (R.T., 12:4-8.)

Because they arose from the same City Council action, IBEW's illegal MOU allegation tended to bleed into its allegation that the City's unilaterally imposed terms differed materially from those in its LBFO. Consequently, the City was not sufficiently placed on notice that IBEW intended to litigate the issue, as distinct from its allegation that the City's unilateral imposition of

[17] Although former MMBA section 3505.4, was renumbered as section 3505.7, effective January 2012, the operative language had been part of the MMBA since 2000. It was not, however, the subject of Board decision until March 8, 2013, some nine months after issuance of the complaint in this case, which may explain the oversight. (See *City of Santa Rosa, supra*, PERB Decision No. 2308-M, p. 4.)

terms differed materially from its pre-impasse proposals. Because the requirement of notice is not satisfied, we need not determine whether this issue satisfies the other criteria for consideration of unalleged violations. (*Tahoe-Truckee, supra,* PERB Decision No. 668, pp. 4-10.)

We next consider whether IBEW's related allegation that the City unilaterally imposed terms that were inconsistent with its LBFO may be considered as an unalleged violation.

Appropriateness of Unalleged Violation: Imposition of Terms Not Consistent with LBFO

1. The City had adequate notice and opportunity to defend against this allegation.

The City's January 27, 2012 position statement in response to the amended charge argues that "the City's implemented change in employee retirement contributions was reasonably contemplated within its [LBFO]" and that, in fact, "the City implemented exactly the change in contributions stated in the LBFO." (p. 1.) The January 27, 2012 position statement elaborates by quoting the language of its LBFO providing for employees to pay the "annualized equivalent" of 4 percent, and further asserts that the parties discussed this concept multiple times and understood it to mean that the dollar amount of monthly or other periodic installment payments by employees would increase to meet a finite amount of savings, the longer it took to reach agreement. The City's position statement also explained the City Council's vote to rescind its prior ordinance providing for the City to pay the full 8 percent EPMC because "the City could not have required employee pickup while it still had an ordinance on the books that required the City to pay the entire EPMC." (p. 4.) As explained in the position statement, both points were offered to rebut IBEW's allegation that the unilaterally imposed "MOU" requiring employees to pay the full 8 percent EPMC differed materially from the City's LBFO.

Although the City's brief before the ALJ argued that it did not have adequate notice and opportunity to defend against this allegation, it also acknowledged that this allegation had never been formally dismissed. The City's brief also acknowledged that this allegation was raised in IBEW's opening statement. After rehearsing its concerns about "phantom" allegations that

"may spring to life at hearing," the City's brief then repeated, almost verbatim, the points and authorities from its January 27, 2012 position statement, with additional citations to the record in which IBEW's chief negotiator admitted that the parties had discussed the meaning of "annualized contributions" multiple times during negotiations.

Unlike the ALJ, we conclude that the City had adequate notice and opportunity to defend against IBEW's allegation that the City's unilaterally imposed terms regarding employee EPMC contributions differed materially from the City's LBFO.

2. The unalleged conduct is intimately related to the subject of the complaint and is part of the same course of conduct.

As noted previously, where the same facts are alleged to constitute separate unfair practices, one alleged in the complaint and one unalleged, the separate theories of liability are intimately related to one another and involve the same course of conduct. (*County of Riverside, supra,* PERB Decision No. 2097-M, p. 8; see also *Gonzales Union High School District* (1984) PERB Decision No. 410, pp. 15-20.) Because they involve the same course of conduct, the inclusion of one theory in a complaint necessarily reflects a determination by the Office of the General Counsel that other theories arising from the same factual allegations are also timely. (*County of Riverside, supra*, at p. 8, fn. 5; *Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 15.)

Here, paragraph 9 of the complaint alleges, in relevant part, that on July 20, 2011, the City unilaterally implemented terms that would require employees to pay the full 8 percent of the EPMC previously paid by the City. The City's answer admits substantially these same facts. Although these facts were alleged in support of IBEW's group discrimination theory, the above factual allegations and admissions arise from the same course of conduct and are intimately related to IBEW's allegation that the City unilaterally implemented terms that were inconsistent

with its LBFO. This criterion and the separate timeliness requirement of the unalleged violations doctrine are therefore satisfied.

3. The issue has been fully litigated.

Under *Tahoe-Truckee* and other applicable authority, an issue has been fully litigated when both parties have presented evidence on the issue. (*Tahoe-Truckee, supra*, PERB Decision No. 668; *County of Riverside, supra*, PERB Decision No. 2097-M, p. 8.) This criterion is satisfied by admission into the record of Joint Exhibit 3, which is a copy of the "MOU" unilaterally adopted by the City Council on July 20, 2011, by Joint Exhibit 28, which contains the City's LBFO, and by the testimony of each side's chief negotiator, as both former City Director of Human Resources Stacey Haney (Haney) and IBEW Business Representative Patrick Waite (Waite) testified as to discussions of the City's LBFO and the meaning of the term "annualized."

4. The parties had full opportunity to examine and cross-examine witnesses on the issue.

This criterion is also satisfied by the testimony of Haney and Waite, both of whom testified as to their discussions of the City's LBFO, and both of who were cross-examined on the subject. We therefore conclude that IBEW's allegation that the City unilaterally implemented terms that were inconsistent with its LBFO is properly before the Board.

We have determined above that each of the four indicia of bad faith alleged in IBEW's unfair practice charge were appropriate for consideration by the ALJ either because they were reasonably contemplated by the language of the complaint or because they meet the requirements for consideration as unalleged violations. We now turn to the merits of these allegations.

Unilateral Change Allegation: Imposition/Continuation of 8 Percent EPMC in 2012

IBEW contends that the ALJ erred by failing to determine that the City implemented terms and conditions not reasonably comprehended within its LBFO. IBEW maintains that the LBFO contained a 4 percent annualized EPMC contribution. Because the LBFO was not

implemented until July of 2011, the annualized 4 percent EPMC contribution resulted in an 8 percent contribution for the remainder of 2011. According to IBEW the City should have begun deducting 4 percent for EPMC beginning January 2012, but the City continued deducting 8 percent. IBEW also maintains that, while the City's LBFO would shift the full cost of the EPMC benefit to employees, it did not contemplate discontinuing it entirely, which was the effect of the City Council resolution rescinding Ordinance 10-87 which required the City to pay the 8 percent EPMC.

The City maintains that rescission of Ordinance 10-87 was reasonably contemplated by its LBFO, as official action was necessary for the City to discontinue paying the full 8 percent EPMC. Citing *City of Santa Rosa, supra*, PERB Decision No. 2308-M, the City also asserts that, as a basic tenet of labor law, an imposed terms continues in effect until the parties agree to a different term. The City's argument is only valid, however, if the language of the LBFO does not limit its application to a specified time period. There is no dispute that the City's LBFO provided for IBEW-represented employees to pick up the equivalent of 4 percent of the annualized employee contribution to CalPERS *for calendar year 2011*. By annualized, the parties understood that this figure could increase to a full 8 percent, depending upon when the City Council took action. (Joint Exh. 28; R.T., 11:6-9.)

However, the City does not explain why employees were required to continue paying the full 8 percent amount even *after* December 31, 2011, when, by its own terms, the City's LBFO language was no longer applicable. The City had control over how it drafted its proposals and, if it had intended to require employees to pay more than the annualized 4 percent amount beyond calendar year 2011, it was free to draft its proposal accordingly. Because it instead specifically limited the 4 percent annualized contribution amount to calendar year 2011, its requirement that employees continue paying the higher amount into 2012 departed from the terms reasonably contemplated by its LBFO and constituted an

unlawful unilateral change. This conduct also interfered with the right of employees to be represented and with IBEW's right to represent employees.

Surface Bargaining Allegation: Consideration of the Merits of IBEW's "Unalleged" Indicia

1. Predictably Unacceptable Proposals.

We first consider whether IBEW demonstrated that the City made predictably unacceptable proposals. The Board has described a predictably unacceptable offer as "the offering of a proposal which cannot be accepted coupled with an inflexible attitude on major issues and the failure to offer reasonable alternatives." (*Redwood City School District* (1980) PERB Decision No. 115, proposed dec. at p. 11 (*Redwood City*).) In *Redwood City*, the charging party failed to demonstrate that the employer made predictably unacceptable proposals because the charging party failed to make it clear to the employer that it could not accept the proposal. (*Ibid*.) In addition, *Redwood City* opined that even if a proposal were predictably unacceptable, it would not constitute surface bargaining "unless it foreclosed future negotiations or was so patently unreasonable as to frustrate possible agreement." (*Ibid*.)

IBEW relies on Joint Exhibits 10, 15, 18 and 24, which contain the City's proposals. In Joint Exhibit 10 (dated October 18, 2010), the City proposed that "The EPMC benefit will be cancelled effective January 1, 2011" and "Employees shall pay the full 8% employee portion to CalPERS as part of their bi-weekly payroll." In Joint Exhibit 15 (dated November 29, 2010), the City proposed:

> Effective the first day of the pay period in February 2011, IBEW — represented employees will pick up three percent (3%) of the employee contribution to PERS.
>
> Effective the first day of the pay period in January 2012, IBEW — represented employees will pick up three percent (3%) of the employee contribution to PERS.
>
> Effective the first day of the pay period in January 2013, IBEW — represented employees will pick up the remaining two percent (2%) of the employee contribution to PERS.

In Joint Exhibit 18 (dated December 14, 2010), the City repeated its November 29, 2010 proposal, after rejecting IBEW's proposal to restore 3 percent of the EPMC after 26 pay periods. In Joint Exhibit 24 (dated March 2, 2011) the City offered another tiered proposal whereby employees would pay 4 percent for 2011 beginning April 1, 2011; another 2 percent in 2012; and the final 2 percent in 2013.

There was little testimony regarding these four Joint Exhibits. Witnesses testified primarily on the meaning of the EPMC proposals and they did not explain whether or why the proposals were predictably unacceptable. IBEW relies on the following testimony by Haney on cross examination:

> Q Did the City offer any kind of financial incentives to IBEW in exchange for IBEW accepting the City's proposal to pick up the entire EPMC?
>
> A I don't recall that we did.

(R.T., 87:27-88:2.) IBEW argues that the City's EPMC proposals are inherently unacceptable because no financial incentives were offered in return for employees' agreement to pay the entire EPMC amount. The City did not ask Haney whether the City's EPMC proposals were predictably unacceptable on redirect.

The Joint Exhibits demonstrate that the City sought various ways to reach its goal of having IBEW members assume the entire EPMC payment. There was no testimony or evidence to indicate how the City's stance was predictably unacceptable rather than lawful hard bargaining. The ALJ considered whether the City's repeated proposals for 8 percent EPMC was evidence of bad faith bargaining, though not specifically whether this demand was predictably unacceptable, and determined that the evidence did not demonstrate an intent by the City to "subvert the bargaining process" or that the City was "merely going through the motions" of negotiations with no real intent to reach agreement. (Proposed dec., pp. 15-16.)

In fact, both sides made significant movement on this issue though ultimately failed to reach agreement. We conclude that IBEW has failed to demonstrate that the City made predictably unacceptable proposals.

2. Premature Declaration of Impasse.

Impasse refers to an *overall* deadlock in negotiations. An employer may not insist on separating one negotiable subject from all others and then bargain to impasse only as to that subject and impose its proposal, while refusing to discuss other subjects that may form the basis of a possible compromise. (*City of San Jose, supra,* PERB Decision No. 2341-M, pp. 29-30; *Visiting Nurse Services of W. Massachusetts, Inc.* (1998) 325 NLRB 1125, 1130-1131, enforced by (1st Cir. 1999) 177 F.3d 52, 59.) Even when impasse results from disagreement over a single subject, that subject must be of such critical and overriding importance to the parties that disagreement on that subject alone causes an overall breakdown in negotiations such that further bargaining over any subject would be futile. (*In Re Calmat Co.* (2000) 331 NLRB 1084, 1097; *In Re Richmond Elec. Services, Inc.* (2006) 348 NLRB 1001.)

IBEW contends that the ALJ erred by failing to find that the City prematurely declared impasse. Paragraph 4 of the complaint alleged that on three occasions between October 18, 2010 and January 13, 2011, the City engaged in evasive bargaining tactics by threatening IBEW with a premature declaration of impasse. The crucial evidence on this point was Waite's testimony that, on January 31, 2011, Haney told IBEW's representatives that the City was very close to where it wanted to be and that impasse was close. (R.T., 26:9-12; Charging Party Exh. B.) The ALJ noted PERB precedent holding that a premature, unfounded or insincere declaration of impasse is evidence of bad faith in negotiations, but found that the evidence did not demonstrate that the City had threatened impasse, as alleged in the complaint, and made no determination whether the City's actual declaration of impasse was premature, as argued in IBEW's briefing before the ALJ.

IBEW's contention that the City prematurely declared impasse relies on the fact that the parties had not completed bargaining over OPEB when the City declared impasse on March 23, 2011. Waite testified that he was "shocked" when, shortly after declaring impasse, Haney advised him to expect additional OPEB proposals the following day. (R.T., 29:6-27, 35:17-21.)

Respondent's Exhibit 8 purports to memorialize IBEW's verbal counterproposal of March 2, 2011, in which, according to Haney, IBEW agreed to bargaining OPEB issues separately. (R.T., 75:7-28; Respondent's Exh. 8.) Waite denied that IBEW had consented to bargaining separately over OPEB and explained that IBEW's March 2, 2011 counterproposal was developed after IBEW's membership had voted down a previous tentative agreement and in response to Haney's request for language that Waite thought would be acceptable to the membership. (R.T., 35:17-21, 89:21-91:22, 91:28-92:12.) According to Waite, he simply left OPEB issues, along with furloughs, out of IBEW's counterproposal but never consented to bargain OPEB issues separately going forward. Waite's testimony on this point is confirmed by Respondent's Exhibit 8, which indicates that IBEW's counterproposal was presented and understood as a package proposal. In fact, Haney explained that she prepared Respondent's Exhibit 8 "in this format so that the City could counter using a similar format, so we were working off similar templates." (R.T., 75:15-16.)

Under contract law, unless the City accepted all aspects of the package, its response must be characterized as a rejection and counteroffer. (Civ. Code, § 1585; *King v. Stanley* (1948) 32 Cal.2d 584, 588, disapproved of on other grounds by *Patel v. Liebermensch* (2008) 45 Cal.4th 344.) And, in fact, the City countered with a similarly structured package which would take OPEB bargaining "offline" with a commitment to meet and confer over program implementation on or before September 1, 2011. (Joint Exh. 24). As with IBEW's proposed language, agreement to take OPEB issues "offline" was conditioned upon acceptance of other

items in the package proposal, which IBEW did not accept, and no evidence was presented that the parties otherwise agreed that OPEB issues would be bargained separately.

Although the parties met for negotiations 16 times and participated in three days of mediation, there is little evidence on the progress or depth of their discussions over OPEB, whether they were close to an agreement on that subject, or even its significance to the parties relative to other issues. Although there was no evidence of ground rules or definitive testimony that the parties had agreed to bargain OPEB issues separately, the fact that each side was at least willing to live with that arrangement as part of a package proposal to settle all other outstanding items provides at least some evidence that OPEB was not so significant, that its last-minute removal detrimentally affected IBEW's ability to offer a meaningful compromise on the primary source of their disagreement, EPMC contributions.

By contrast, in *City of San Jose, supra,* PERB Decision No. 2341-M, the retirement reform issues which the employer allegedly sought to relegate to future reopener negotiations were a significant component of the "total compensation" formula used to determine the amount of concessions needed from employees. Consequently, the employer's alleged insistence on bargaining retirement issues separately allegedly had the intended or actual effect of limiting the range of meaningful compromises the union could offer. Waite may well have been "shocked" to learn that the City intended to continue bargaining OPEB after declaring impasse, but otherwise the record is devoid of evidence as to the significance of the issue in negotiations and whether its absence contributed in any meaningful way to the breakdown in negotiations. Consequently, we find that, by April 6, 2011, when the City presented its LBFO, negotiations had reached a bona fide impasse over the EPMC issue, and that the City did not prematurely declare impasse.

3. Implementation of Terms Not Reasonably Contemplated by the City's LBFO as Evidence of Bad Faith.

As discussed above, the City's continuation of the 8 percent EPMC after December 31, 2011 constituted a unilateral change in terms and conditions of employment, a per se violation. Although per se violations may also serve as indicia of bad faith in support of a surface bargaining allegation (*City of San Jose, supra*, PERB Decision No. 2341-M, pp. 23, 37-39), there is no evidence here that this unlawful conduct contributed to the prior breakdown in negotiations or undermined IBEW's authority during the prior negotiations. (*Fresno Co. IHSS Public Authority, supra*, PERB Decision No. 2418-M, pp. 54-55.) IBEW's brief before the ALJ effectively conceded this point by noting that, if the City implemented an annualized 4 percent EPMC provision as set forth in its LBFO, then it committed a separate unilateral change in the amount of employee EPMC contributions, effective January 2012 when the LBFO expired by its own terms. (p. 16.)

Under the circumstances, this formulation makes more sense than attempting to read backward from the City's post-impasse violation to find that it bargained in bad faith during negotiations. Indeed, other than its per se violation of unilaterally changing employees' EPMC contributions, the record, at least on the issues properly before the Board, is devoid of probative evidence that the City entered into successor negotiations with IBEW in bad faith.

CONCLUSION

Accordingly, we dismiss IBEW's surface bargaining allegation, but conclude that the City violated its duty to meet and confer in good faith by unilaterally changing the amount of employee EPMC contributions from the amount specified in the City's LBFO. This conduct also interfered with the right of employees to be represented and with IBEW's right to represent employees in their employment relations.

In addition to a cease-and-desist order and posting requirement, the appropriate remedy for an employer's unilateral change is to order the employer to rescind the new or changed policy, to bargain with the representative upon request, and to make affected employees whole

for any losses incurred as a result of the unlawful conduct. (*California State Employees' Assn. v. Public Employment Relations Bd. (*1996) 51 Cal.App.4th 923, 946; *City of Pasadena, supra*, PERB Order No. Ad-406-M, pp. 13-14.) Pursuant to Article XVI (Unfair Labor Practice Charge) of the parties' 2012 MOU, the City's back pay liability is limited to the period August 6, 2011, when employees began paying the EPMC, to May 2, 2012, the effective date of the successor MOU. (Joint Exh. 4, p. 32.) To ensure that affected employees are made whole, this amount shall be augmented by interest at the rate of 7 percent per annum in accordance with long-standing PERB precedent. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 19; *San Ysidro School District* (1997) PERB Decision No. 1198, p. 5.)

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this case and pursuant to the Meyers-Milias-Brown Act (MMBA), Government Code section 3509, the Public Employment Relations Board (PERB) REVERSES the administrative law judge's proposed decision in part and finds that the City of Roseville (City) violated sections 3505 and 3506.5, subdivision (c), of the Government Code, and committed an unfair practice pursuant to section 3509, subdivision (b), of the Government Code and PERB Regulation 32603, subdivision (c) (Cal. Code Regs., tit. 8, § 31001 et seq.), by unilaterally altering the amount of employee contributions to the Employer Paid Member Contribution (EPMC) to the California Public Employment Retirement System. The above acts also violated section 3506.5, subdivisions (b) and (a), of the Government Code, by denying the International Brotherhood of Electrical Workers Local 1245 (IBEW) rights guaranteed to it by the MMBA, and by interfering with the rights of employees to join, form and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

The City, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing employee pension contributions and/or upon impasse, unilaterally imposing terms and conditions of employment not reasonably comprehended by the City's pre-impasse bargaining proposals.

2. Denying IBEW rights guaranteed by the MMBA to represent employees.

3. Interfering with the rights of employees of the City 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.

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

1. Restore the status quo by rescinding the unilaterally imposed increased employee EPMC contributions, effective January 2012.

2. Make all affected employees whole for lost wages and benefits in accordance with Article XVI (Unfair Labor Practice Charge) of the parties' 2012 Memorandum of Understanding, plus interest at the rate of seven (7) percent per annum.

3. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to IBEW-represented employees of the City are customarily posted, copies of the Notice attached hereto as an Appendix, signed by an authorized agent of the City. Such posting shall be maintained for at least thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with IBEW-represented employees of the City. The City, its governing board and its representatives shall take reasonable steps to ensure that the posted Notice is not reduced in size, defaced, altered or covered by any material.

4. Written notification of the actions taken to comply with this Order shall be made to PERB's General Counsel, or the General Counsel's designee. The City shall provide written reports, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on IBEW or its designated counsel.

All other allegations included in Unfair Practice Case No. SA-CE-757-M are hereby dismissed.

Members Winslow and Gregersen 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. SA-CE-757-M, *International Brotherhood of Electrical Workers Local 1245 v. City of Roseville*, in which all parties had the right to participate, it has been found that the City of Roseville (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3505, 3506.5, subdivision (c), and 3509, subdivision (b), and Public Employment Relations Board (PERB) Regulation 32603, subdivision (c) (Cal. Code Regs., tit. 8, § 31001, et seq.), when it failed and refused to meet and confer with the International Brotherhood of Electrical Workers Local 1245 (IBEW) before requiring employees represented by IBEW to pay an eight (8) percent contribution toward the City's Employer Paid Member Contribution (EPMC), beginning January 1, 2012. This conduct also interfered with employee rights guaranteed by the MMMBA, in violation of Government Code sections 3505, 3506.5, subdivision (a), and 3509, subdivision (b), and PERB Regulation 32603, subdivision (a), and likewise denied IBEW its right to represent bargaining unit employees, in violation of Government Code sections 3506, 3506.5, subdivision (b), and 3509, subdivision (b), and PERB Regulation 32603, subdivision (b).

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer with IBEW before altering policies affecting employee compensation or other negotiable matters.

2. Interfering with employee rights to be represented by IBEW in their employment relations.

3. Denying IBEW its right to represent employees.

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

1. Rescind its decision to deduct from employee paychecks an eight (8) percent contribution toward the City's Employer Paid Member Contribution (EPMC), beginning January 1, 2012.

2. Make affected employees whole for lost compensation resulting from the January 1, 2012 change in EPMC contributions, in accordance with Article XVI (Unfair Labor

Practice Charge) of the 2012 Memorandum of Understanding, plus interest at the rate of seven (7) percent per annum.

Dated: _____ CITY OF ROSEVILLE

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.