support of a surface bargaining allegation. (*Roseville, supra*, PERB Decision No. 2505-M, p. 14.) In *Roseville*, we explained that "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." (*Id.* at p. 13.) This makes it "unrealistic to expect that a surface bargaining charge include all possible evidence of the respondent's intent or motive in negotiations." (*Ibid*.) We also noted that the typical surface bargaining complaint alleges that the respondent's conduct, including but not limited to specifically pleaded acts or evidence, establishes a failure or refusal to meet and confer in good faith. (*Id.* at p. 12.) This pleading practice, we determined, adequately "identifies the specific acts or indicia that are sufficient to state a prima facie case, while also giving the respondent notice that . . . these acts or indicia are not exhaustive of the evidence the charging party may present at hearing." (*Ibid.*)

On this issue, *Roseville, supra*, PERB Decision No. 2505-M, is consistent with the practices of the National Labor Relations Board (NLRB) concerning conduct that may serve as evidence of surface bargaining:

> The [NLRB] has found violations of surface bargaining based on general allegations similar to that herein. "[I]t is settled law that particularity of pleading is not required of a complaint issued by the Board," . . . and that the General Counsel is not required to plead his evidence in its entirety. . . . In an allegation of surface bargaining, unlike individual acts alleged to be violative of Section 8(a)(5), the ultimate fact which is alleged is bargaining with a particular state of mind, as to which the individual acts are merely the evidence and need not be pleaded.

(*SCA Services of Georgia* (1985) 275 NLRB 830, 856, citations and footnote omitted; see also *Redburn Tire Co.* (2012) 358 NLRB 942, 948 [considering evidence of bad faith "maintained by the General Counsel but not alleged in the complaint"]; *Premier Cablevision* (1989)

293 NLRB 931 [considering certain evidence as indicative of bad faith, even though it was "not alleged by the General Counsel independently to constitute bad-faith bargaining"]; *Clearwater Finishing Co.* (1981) 254 NLRB 1168, 1174 ["Although this is background evidence not alleged in the complaint, it involves company conduct at the bargaining table, and thus provides an additional reason for rejecting the Company's argument that such conduct fails to manifest bad-faith bargaining"]; *FMC Corp.* (1988) 290 NLRB 483, 497 [considering unalleged evidence of a per se violation of the duty to bargain (bypassing the exclusive representative) as potential evidence of bad faith]; *J.P. Stevens & Co., Inc.* (1978) 239 NLRB 738, 761 [considering additional evidence of bad faith not alleged in the complaint].)

There is an exception to this rule. Often, evidence of surface bargaining may also support an independent violation, such as a per se violation of the duty to bargain. *Roseville*, *supra*, PERB Decision No. 2505-M, allows the charging party to introduce such evidence to prove bad faith bargaining under the totality of conduct test, without moving to amend the complaint or satisfying the unalleged violation doctrine. (*Id.* at p. 15.) But if the charging party also seeks to use the same evidence to prove an independent violation, then it must either: (1) move to amend the complaint to add the independent allegation; or (2) demonstrate that the unalleged violation doctrine has been satisfied. (*Ibid.*) If the charging party does neither, then the evidence may only be considered to prove bad faith bargaining under the totality of the conduct test. (*Ibid.*)

In this case, the Association is not pursuing independent violations based on the City's failure to provide its target savings amount or its failure to adopt the factfinders' recommendations. As a result, these two categories of evidence may be properly considered

either to prove surface bargaining, or to support the complaint allegation that the City failed to participate in impasse and factfinding procedures in good faith.[6] Because consideration of this evidence does not expand the City's liability to include unfair practices not alleged in the complaint, the unalleged violation doctrine does not apply.

Our concurring colleague argues that, without applying the unalleged violation doctrine, we may only consider evidence that was specifically alleged in the Association's unfair practice charge. In so arguing, he reads *Roseville*, *supra*, PERB Decision No. 2505-M, more narrowly than is appropriate. Although the "unalleged" evidence of surface bargaining in that case was included in the unfair practice charge, the decision's rationale was not limited to those circumstances. It was instead based on the nature of surface bargaining allegations and the impracticality of requiring a surface bargaining charge or complaint to include all the charging party's evidence. (*Id.* at pp. 12-13.) Nothing in the decision suggests that surface bargaining charges must detail all the evidence against the respondent, which would make them unique among unfair practice charges. Therefore, *Roseville* provides compelling support for our holding here.

Nor do due process concerns compel a different result. Our concurring colleague fears that a respondent may not "realize" that certain evidence is being offered at hearing to prove bad faith bargaining. But, as explained above, due process requires notice of the allegations against the respondent, not of the evidence in support of those allegations. A respondent that has received a complaint alleging that it engaged in bad faith bargaining during a particular course of negotiations may reasonably presume that the evidence introduced at hearing is intended to prove the complaint's allegation. If unclear how the evidence being introduced

[6] As we explain below, it is not entirely clear whether the Association is pursuing a per se violation of the duty to participate in good faith in impasse procedures.

relates to those allegations, a respondent should pose a relevance objection. The concurrence cites no authority for the proposition that due process requires anything more.[7]

Nor does the concurrence cite authority for its implicit argument that more detailed notice of the underlying evidence is required in a surface bargaining case than in other types of cases. In a surface bargaining case, the alleged violation is failing to bargain in good faith, i.e., with the requisite intent to reach an agreement. Specific acts or conduct are merely evidence of the lack of good faith. (*Roseville, supra*, PERB Decision No. 2505-M, p. 11.) Some types of conduct have been recognized as "indicia" of bad faith, but this has no special significance beyond providing a useful shorthand for the types of conduct PERB and the NLRB have found to be particularly persuasive evidence of bad faith. As we note at page 29, *post*, in fact, it would be possible to prove surface bargaining even without proving any particular indicium. Undoubtedly, a respondent would find it useful to know in advance of the hearing which indicia of surface bargaining the charging party believes are established by the evidence. However, we are aware of no authority (and the concurrence does not cite any) suggesting that

[7] The concurrence claims this case illustrates the danger, because the City had no opportunity to present evidence or argument to rebut the Association's claim regarding the target savings issue. But, as the concurrence notes, each party's chief negotiator testified about the target savings issue. This testimony may have been brief on both sides, but this undoubtedly says more about the weakness of the Association's claim (see *post* at pp. 19-21) than it does about whether the City had a fair opportunity to present evidence on it. In fact, the City's chief negotiator was asked about this issue on direct examination by counsel for the City.

As for the City's lack of opportunity to respond to the arguments in the Association's post-hearing brief, this was because the parties and the ALJ agreed upon simultaneous post-hearing briefs, with no reply briefs. This type of briefing arrangement is not mandatory. (See PERB Reg. 32212.)

due process requires notice of those indicia, any more than it requires notice of the particular cases or other legal authorities the charging party intends to cite in its post-hearing brief.[8]

The concurrence also claims that our holding unfairly opens the door to a finding of bad faith bargaining based on a single, unalleged per se violation of the duty to bargain. But such a finding would still require more than just the evidence of the per se violation; it would also require evidence of the violation's effect on the parties' negotiations. (*City of San Jose, supra*, PERB Decision No. 2341-M, p. 19.)

We recognize, of course, that there may be circumstances in which a respondent is surprised by evidence presented at hearing. This is possible in any case, and cannot justify a different pleading standard for surface bargaining cases. Rather, any due process concerns can be addressed on a case-by-case basis, by continuances or scheduling additional days of hearing, when appropriate. While the concurrence predicts this may burden ALJs with longer

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[8] As we noted in *Roseville, supra*, PERB Decision No. 2505-M, the "indicia" of bad faith are not unlike the "nexus factors" that are recognized as circumstantial evidence of unlawful motive in a discrimination case. Charges and complaints alleging discrimination have never been required to allege all the evidence proving that the respondent acted with an unlawful motive. (*Id.* at p. 20.)

Our concurring colleague rejoins that the Board will dismiss a discrimination charge that fails to allege facts establishing an unlawful motive. This is true, but it misses the point. It is a fundamental principle that a charge must be dismissed if it fails to include sufficient facts to establish a prima facie case. (PERB Reg. 32620, subd. (b)(5).) This does not mean a charging party is limited to attempting to prove the evidence or facts that were alleged in the charge. The Board has never applied such a rule to any type of charge.

We note, however, that the possibility of a charge being dismissed for failure to state a prima facie case provides a clear disincentive for a charging party to "hide the ball" by strategically withholding its strongest evidence until the hearing.

hearings, that outcome is preferable to placing pre-determined and artificial limits on what evidence constitutes the totality of circumstances in a surface bargaining case.[9]

Therefore, we conclude that the ALJ erred by applying the unalleged violation test to the additional evidence of surface bargaining proffered by the Association. We consider the merits of the Association's claims regarding this evidence below in the course of addressing the Association's remaining exceptions.

Matters Not Presented to the ALJ

The Association's exceptions also assert that by laying off nine members of the Association's bargaining unit, the City intended to punish the Association for successfully prosecuting its previous unfair practice charge against the City. This argument was not presented to the ALJ. The Association's brief to the ALJ mentioned the City's layoff decision, but it did not suggest that the decision was motivated by a desire to punish the Association for its prior PERB charge. Finding no compelling reason to consider a matter that the Association neglected to mention to the ALJ, we decline to do so. (See *Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 12.)

[9] We of course do not hold that an ALJ hearing a surface bargaining case cannot exclude irrelevant or cumulative evidence offered by a charging party or respondent. While ALJs must "[i]nquire fully into all issues and obtain a complete record upon which the decision can be rendered" (PERB Reg. 32170, subd. (a)), they must also "[r]egulate the course and conduct of the hearing" (PERB Reg. 32170, subd. (d)), and they may exclude "[i]mmaterial, irrelevant, or unduly repetitious evidence" (PERB Reg. 32176).

As for the concurrence's concern that ALJs will struggle with how to treat evidence supporting indicia of bad faith that the respondent did not realize were being offered against it, we trust that the ALJs will understand our holding—such evidence, having been properly admitted, should be considered if it is relevant. PERB's ALJs have, for example, successfully heard discrimination allegations for decades without requiring the complaint or the charge to identify the specific facts purporting to show nexus, i.e., the respondent's unlawful motive.

Similarity of the City's Guiding Principles in the 2009-2010 and 2012-2013 Negotiations

The ALJ concluded that the similarity between the "Guiding Principles" documents presented at the outset of the 2009-2010 and 2012-2013 negotiations was not evidence of bad faith. The Association excepts to this conclusion, arguing that the similarity shows that the City's negotiation tactics in 2012-2013 were a "continuation of its unlawful actions in 2009-2010." We reject this exception. The City's unlawful conduct in 2010 was failing to participate in the factfinding process mandated by its local rules. (*City of Davis, supra*, PERB Decision No. 2271-M, pp. 24, 26.) There was no finding in that case, and no evidence in this one, that the City engaged in surface bargaining during the 2009-2010 negotiations.[10]

Nor is it evidence of bad faith that the City had similar goals during both rounds of negotiations. Although the parties began negotiations in 2012 before receiving the Board's decision in *City of Davis, supra*, PERB Decision No. 2271-M, the parties had received the ALJ's proposed decision, which ordered the City to rescind the terms it had imposed at the conclusion of the 2009 negotiations and make employees whole. Yeung testified that he made clear to the Association that the starting point for the 2012 negotiations would be the 2006-2009 MOU, i.e., the terms and conditions that were in place before the City's 2010 imposition. In other words, the City entered into the 2012 negotiations with the assumption that it would not realize the benefit of the concessions it had imposed on the Association in 2010. Given that the City's financial condition had not substantially improved in the interim, replicating the 2009 proposals in 2012 does not demonstrate surface bargaining. The purpose of our make-whole order in *City of Davis, supra*, PERB Decision No. 2271-M, was to restore the parties to the position they were in before the City unlawfully imposed its LBFO in 2010. The order did

[10] We note that the Association points to nothing in either version of the Guiding Principles suggesting that the City lacked an intent to reach agreement.

not prohibit the City from subsequently attempting to achieve the same financial objectives through lawful good faith bargaining.

The City's Failure to Provide Its Target Savings

In *County of Solano* (2014) PERB Decision No. 2402-M, we determined that the employer's target savings, i.e., the total dollar amount of savings the employer hoped to achieve through negotiations, was presumptively relevant information. (*Id.* at p. 12.) But the employer in that case had no savings target, and there is no duty to provide non-existent information. (*Ibid.*) A union faced with a similar refusal may distinguish *County of Solano* by showing, for instance, that the employer has not been diligent in working to locate and collect information relevant to the request (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, pp. 33-34), or by showing that the employer's purported lack of target savings undercuts the employer's ability to fairly maintain and rationally support its bargaining position. Indeed, "[t]he obligation to bargain in good faith requires the parties to explain the reasons for a particular bargaining position with sufficient detail to 'permit the negotiating process to proceed on the basis of mutual understanding.'" (*County of Tulare* (2015) PERB Decision No. 2461-M, adopting proposed decision at p. 9.) Likewise, "[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims." (*NLRB v. Truitt Mfg. Co.* (1956) 351 U.S. 149, 152.) "If . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." (*Id.* at pp. 152-153.) An employer's refusal to

provide information to back up its bargaining claims may be evidence of bad faith bargaining. (*Ibid.*)[11]

In this case, however, even though *County of Solano*, *supra*, PERB Decision No. 2402-M, was decided well before the formal hearing in this case, the Association has made no attempt to distinguish that case. The City stated at the bargaining table, and its chief negotiator testified consistently at hearing, that it had not calculated a target savings amount because it was facing a substantial structural budget deficit that could not be fully addressed through employee concessions. As a result, the City explained, it had no target amount in mind. The Association has made no attempt to challenge these assertions, either during bargaining or during the litigation of this case. For instance, the Association did not, through follow-up requests for information or public records requests, or in presenting its case at trial, attempt to test the truth of the City's claims that it had no target savings amount, or that it was facing a serious budget deficit.

Nor, as far as the record shows, did the Association request any information relevant to assessing the amount of savings likely to be achieved by the City's bargaining proposals. The City noted in its written proposals the estimated savings that would be achieved by its

[11] This principle applies to any situation in which a party possesses data relevant to its bargaining positions. (*E.I. Du Pont & Co.* (1985) 276 NLRB 335, 341.) Thus, the bargaining representative may request information to assess an employer's claims used to justify concessionary proposals. (*Caldwell Mfg. Co.* (2006) 346 NLRB 1159, 1160; see also *NLRB v. Acme Industrial Co*. (1967) 385 U.S. 432, 435-436 [discovery-type standard requires production of documents and information if there is a "probability" that such responsive material "would be of use to the union in carrying out its statutory duties"].) PERB, similarly, has held that an employer acts in bad faith if it fails to provide the exclusive representative with financial information necessary to formulate proposals for alternatives to layoffs. (*Oakland Unified School District* (1985) PERB Decision No. 540, p. 18.) The fact that such information may not exist in precisely the form requested does not relieve the employer of its obligation to provide what responsive information it does have, or to state its reasons for failing to do so. (*Ibid.*; see also *Regents of the University of California (Davis)*, *supra*, PERB Decision No. 2101-H, pp. 35-36.)

proposals. The Association did not introduce competent evidence at hearing showing that the City failed or refused to respond to any follow-up requests, or that the City concealed or exaggerated its financial condition.

In sum, the Association did not present evidence that the City was dishonest in denying that it had a target savings amount, that the City otherwise failed to provide information requested by the Association, or that the City's bargaining positions were not fairly maintained or rationally supported. In these circumstances, we find that the Association has not met its burden of proof that the City's conduct demonstrated bad faith.[12]

The City's Alleged Inflexibility and Alleged Failure to Provide Responses/Counterproposals

Several of the Association's exceptions urge us to find that the City maintained an inflexible position in negotiations, failed to respond adequately to the Association's proposals, and failed to provide counterproposals. These exceptions are not supported by the record.

The record shows that the City was firm on some issues, but flexible on others. While the City was, as the ALJ concluded, "adamant in seeking concessions," it effectively countered some of its own economic proposals before the Association submitted its only written counterproposal. The City also expressed its openness to some minor economic "sweeteners," such as increases in standby pay and the boot allowance, if the parties could reach an overall successor agreement.[13]

[12] Because there is no evidence that the City calculated its target savings, we do not reach the issue left open in *County of Solano*, *supra*, PERB Decision No. 2402-M, viz., whether an employer's target savings is exempt from disclosure on the grounds that it intrudes upon the employer's mental processes. (*Id.* at p. 12, fn. 7.)

[13] The Association argues that "conditioning agreement on non-economic matters to a party's agreement on economic provisions constitutes bad faith bargaining," citing *Fremont Unified School District* (1980) PERB Decision No. 136 (*Fremont I*), and invites us to extend

The Association claims the City failed to provide a rational argument for opposing some of the Association's non-economic proposals, including binding arbitration, the weekend standby vehicle policy, the outside employment policy, and moving positions from another unit to the Association's unit. To the contrary, for most of these proposals, the evidence is that the City responded adequately, and for the rest, the evidence is inconclusive.

Regarding binding arbitration, Yeung's undisputed testimony was that he told Akins the City was "very opposed" to it, and that "the City was happy with the way things are." Given

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this principle beyond "non-economic matters" to "minor" or "minimally" economic proposals. We decline the invitation.

As a threshold matter, the rule for which the Association cites *Fremont I* is already questionable. *Fremont I* was vacated in relevant part. (*Fremont Unified School District* (1982) PERB Decision No. 136a (*Fremont II*).) Although it was later cited favorably in a proposed decision adopted by the Board (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270, adopting proposed decision at p. 86), the Board has also held that the "packaging" of economic and noneconomic proposals is not evidence of bad faith (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S, adopting warning letter at pp. 4-5; accord *County of Solano*, *supra*, PERB Decision No. 2402-M, p. 13 [affirming ALJ's conclusion that "it was not unlawful to place a condition on a proposal [agreeing to binding arbitration only if the parties reached a total agreement] unless the condition is outside the control of the parties"]).

Certainly, the refusal to *discuss* certain issues until agreement is reached on others is not only evidence of bad faith (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 23), it is a per se violation of the duty to bargain (*City of San Jose*, *supra*, PERB Decision No. 2341-M, p. 27.) But this is not the same as a refusal to *agree* on certain issues absent agreement on other issues, which, in the above-cited cases, the Board found not even to be evidence of bad faith.

In addition, extending the *Fremont I* rule to minor economic issues, as the Association urges us to do, would also conflict with the well-settled rule that impasse is reached (and the duty to bargain suspended) "when the parties are deadlocked on one or several major issues, even if the parties continue to meet and *even if concessions on minor issues are possible*." (*Regents of the University of California* (1985) PERB Decision No. 520-H, p. 17, emphasis added; see also *California State University* (1990) PERB Decision No. 799-H, Proposed Decision at p. 48 [while secondary issues "could have been ironed out by the parties," they were "hopelessly deadlocked on the primary issue," and "it was not a sign of bad faith" for the employer "to stick to its position and declare impasse"].) The Association offers no countervailing reason to upset our case law in this regard. We decline to do so.

that the prior MOU did not provide for binding arbitration, the City's opposition to binding arbitration is not necessarily indicative of bad faith. While the City's explanation was not detailed, the Association introduced no other evidence about the parties' experience under their current grievance procedure, and therefore did not prove that the City's position was not rationally supported or fairly maintained.[14]

With respect to the outside employment policy, the City rejected the Association's proposal, explaining that its employee handbook included a City-wide policy permitting outside employment except where it created a conflict. Yeung and Melissa Chaney (Chaney), the City's director of human resources, both testified that after the City provided this explanation for rejecting the Association's proposal, the topic did not come up again during negotiations.

As for the proposed modification of the unit, the City asked to discuss this issue away from the table, and there is no evidence that the Association objected. Chaney then looked into the proposed modification and told Akins why the City believed the classifications were in the appropriate unit. After receiving the City's explanation, the Association did not pursue the issue further. But even assuming the City's responses to this proposal were somehow inadequate, unit composition, including the appropriate placement of classifications, is not a mandatory subject of bargaining. (*Chula Vista City School District* (1990) PERB Decision No. 834, p. 38.) The Board has never held that a party's failure to explain its position on a non-mandatory subject is evidence of bad faith.

Regarding the Association's standby vehicle proposal, we similarly find no evidence that the City's conduct evidenced an intent to frustrate negotiations. Although this was among

[14] We also note that the Association did not argue or attempt to prove that the City's rejection of binding arbitration was predictably unacceptable.

the Association's opening proposals presented on May 3, 2012, specific reference to the standby vehicle issue was omitted from the Association's counter-proposal on July 10, 2012. By that point, the Association's proposal was to "incorporate the present standby policy into the agreement." Because the Association dropped its standby vehicle proposal on its own, the City did not act in bad faith by failing to respond to it.

Relatedly, the Association claims that the City failed to offer counterproposals to the Association's proposals on these issues. The Association cites *Oakland Unified School District* (1981) PERB Decision No. 178 for the proposition that "the failure to offer counterproposals may be construed as bad faith bargaining if no explanation or rationale supports the bargaining party's position." Because we have rejected the argument that the City failed to adequately explain its opposition to the Association's proposals (except with respect to the standby policy), we conclude that the City's failure to make counterproposals on the same subjects is not evidence of bad faith.

In addition to the lack of evidence that the City failed to adequately respond to the Association's proposals or explain its own positions, we note that at hearing, the Association did not contest Yeung's testimony that the Association never asked the City to respond further to its proposals. In these circumstances, there is not enough evidence to show that the City intended to frustrate negotiations by failing to consider and respond to the Association's proposals.

Parity Agreements

In two of its exceptions, the Association asks us to find that the City unlawfully tied its own hands by entering into "me-too" or "parity" agreements with other unions. Under long-settled precedent, such agreements are not a per se violation of the duty to bargain, but "there

may be circumstances when a 'me-too' agreement is evidence of bad faith bargaining." (*Banning Teachers Assn. v. PERB* (1988) 44 Cal.3d 799, 807-808; *Banning Unified School District* (1985) PERB Decision No. 536.)

In this case, the City's parity agreements with other bargaining units were not a factor in the parties' negotiations. Indeed, the City entered into these agreements *after* the Association had already rejected the City's LBFO and after impasse was declared. While the Association questions whether the parity agreements played a role earlier than that, the evidence shows that the City did not discuss parity agreements with the other units until the first week of December 2012, when another union suggested the concept. The City and the Association had reached impasse several weeks earlier, on November 7, 2012. And although the Association claims that the City made clear before the parties reached impasse that it wanted similar concessions from all of its units, this alone is not evidence of bad faith under the facts of this case. (*County of Solano*, *supra*, PERB Decision No. 2402-M, p. 10; *City of San Ramon* (2018) PERB Decision No. 2571-M, p. 8, fn. 10; cf. *Regents of the University of California* (1983) PERB Decision No. 356-H, p. 21.) Therefore, the Association has failed to meet its burden of proving that the City showed bad faith by entering into parity agreements with other units.

The City's Rejection of the Factfinders' Recommendations

The Association argues that the City Council's refusal to accept or adopt any of the factfinders' recommendations is "one more indication of its inflexibility and bad faith in these negotiations." While the City's conduct after the parties reached impasse cannot independently support a finding that the City failed or refused to bargain in good faith (*Moreno Valley Unified School Dist. v. PERB* (1983) 142 Cal.App.3d 191, 201-202), the Board

has left open the possibility that events occurring post-impasse may be probative of whether a party engaged in surface bargaining before impasse was reached (*Fresno County In-Home Supportive Services Public Authority*, *supra*, PERB Decision No. 2418-M, pp. 53-54, fn. 20). In this case, however, we conclude that the Association has not met its burden of showing that the City acted in bad faith.[15]

We begin by reviewing the factfinding process. Following a declaration of impasse in negotiations, the MMBA gives a recognized employee organization the right to request that the parties' dispute be submitted to a three-member factfinding panel, consisting of a neutral chairperson and one member appointed by each party. (§ 3505.4, subd. (a).) The factfinding panel is empowered to hold hearings, conduct investigations, and ultimately make findings and recommendations to resolve the bargaining dispute. (§§ 3505.4, subd. (c), 3505.5.) The panel's recommendations are not binding on either party, and the public agency is free to implement its LBFO after holding a public hearing on the impasse. (§§ 3505.5, 3505.7.)

Although they are not binding, "the factfinder's recommendations are a crucial element in the legislative process structured to bring about peacefully negotiated agreements." (*Modesto City Schools* (1983) PERB Decision No. 291, p. 36 (*Modesto*).)[16] Their function "is

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[15] This conclusion makes it unnecessary to decide whether the Association is also relying on the City Council's treatment of the factfinding report to support a separate violation of section 3506.5, subdivision (e), which makes it unlawful for a public agency to "[r]efuse to participate in good faith in an applicable impasse procedure." The Association points out that the complaint alleges a violation of section 3506.5, subdivision (e), but the Association's exceptions only refer to the City's conduct in this regard as "additional evidence of bad faith" and "one more indication of [the City's] inflexibility and bad faith *in these negotiations*" (emphasis added).

[16] Because we have not specifically considered the scope of the duty to participate in good faith in factfinding procedures under the MMBA, it is appropriate to rely on precedent interpreting the similar factfinding provisions found in the Educational Employment Relations Act (§§ 3548.1-3548.3) and the Higher Education Employer-Employee Relations Act

to change the circumstances of bargaining by providing an impetus for settlement of the parties' dispute." (*Id.* at p. 37.) To discharge their duties to participate in good faith in statutory impasse procedures (MMBA, § 3506.5, subd. (e); PERB Regs. 32603, subd. (e), 32604, subd. (d)), both parties must "consider the recommendations [of the factfinding panel] in good faith to determine whether there is a basis for settlement, or for such accommodations, concessions, or compromises that might lead to settlement." (*Charter Oak Unified School District* (1991) PERB Decision No. 873, p. 9, citing *Modesto*, *supra*, PERB Decision No. 291.) "As a result of this process, either party or both parties may decide in good faith that the factfinding report does not provide a basis for settlement or movement that could lead to settlement." (*Ibid.*)

The Association appears to argue that the City Council should have adopted some or all of the factfinding panel's recommendations to implement the proposed structural changes over a more gradual time period or with offsetting salary increases. This is not the law. While factfinding is intended to forge a path out of impasse, neither party is required to follow that path by accepting the recommendations. (MMBA, § 3505.7.)

The Association alternatively appears to argue that the City failed to satisfy its duty to consider in good faith the factfinding report's recommendations. Here, the Association relies solely on what it claims is the inconsistency between the City Council resolution, which stated that the recommendations were "insufficient to address the structural changes necessary," and the factfinding report, which recommended many of the structural changes the City wanted. This is a closer question.

(§§ 3591-3593). (See *San Diego Housing Commission v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 1, 13; *County of Contra Costa* (2014) PERB Order No. Ad-410-M, p. 32.)

We agree that the City Council's resolution did not explain as clearly as it might have why it was rejecting the factfinding report. On this record, however, referring to the resolution alone does not complete the Association's task of showing that the City failed to consider the factfinding report in good faith. The Association provided no evidence regarding what occurred when the parties met to discuss the factfinding report before the City Council considered it. In the absence of such evidence, the record is insufficient for us to conclude that the City failed to adequately explain its position on the report, or otherwise demonstrated a failure to consider the report in good faith.

We therefore find that the Association did not satisfy its burden of proving that the City failed to consider in good faith the factfinding report.

Totality of the Circumstances

The Association also takes exception to the manner in which the ALJ analyzed the totality of circumstances in this case. It argues that it is "not clear" whether the ALJ was applying the per se test or the totality of the conduct test, because she addressed each of the indicia of surface bargaining alleged in the complaint, concluded that they did not establish bad faith bargaining, and never analyzed them in their totality.

The Association's argument seems to be that even if no single portion of the City's conduct was sufficient to establish a recognized indicium of bad faith or a per se violation, the totality of the City's conduct could still add up to a finding of bad faith. We acknowledge this possibility, and we note the following cautionary observation by the NLRB:

> Any student of Board law could contrive a script by which a party could bargain indefinitely without reaching agreement and without exposing any of the specific indicia heretofore pointed out by the Board in surface bargaining decisions. . . . The danger to the trier of fact is that he becomes so engrossed with an examination of each individual alleged indicium that he fails to

> note the broad picture. In short he can't see the forest for the trees.

(*Milgo Industries, Inc.* (1977) 229 NLRB 25, 30.)

Read in isolation, some of the ALJ's conclusions might suggest that she was considering whether each alleged indicium of bad faith was sufficient on its own to sustain a finding of surface bargaining. However, we have reviewed the record under the totality of the circumstances test, keeping in mind the possibility that a party might weave together otherwise lawful conduct in a manner that amounts to bad faith. We find that the bad faith allegations reviewed above are individually unproven and also not probative of bad faith when aggregated.

Therefore, the Association failed to prove that the City engaged in surface bargaining, and we affirm the ALJ's dismissal of the complaint.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-866-M are hereby DISMISSED.

Members Banks and Krantz joined in this Decision.

Member Shiners' concurrence begins on page 30.

SHINERS, Member, concurring: I agree with my colleagues that the Davis City Employees Association (Association) did not prove that the City of Davis (City) engaged in surface bargaining during 2012-2013 contract negotiations or participated in bad faith in impasse procedures following those negotiations. I therefore join the majority opinion, except for its discussion of whether the City's refusal to provide a target amount of savings it was seeking from the Association through concessions demonstrated bad faith.[17] In my view, the Board cannot consider that allegation for two reasons.

1. The Association Waived the Target Savings Allegation By Not Specifically Excepting to the ALJ's Refusal to Consider It

"An exception not specifically urged shall be waived." (PERB Reg. 32300, subd. (c).) That is what happened here. In the proposed decision, the administrative law judge (ALJ) declined to consider the following two allegations of bad faith, finding that neither satisfied PERB's test for considering an unalleged violation: (1) the City acted in bad faith by failing to adopt any of the factfinding report's recommendations and (2) the City acted in bad faith by refusing to provide a target savings amount. The Association specifically excepted to the ALJ's refusal to consider the allegation about the factfinding report, but did not specifically except to her ruling regarding the target savings amount. By not doing so, the Association waived any challenge to the ALJ's refusal to consider the target savings allegation as evidence of the City's bad faith.

The majority admits that the Association did not file a specific exception regarding this allegation but nonetheless concludes it can consider the issue, citing decisions where a filing substantially complied with PERB's Regulations. I disagree that there was substantial

[17] My disagreement with the majority is based solely on procedural grounds. If this allegation were properly before the Board, I would join the majority opinion in full.

compliance here. PERB Regulation 32300, subdivision (a) requires a statement of exceptions to:

> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
>
> (2) Identify the page or part of the decision to which each exception is taken;
>
> (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
>
> (4) State the grounds for each exception.

The Association's exceptions mention the City's refusal to provide a target savings amount in three places: (1) in its summary of the proposed decision's factual findings, (2) in support of its contention that its proposals were not predictably unacceptable, and (3) in support of its argument that the City participated in factfinding in bad faith by not implementing the structural changes recommended in the factfinding report. Each of these instances states the City's refusal to provide a target savings amount as a fact, but none takes issue with the ALJ's refusal to consider this fact as evidence of bad faith bargaining. Because these cursory mentions of target savings do not substantially comply with the requirements of PERB Regulation 32300, subdivision (a), the Board cannot consider whether the City's refusal to provide a target savings amount to the Association indicates bad faith. From my review of the exceptions, it is clear the Association has abandoned its argument that the City's refusal to provide a target savings amount showed bad faith. The majority nonetheless goes to great lengths to address this discarded argument. Consequently, although I believe consideration of this issue runs afoul of Regulation 32300, subdivision (c), I must address the majority's unwarranted extension of *City of Roseville* (2016) PERB Decision No. 2505-M (*Roseville*) in service of an argument the Association could have made, but did not.

2. *Roseville* Does Not Allow The Board to Consider the Target Savings Allegation as Evidence of Bad Faith

In my view, *Roseville* permits an ALJ or the Board itself to consider indicia of surface bargaining that were not alleged in the complaint only when they were alleged in the underlying unfair practice charge. In *Roseville,* the charging party excepted to "the ALJ's refusal to consider several matters ***which were alleged in [its] 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." (*Roseville, supra,* PERB Decision No. 2505-M, p. 2, emphasis added.) Accordingly, the Board considered "[w]hether 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." (*Id.* at p. 6, emphasis added.) Although it did not find the unalleged violations doctrine applicable, the Board agreed with the charging party "that the ALJ's refusal to consider matters ***alleged in the charge*** but not included in or identified as evidence . . . in the complaint was contrary to the language and purpose of [PERB's] Regulations." (*Id.* at p. 14, emphasis added.) The Board then set out a general rule:

> 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.

(*Id.* at p. 15, emphasis added.)

The Board reiterated this rule on the following page:

> 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.

(*City of Roseville* (2016) PERB Decision No. 2505-M at p. 16, emphasis added.)

Turning to the complaint in that case, the Board stated:

> 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.

(*Id.* at p. 17, emphasis added.)

The Board went on to say in the following paragraph:

> 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 complaint, when such evidence is offered solely to support a surface bargaining allegation alleged in the complaint.

(*Ibid.*, emphasis added.)

The statements from pages 15 and 16 quoted above appear in the section of the decision discussing what notice of factual allegations is sufficient to satisfy due process requirements. I therefore read *Roseville* as holding that due process requirements limit an ALJ or the Board itself to only considering indicia of surface bargaining that were alleged in the charge. The

Board's application of the rule on page 17 of the decision, as quoted above, supports this reading.

The application of *Roseville* in this case is simple. The Association's charge did not allege that the City's failure or refusal to provide a target savings amount indicated bad faith. Consequently, the Board cannot consider the Association's belated argument—made for the first time in its post-hearing brief after the evidentiary record closed—that the City acted in bad faith by refusing to provide a target savings amount.

Despite *Roseville*'s numerous references to indicia and evidence of bad faith "alleged in the charge," the majority claims the Board did not intend to limit the evidence in surface bargaining cases to evidence that supports indicia alleged in the charge or complaint. Rather, the majority declares that *Roseville* allows an ALJ or the Board itself to consider *any* evidence in support of a surface bargaining allegation, even if, as here, the evidence supports an indicium of surface bargaining not alleged in the case until after the close of the evidentiary record. I disagree with the majority's extension of *Roseville* for several reasons.

a. <u>The Majority Misinterprets *Roseville*</u>

The majority's reinterpretation of *Roseville* is contrary to well-established rules of legal interpretation. "[T]he language of an opinion must be construed with reference to the facts presented by the case; the positive authority of a decision is coextensive only with such facts. [Citation.]" (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1097.) The issue before the Board in *Roseville* was whether the ALJ should have considered indicia of bad faith that were alleged in the charge but not alleged in the complaint. The Board ruled that the ALJ erred in not considering evidence supporting those previously alleged indicia. But the issue of whether *indicia not alleged in the charge* may be considered in support of a surface bargaining theory

was not raised by the facts of the case. Thus, the Board could not have decided that issue, and consequently its holding did not encompass indicia not alleged in the charge.

Moreover, if the Board's intent in *Roseville* was to set out the broad rule the majority announces today, i.e., that an ALJ or the Board itself may consider evidence in support of an indicium of bad faith that was not alleged in the charge, it should have done so clearly at the time (although, as noted above, such a rule would have been dicta because the facts before the Board did not raise that issue). *Roseville*'s repeated references to evidence and indicia "alleged in the charge" does not put respondents on notice that they should be prepared to rebut evidence that supports indicia *not* alleged in the charge or complaint. Although the majority provides such notice in this case, it does so by extending *Roseville,* not by clarifying it.

The majority also asserts that limiting consideration of surface bargaining indicia to those alleged in the charge would create a higher pleading standard for surface bargaining cases. In support of this assertion, the majority relies on PERB's practice of not including in a complaint alleging discrimination the specific evidence or "nexus factors" showing the respondent acted with unlawful motive. But this practice does not prove the majority's point because the omission of such "factors" from the complaint does not mean they were not alleged in the charge. Indeed, as *Roseville* notes, "PERB discrimination complaints typically omit the specific nexus factors or any other facts ***alleged in the charge*** to establish unlawful motive." (*Roseville, supra*, PERB Decision No. 2505-M, p. 20, emphasis added.)[18] The

[18] The majority's claim that unfair practice charges alleging discrimination need not allege facts showing the respondent's unlawful motive is demonstrably false, as PERB routinely dismisses charges that fail to allege such facts. (E.g., *County of San Diego* (2012) PERB Decision No. 2258-M, adopting warning letter at p. 3; *City & County of San Francisco* (2009) PERB Decision No. 2075-M, p. 6; *Los Angeles Community College District* (1997) PERB Decision No. 1222, adopting dismissal letter at pp. 2-4; *Charter Oak Unified School District* (1984) PERB Decision No. 404, pp. 4-5.)

majority's reliance on the practice in discrimination cases therefore misses the mark because it does not address whether an ALJ or the Board itself may consider evidence of unlawful motivation not alleged in the charge.

b. The Majority's Extension of *Roseville* Promotes Inefficiency and Gamesmanship

Under the majority's extension of *Roseville*, a charging party could allege in the charge facts sufficient for a complaint to issue, then at hearing present different facts supporting different indicia of surface bargaining. Not only would this make a mockery of PERB's charge investigation process, it would force the respondent to defend at hearing an entirely different case than the one for which it prepared based on the pleadings. The majority brushes off this concern by noting that the respondent could ask for a continuance or schedule additional days of hearing to respond to unanticipated evidence. But this would solve the problem only if the respondent became aware during the hearing that this unexpected evidence was being offered to support an indicium of bad faith not previously alleged in the case. When a charging party raises an indicium for the first time in its post-hearing brief—as the Association did here—the respondent no longer has the ability to put on additional evidence related to that indicium, thereby allowing the charging party to successfully hide the ball.

The majority's new rule also increases the burden on ALJs. If the solution to unanticipated evidence is to schedule additional hearing days, hearings will go longer so respondents can rebut evidence of indicia alleged for the first time at the hearing. And if the respondent does not deduce at the hearing that a new indicium is being alleged, the ALJ will have to struggle with how to handle the evidence supporting an indicium raised for the first time after the record has closed, as the ALJ did here. On the other hand, limiting the charging

party to litigating the bad faith conduct alleged in the charge places no significant burden on the charging party, promotes efficiency, and discourages chicanery.

c. The Majority's Extension of *Roseville* Allows Due Process Violations

The most troubling aspect of the majority's extension of *Roseville* is that it allows a violation to be found based on evidence the respondent may not have realized was being offered for the purpose of proving bad faith bargaining, thereby violating the respondent's due process rights. The charge in this case did not allege the City's refusal to provide a target savings amount as an indicium of surface bargaining, so naturally the complaint did not include such an allegation. At the hearing the parties' chief negotiators briefly testified about the Association's request for a target amount and the City's response. But the Association did not indicate in its opening statement or at any time during the hearing that it considered the City's refusal to provide a target savings amount to indicate bad faith. Instead, the Association waited until its post-hearing brief—filed simultaneously with the City's post-hearing brief—to claim for the first time that the City's refusal to provide a target savings amount indicated bad faith surface bargaining.[19] Thus, the City had no opportunity before the record closed to present evidence or argument to rebut the Association's claim.

The majority's conclusion that the City's refusal to provide a target savings amount did not indicate bad faith in this case does not dispel the possibility of due process violations in future cases. To reach the target savings issue, the majority relies on *Roseville*'s distinction

[19] Claiming no due process problem exists in this scenario, the majority analogizes it to one where"notice of the particular cases or other legal authorities [it] intends to cite in its post-hearing brief." (Majority Opinion, p. 16.) This is argument *reductio ad absurdum*, as neither due process nor PERB's regulations require prior notice of legal authority. Our regulations, however, do entitle a respondent to notice of "the facts and conduct alleged to constitute an unfair practice" (PERB Reg. 32615, subd. (a)(5)), a requirement that comports with principles of due process.

between per se bad faith bargaining allegations and surface bargaining allegations for pleading and evidentiary purposes. (Majority Opinion, pp. 13-14.) But under *City of San Jose* (2013) PERB Decision No. 2341-M (*San Jose*), a single indicium of surface bargaining may have such a detrimental effect on negotiations that, standing alone, it is sufficient to prove bad faith bargaining. (*Id*. at pp. 19, 32-33, 37-39.) The majority thus allows a scenario whereby evidence supporting a surface bargaining indicium not alleged in the charge enters the door through *Roseville*, and can then transform into a per se bad faith bargaining violation under *San Jose*, rendering the *Roseville* distinction meaningless.[20] In my view, imposing liability in such circumstances would violate the respondent's due process rights. Accordingly, I respectfully decline to join the majority in untethering *Roseville* from its due process moorings.

[20] This scenario is reminiscent of "Schrödinger's Cat," a thought experiment proposed by physicist Erwin Schrödinger, in which he postulated that under the theory of quantum physics, it would be possible for a cat in a closed box to be both simultaneously alive and dead until the moment that it is observed. (See Erwin Schrödinger, *The Present Situation in Quantum Mechanics*, in Naturwissenschaften (1935).) Here, the unalleged indicium would exist simultaneously as both evidence of surface bargaining and a per se violation until the decisionmaker opens the box after the evidentiary record has closed and deems the indicium to be of one type or the other.