STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS LOCAL 39, Charging Party, v. EL DORADO COUNTY SUPERIOR COURT, Respondent.	Case No. SA-CE-22-C PERB Decision No. 2589-C October 17, 2018

Appearances: Weinberg, Roger & Rosenfeld, by Gary P. Provencher, Attorney, for Stationary Engineers Local 39; Wiley, Price & Radulovich, by Joseph E. Wiley, Attorney, for El Dorado County Superior Court.

Before Banks, Winslow and Shiners, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Stationary Engineers Local 39 (Local 39) and by the El Dorado County Superior Court (Court) to the proposed decision (attached) of a PERB administrative law judge (ALJ), which dismissed the complaint and Local 39's unfair practice charge against the Court. The complaint, as amended, alleged that the Court violated its duty to meet and confer in good faith under the Trial Court Employment Protection and Governance Act (Trial Court Act)[1] and PERB Regulations[2] by informing employees on May 18, 2013 that it would be reducing and eventually eliminating the Court's employer paid member pension contribution

[1] The Trial Court Act is codified at Government Code section 71600 et seq. Unless otherwise specified, all statutory references herein are to the Government Code.

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

(EPMC); and by unilaterally implementing the reduction and eventual elimination of the EPMC.[3] This conduct was also alleged to interfere with the representational rights of Local 39 and employees, in violation of the Trial Court Act and PERB Regulations.[4] Underlying both allegations is Local 39's contention that the Court insisted to impasse and then unilaterally imposed a waiver of so-called "classic" employees' statutory right under the California Public Employees' Pension Reform Act of 2013 (PEPRA)[5] to maintain the Court's previously-existing policy of cost-sharing until January 1, 2018.[6] According to Local 39, by prohibiting public employers from unilaterally changing existing pension cost-sharing agreements until January 1, 2018, section 20516.5 of PEPRA effectively conferred on public employees a statutory right to continue receiving existing EPMC benefits until January 1, 2018.

After determining that PERB has jurisdiction to interpret the public employment retirement laws insofar as necessary to decide the present unfair practice allegations, the ALJ rejected Local 39's interpretation of PEPRA/PERL and dismissed the complaint and

---

[3] The unilateral change allegation was included as the result of a motion to amend the complaint made by Local 39 shortly before the hearing and granted by the ALJ. Although the Court objected to this motion, it has not excepted to the ALJ's ruling and whether the motion was properly granted is therefore not before us. (PERB Regulation 32300, subd. (c).)

[4] As alleged in the complaint, and stipulated by the parties, before May 18, 2013, the Court's policy, as embodied in the parties' expired Memorandum of Understanding (MOU), was to pay employees' statutorily-required contribution of 7 percent of their reportable compensation toward their pension benefit from the California Public Employees' Retirement System (CalPERS). The parties' MOU was effective from February 12, 2011 through September 30, 2012.

[5] PEPRA, which became effective on January 1, 2013, amended the Public Employees Retirement Law (PERL), which is codified at Government Code section 20000 et seq.

[6] Pursuant to CalPERS regulations, the term "classic" employees refers to members of public pension systems (i.e., employees), who were hired before PEPRA's January 1, 2013 effective date, and who remain subject to the previously-existing terms of CalPERS membership. (Cal. Code Regs., tit. 2, § 579.1, subds. (a), (b).)

underlying unfair practice charge. Local 39's statement of exceptions and supporting brief disagree with the ALJ's legal reasoning and her conclusion that PERL, as amended by PEPRA, provides employees with no statutory right to continue receiving existing EPMC until January 1, 2018. The Court agrees with the ALJ's reasoning and urges PERB to adopt the proposed decision insofar as it dismisses the complaint. However, the Court also excepts to the ALJ's conclusion that PERB has authority to interpret the public employment retirement laws, and therefore urges lack of jurisdiction as an alternative ground for dismissing the complaint.

The Board has reviewed the stipulated record and exhibits, the proposed decision, and the parties' exceptions, responses and supporting briefs in light of applicable law. Based on this review, we find that the ALJ's findings of fact are adequately supported by the record and we adopt them as the factual findings of the Board itself. The ALJ's conclusions of law are well reasoned and in accordance with applicable law. We therefore adopt the proposed decision as the decision of the Board itself, as supplemented by the following discussion of the parties' exceptions.

DISCUSSION

The Court's Exception to PERB Jurisdiction over this Dispute

As an initial matter, we address the Court's cross-exception challenging PERB's jurisdiction. The Court contends that, because Local 39 concedes that the Court met and conferred in good faith and exhausted applicable impasse procedures before unilaterally implementing changes to the EPMC, the complaint's allegations turn solely on whether the Court's conduct violated section 20516.5 of PERL. According to the Court, because the PEPRA/PERL statutory scheme is administered by CalPERS, and not PERB, PERB has no

authority to resolve a dispute which turns entirely on the statutory interpretation of external law. Although the Court offers this exception as an "alternative" justification for dismissing the complaint and unfair practice charge, we must, in any event, determine whether PERB has jurisdiction before addressing the merits. (*County of Santa Clara* (2015) PERB Decision No. 2431-M, p. 14; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391-392.)

Although establishing jurisdiction is necessary to avoid acting in excess of our authority, in this case, the issue is not a difficult one. By statute, PERB has the power and duty to "determine in disputed cases whether a particular item is within or without the scope of representation" (Trial Court Act, § 71639.1, subd. (b), incorporating Gov. Code, § 3541.3, subd. (b)), and it has routinely exercised this authority in unfair practice cases involving the mutual obligation of public employers and employee organizations to meet and confer over employee pension benefits and contributions. (*El Dorado County Superior Court* (2017) PERB Decision No. 2523-C, pp. 7-8; *County of San Luis Obispo* (2015) PERB Decision No. 2427-M, pp. 30-34; *County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 7.)

Where the parties to an unfair practice case dispute whether external law, including the public employment retirement laws, removes an otherwise negotiable matter from the scope of representation, or creates a statutory right not subject to waiver or impairment through unilateral employer action, PERB may interpret the provisions of external law as necessary to decide questions arising under the collective bargaining statutes we administer. (*County of San Luis Obispo, supra,* PERB Decision No. 2427-M, pp. 30-34; *City of San Jose* (2013) PERB Decision No. 2341-M, p. 44; *Berkeley Unified School District* (2012) PERB Decision

No. 2268, pp. 3-9; *City of Pinole* (2012) PERB Decision No. 2288-M, p. 8, disapproved on other grounds by *County of Tulare* (2015) PERB Decision No. 2414-M, p. 48.)

Here, the ALJ considered the parties' conflicting interpretations of PEPRA/PERL to determine whether the Court's unilateral imposition of its proposal affected a statutory right of employees, and she correctly concluded that the present dispute was within PERB's unfair practice jurisdiction. Accordingly, we deny the Court's exception to PERB's jurisdiction to decide this case.

Local 39's Exception to the ALJ's Interpretation of the PEPRA/PERL

Although the Board reviews exceptions to a proposed decision de novo, it need not address arguments that have already been adequately addressed in the same case or that would not affect the result. (*Trustees of the California State University* (2014) PERB Decision No. 2400-H, pp. 2-3; *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, pp. 4-5; *Morgan Hill Unified School District* (1995) PERB Decision No. 1120, p. 3.) For the most part, Local 39's statement of exceptions and supporting brief repeat arguments that were considered and adequately addressed by the proposed decision, and we therefore do not repeat them here. In addition, Local 39 points to accepted canons of statutory construction requiring courts and administrative agencies to give meaning and effect to every provision of a statute, so that none is rendered as surplusage. It argues that, by interpreting PERL section 20516.5 to permit an employer to alter existing EPMC benefits before 2018, the ALJ effectively ignored the language of subdivision (c) of that section stating that "Subdivision (b) shall become operative on January 1, 2018." We disagree.

Subdivision (b) refers only to requiring employees to pay "50 percent of normal costs." It does not limit employer changes to the EMPC. Consistent with CalPERS's interpretation of

PEPRA in Circular Letter No. 200-055-12, the ALJ concluded that PERL section 20516.5 precludes employers from unilaterally requiring classic employees to pay at least 50 percent *of the normal cost* of pension benefits before January 1, 2018, but does not prohibit employers from increasing, reducing, or eliminating EPMC for classic employees. While PERL section 20516.5 requires an agreement before an employer may require employees to pay all or part of *the employer's* portion of the pension contribution, subdivision (h) specifies that this provision does not require the employer to enter into a collective bargaining agreement to increase the amount of *the member contribution*, when such increase is otherwise authorized by statute.

Additionally, as explained in the proposed decision, PERL section 20691 has long authorized employers to modify or eliminate EPMC benefits after meeting and conferring in good faith and exhausting applicable impasse resolution procedures, and the amendments enacted by PEPRA did nothing to change this aspect of PERL, including the employer's ability to change or eliminate EPMC benefits affecting classic employees. The ALJ's interpretation of PEPRA/PERL is consistent with the plain meaning of the statute, the overall statutory scheme and legislative purpose of PEPRA, and the statutory interpretation adopted by CalPERS, the administrative agency responsible for administering PERL and PEPRA.

After meeting and conferring to impasse and exhausting all impasse resolution procedures required by the Court's local rules, the Court unilaterally implemented its proposal to phase out the EPMC and shift to employees responsibility for paying the employee member contribution, which is set by statute at 7 percent of reportable compensation. Because the statutory language guarantees no right to an employer paid member contribution, the Court's unilateral implementation of its proposal to phase out the EPMC did not effect a waiver or

impair a statutory right of employees and therefore did not constitute a per se violation of the Court's duty to meet and confer in good faith.

Accordingly, we deny Local 39's exception and hereby adopt the proposed decision as the decision of the Board itself.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-22-C are hereby DISMISSED.

Members Winslow and Shiners joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS LOCAL 39, Charging Party, v. EL DORADO COUNTY SUPERIOR COURT, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-22-C PROPOSED DECISION (June 14, 2016)

Appearances: Weinberg, Roger & Rosenfeld by Gary P. Provencher, Attorney, for Stationary Engineers Local 39; Wiley, Price & Radulovich, by Joseph E. Wiley, Attorney, and Monna R. Radulovich, Attorney, for El Dorado County Superior Court.

Before Robin W. Wesley, Administrative Law Judge.

INTRODUCTION

In this case, a union alleges that an employer violated the Trial Court Employment Protection and Governance Act (Trial Court Act),[1] and regulations of the Public Employment Relations Board (PERB or Board),[2] when it implemented a provision requiring employees to pay the statutory member contribution portion of their pension costs. The employer denies any violation of law or PERB regulations.

PROCEDURAL HISTORY

On May 20, 2013, Stationary Engineers Local 39 (Local 39) filed an unfair practice charge against the El Dorado County Superior Court (Court). On August 12, Local 39 filed a

[1] The Trial Court Act is codified at Government Code section 71600 et seq. All statutory references are to the Government Code, unless otherwise stated.

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

first amended charge. The Court filed position statements in response to the original and amended unfair practice charge.

On June 16, 2014, the PERB Office of the General Counsel issued a complaint alleging that the Court unilaterally changed its policy without notice and an opportunity to meet and confer when it required employees to pay a portion of their compensation for their retirement benefits. This conduct is alleged to have violated the Trial Court Act sections 71631, 71633, 71634.2, and 71635.1; and thereby constituted an unfair practice under Trial Court Act section 71639.1, subdivision (c), and PERB Regulation 32606, subdivisions (a), (b), and (c).

On June 27, 2014, the Court filed an answer to the complaint, denying the substantive allegations, and asserting affirmative defenses.

On September 15, 2014, the parties participated in a PERB settlement conference, but the matter was not resolved.

On June 10, 2015, Local 39 filed a motion to amend the complaint and second amended unfair practice charge. The Court filed its opposition to the motion on June 17. On June 18, the motion was granted, and an amended complaint issued alleging that the Court failed to bargain in good faith by implementing the requirement that employees pay the statutory employee member contribution. This conduct is alleged to have violated the Trial Court Act sections 71631, 71633, 71634.2, and 71635.1; and thereby constituted an unfair practice under Trial Court Act section 71639.1, subdivision (c), and PERB Regulation 32606, subdivisions (a), (b), and (c).

On July 1, 2015, the Court filed an amended answer to the amended complaint, denying the substantive allegations, and asserting affirmative defenses.

The parties opted to submit the case by stipulated record, which was filed on September 11, 2015. With the filing of post-hearing briefs on November 20, the case was submitted for decision.

FINDINGS OF FACT

The Court is a trial court within the meaning of Trial Court Act section 71601, subdivision (k), and PERB Regulation 32033, subdivision (a). The Court admitted in its answer that Local 39 is an exclusive representative within the meaning of PERB Regulation 32033, subdivision (b), of a bargaining unit of Court employees.

The Court and Local 39 have been parties to a succession of labor agreements, including the memorandum of understanding (MOU) effective February 12, 2011, through September 30, 2012.

Court employees participate in the California Public Employees' Retirement System (CalPERS). Under CalPERS, contributions to the retirement plan consist of two parts: (1) a percentage of the employee's compensation that the employer must contribute ("employer contribution"); and (2) a percentage of the employee's compensation that the employee must contribute ("member contribution" or "employee's normal rate of contribution"). The employee's member contribution is set by statute. The member contribution for Court employees represented by Local 39 is 7%. The "total normal cost" of a contracting agency's retirement benefits is determined annually by CalPERS. For fiscal year 2013-2014, CalPERS determined that the Court's total normal cost was 15.737% of compensation.[3] This cost consists of the employee's statutory member contribution of 7%, and the Court's employer contribution of 8.737%.

[3] This rate does not include the Court's past unfunded liability.

Pursuant to the MOU, the Court agreed to pay both parts of the CalPERS retirement plan contributions, the employer and employee contributions. When an employer picks up the employees' member contribution it is referred to as the "Employer Paid Member Contribution" (EPMC). MOU Article 9, Section 8, states, in part:

> A. Except as specified in Section 8.B. below, the Court will pay that portion of each employee's PERS contribution equal to seven percent 7.0% of reportable compensation.
>
> B. New Employee PERS Contributions – Notwithstanding Section 8.A. above, new employees hired on or after March 5, 1994, shall pay the full seven percent (7.0%) employee share of PERS contribution for the first twenty-six (26) pay periods of continuous Court service. At the expiration of twenty-six (26) pay periods of employment, the Court will pay three and a half percent (3.5%) of the employee's contribution to PERS from the twenty-seventh (27th) to fifty-second (52nd) pay period of continuous Court service. Beginning with the fifty-third (53rd) pay period of continuous Court service, the Court will pay seven percent (7.0%) of the employee's PERS contribution.

In August 2012, Local 39 and the Court commenced negotiations for a successor MOU. Michael Guevara (Guevara) was the chief spokesperson for the Court, and James Britton (Britton) was the chief spokesperson for Local 39.

On August 27, 2012, the Court submitted its initial bargaining proposal, including a proposal that the Court would no longer continue the EPMC effective October 1. Instead, employees would be responsible for paying the statutory member contribution of 7% of reportable compensation. The parties discussed the merits of this proposal, as well as the reduction in Judicial Branch funding and its impact on the Court.

On September 11, 2012, Local 39 submitted a counterproposal to the Court's initial proposal. Local 39 proposed that effective October 1, employees would assume responsibility

for the 7% EPMC, but there would be a 7% offset for employees through the cafeteria plan. The parties discussed the merits of this proposal.

On September 18, 2012, Local 39 submitted a modified EPMC proposal to phase in the elimination of the EPMC. On July 1, 2013, employees would pay 3.5% of their member contribution. On June 30, 2014, employees would contribute the remaining 3.5% of the member contribution. Thus, by June 30, 2014, the EPMC would be eliminated and employees would be responsible for the entire 7% statutory member contribution. After discussing the modified proposal, the Court accepted Local 39's proposal.

On September 26, 2012, the Court provided a counter/modified proposal on a number of other issues. Local 39's modified EPMC proposal, which had been accepted by the Court, was not changed.

On October 3, 2012, the parties reached a tentative agreement on all issues. On October 17, the tentative agreement was rejected by Local 39's members.

On November 16, 2012, the parties resumed negotiations, discussing the reasons for the employees' rejection of the tentative agreement. The Court submitted a package proposal, which was discussed by the parties.

On December 13, 2012, Local 39 provided a counter package proposal. The Court submitted a package counter to Local 39's proposal. The parties discussed both proposals. Guevara stated that the Court's funding had changed. Originally, the Court anticipated that the Governor would allow the trial courts to carry forward 2% of their budget as a reserve for 2013-2014, but that amount had now been reduced to a 1% reserve carry-over. In addition, CalPERS' contribution rates had increased more than projected. Thus, Guevara explained, the Court's reserves would be lower than anticipated, causing the Court to modify its previous

EPMC proposal. The Court proposed that employees pay 3.5% of the member contribution on February 1, 2013, and the full 7% member contribution effective July 1, 2013.

On January 8, 2013, Local 39 submitted a counterproposal, including an EPMC proposal that employees pay only 1% of the member contribution. The parties discussed Local 39's proposal, but did not reach agreement.

On January 8, 2013, Guevara wrote to Britton invoking the impasse procedures under the Court's Employer/Employee Relations Rules (EERR).

On February 26, 2013, the parties held an impasse meeting pursuant to EERR Article 15. The dispute was not resolved. During the meeting, Britton stated that the Court could not impose an increase in employee paid member contributions after January 1, 2013. At the conclusion of the meeting, Guevara declared impasse.

On February 28, 2013, Britton wrote to the Court stating that Local 39 did not believe the parties were at impasse. Britton asserted that employee member contributions for pension benefits was a permissive subject of bargaining, and impasse on this subject was unlawful. Britton did agree, however, to participate in mediation.

Guevara responded on March 4, 2013, declining to withdraw the Court's impasse letter, and noting the parties' agreement to participate in mediation.

On April 11, 2013, the parties met with a mediator from the State Mediation and Conciliation Service, but mediation was unsuccessful. After the mediation session concluded, the parties held a meet and confer session. The Court gave Local 39 its last, best, and final offer (LBFO). Local 39 agreed to take the offer to its membership for a vote.[4]

[4] The Court's EPMC proposal remained the same, but the effective dates were modified slightly as the initial effective date had already passed.

On April 18, 2013, Britton notified the Court that the Local 39 membership had rejected the LBFO, and requested that the parties proceed to factfinding.

On April 23, 2013, the Court declined to participate in factfinding.[5]

On May 6, 2013, the Court advised Local 39 that it would implement terms of its LBFO on May 18, including the following provisions on retirement contributions.

> A. Effective pay period 12 in 2013, with a pay date of June 7, 2013, the employees will pay 3.5% (half) of the employee portion of the PERS contribution, currently equal to 7% of reportable compensation.
>
> B. Effective pay period 15 in 2013, with a pay date of July 19, 2013, the employees will pay the remaining 3.5% of the employee portion of the PERS contribution for the full 7% employee contribution, currently equal to 7% of reportable compensation.

The parties returned to the bargaining table during the summer of 2014, as a result of a change in the Court's funding received from the State. In August 2014, the parties reached agreement on a successor MOU effective September 1, 2014, through September 30, 2017. The MOU does not include any provisions on the EPMC.

On September 12, 2012, while the parties were meeting and conferring, the Governor signed into law the Public Employees' Pension Reform Act of 2013 (PEPRA),[6] which took effect on January 1, 2013.[7] PEPRA enacted significant changes affecting public employee pension benefits, including pensionable salary caps, equal sharing of pension costs as the

---

[5] EERR Section 17 states, in part, that, "The parties *may* mutually agree to submit the impasse to fact-finding." (Emphasis added.)

[6] PEPRA is codified at Government Code section 7522 et seq. All statutory references are to the Government Code, unless otherwise stated.

[7] The Legislature has since passed a number of bills to clarify and modify PEPRA. (Steele, *CPER Pocket Guide to Public Employee's Pension Reform Act* (2nd ed. 2015) p. 1, fn. 2.)

standard, increased retirement ages, and new retirement formulas.[8] PEPRA is applicable to, and amended, a number of state and local public retirement system laws, including the Public Employees' Retirement Law (PERL)[9] administered by CalPERS.[10]

On December 3, 2012, CalPERS issued Circular Letter No. 200-055-12. Its purpose was "to confirm CalPERS current interpretation" of PEPRA and PERL amendments. Under "Employer Paid Member Contributions (EPMC)," the Letter stated:

> PEPRA prohibits EPMC for new members,[11] employed by public agencies, school employers, the judicial branch, or CSU, unless an employer's existing MOU would be impaired by this restriction.
>
> [¶ . . . ¶]
>
> EPMC may continue to be reported for classic members[12] pursuant to existing PERL provisions. *Employers who wish to eliminate or reduce EPMC for classic members are able to do so under existing law through collective bargaining and contract amendments. Existing PERL statutes allow employers to periodically increase, reduce or eliminate employer paid member contributions.*

[Emphasis added.]

---

[8] Press release issued by Governor Jerry Brown on September 12, 2012. (ER Exhibit 23.)

[9] PERL is codified at Government Code section 20000 et seq. All statutory references are to the Government Code, unless otherwise stated.

[10] PEPRA section 7522.02, subdivision (a)(1).

[11] "New members" are generally employees hired on or after January 1, 2013. (PEPRA § 7522.04, subd. (f).) "Members" refers to an employee's membership in CalPERS. Hereafter, "new members" and "new employees" are used interchangeably.

[12] "Classic members" are employees hired before January 1, 2013, with some exceptions. (PEPRA § 7522.04, subd. (d) and (f), PEPRA § 7522.02, subd. (c)(1) and (2).) Hereafter, "classic members" and "classic employees" are used interchangeably.

Under "Employer and Member Contributions," the CalPERS Letter stated:

> *Beginning January 1, 2018, public agencies that have collectively bargained in good faith and completed impasse procedures (including mediation and fact-finding) will be able to unilaterally require classic members to pay up to 50% of the total normal cost of their pension benefit.* It is important to note that the employee contribution may only be increased up to an 8% contribution rate for miscellaneous members, a 12% contribution rate for local police officers, local firefighters, and county peace officers, or an 11% contribution rate for all other local safety members.

[Emphasis added.]

An excerpt from CalPERS' website, "Frequently Asked Questions by Employers," states:

> If an employer currently pays all or a portion of their member's normal contributions (EPMC) for existing employees, does the employer have the option to discontinue this practice? (added 11/15/2012)
>
> Yes. Sections 20961 [sic.][13] and 20693 allow the employer to reduce or eliminate employer paid member contributions.

ISSUE

Did the Court unlawfully implement a waiver of employee statutory rights by unilaterally eliminating the EPMC before January 1, 2018?

CONCLUSIONS OF LAW

Local 39 contends that pursuant to PEPRA's amendments to PERL, the Court is not authorized to unilaterally eliminate the EPMC between PEPRA's effective date of January 1, 2013, and January 1, 2018. When the Court implemented its LBFO eliminating half of the EPMC on June 7, 2013, and the full EPMC on July 19, 2013, Local 39 asserts the Court unlawfully waived its employees' statutory right to receive the EPMC until January 1, 2018.

[13] The correct provision is PERL section 20691.

Local 39 does not challenge the Court's bargaining conduct through impasse, and it acknowledges that the parties reached agreement effective September 1, 2014, to discontinue the EPMC by removing reference to it from the successor MOU.

The Court asserts that PERB does not have jurisdiction to decide violations of PEPRA and PERL. The Court also argues that PEPRA did not change an employer's authority under PERL to modify or eliminate the EPMC.

Jurisdiction

The Court's assertion that PERB lacks jurisdiction to decide violations of PEPRA and PERL has been addressed by the Board. In *City of Pinole* (2012) PERB Decision No. 2288-M, a union alleged that the employer insisted to impasse on pension proposals amounting to a waiver of statutory rights. The employer argued that interpretation of pension provisions under PERL exceeded PERB's jurisdiction. The Board stated:

> While it is true that PERB does not have jurisdiction to enforce statutes such as those in the Government Code governing municipal pensions or in the Education Code, PERB necessarily must interpret certain statutes beyond the collective bargaining laws that PERB administers in the course of determining questions arising under the statutes we do enforce. . . . We do so with the sanction of the California Supreme Court. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865, accord, *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375.)

Although not authorized to enforce PEPRA and PERL, PERB may interpret these statutory provisions. Several provisions of PEPRA and PERL specifically address an employer's collective bargaining obligations. Thus, it is appropriate that PERB interpret PEPRA and PERL to determine whether the Court violated its obligation to meet and confer in good faith under the Trial Court Act.

Bargaining Obligation

Trial Court Act section 71634.2 requires a trial court and recognized employee organization to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment." It is an unfair practice under Trial Court Act section 71639.1, subdivision (c), and PERB Regulation 32606, subdivision (c), for a trial court to "refuse or fail to meet and confer in good faith with an exclusive representative."

The amended complaint contains two theories alleging a violation of the Court's bargaining obligation. The complaint alleges the Court unilaterally changed its policy on paying the EPMC without providing notice and an opportunity to bargain. The complaint also alleges that the Court failed to bargain in good faith under a surface bargaining theory when it implemented elimination of the EPMC as part of its LBFO.

To determine whether a party has violated the Trial Court Act, PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process.

Unilateral Change

An unlawful unilateral change in a negotiable subject is considered a "per se" violation of the duty to bargain in good faith. (*Stockton Unified School District* (1980) PERB Decision No. 143.) To demonstrate an unlawful change, a charging party must establish that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262; *County of Santa Clara* (2013) PERB Decision

No. 2321-M; *Grant Joint Union High School District* (1982) PERB Decision No. 196; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

The complaint alleges that the Court unilaterally imposed a waiver of the bargaining unit employees' statutory right to continue to receive the EPMC until January 1, 2018 without providing notice and an opportunity to meet and confer. Local 39 does not contend that the Court failed to provide notice and an opportunity to bargain. In fact, the parties engaged in negotiations over a successor agreement from August 2012 to May 2013. Thus, the evidence does not demonstrate that the Court unilaterally changed its policy on paying the EPMC without providing Local 39 with notice and an opportunity to bargain. This allegation is therefore dismissed.

Surface Bargaining

Where surface bargaining is alleged, PERB resolves the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (*Oakland Unified School District* (1982) PERB Decision No. 275; *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25.) Once a bona fide impasse in negotiations is reached, either party may refuse to negotiate further, and the employer may implement changes in terms and conditions of employment reasonably comprehended in its LBFO. (*Public Employment Relations Board v. Modesto City Schools District* (1982) 136 Cal.App.3d 881; *Modesto City Schools* (1983) PERB Decision No. 291; *Rowland Unified School District* (1994) PERB Decision No. 1053; *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2102-S.)

Where conduct is alleged to constitute a per se violation of the duty to bargain, it may also indicate the absence of subjective good faith in support of a surface bargaining claim. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M.) Examples of per se violations include refusing to provide necessary and relevant information; refusing to negotiate a mandatory subject of bargaining; making pre-impasse unilateral changes to terms and conditions of employment; insisting to impasse and/or imposing nonmandatory subjects of bargaining; and insisting to impasse and/or imposing proposals that waive employee statutory rights. (*Fresno County In-Home Supportive Services Public Authority, supra,* PERB Decision No. 2418-M, p. 15-16.)

Under its surface bargaining theory, Local 39 does not assert that the Court bargained in bad faith under the totality of conduct, or failed to reach a bona fide impasse, before imposing its LBFO. Local 39 contends only that the Court committed a "per se" violation by insisting to impasse on a nonmandatory subject of bargaining when it implemented, in its LBFO, a waiver of the employees' statutory right to continue to receive the EPMC until January 1, 2018.

A proposal that a party waive a statutory right is a nonmandatory subject of bargaining. (*Chula Vista City School District* (1990) PERB Decision No. 834.) Parties may engage in negotiations on nonmandatory subjects of bargaining, but when a party decides that a nonmandatory subject not be included in the agreement, that party must make clear its opposition to further negotiations on the nonmandatory subject. (*San Mateo County Community College District* (1993) PERB Decision No. 1030.) An employer may not insist to impasse on a waiver of statutory rights "because to do so is an infringement on a right not given the employer." (*San Mateo County Community College District, supra*, PERB Decision

No. 1030, fn. 11; *City of Pinole, supra,* PERB Decision No. 2288-M; *Chula Vista City School District, supra,* PERB Decision No. 834; *Fresno County In-Home Supportive Services Public Authority, supra,* PERB Decision No. 2418-M; *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2081-S.) Even with a bona fide impasse, not all of an LBFO's terms may lawfully be implemented by an employer. (*Fresno County In-Home Supportive Services Public Authority, supra,* PERB Decision No. 2418-M.) "The existence of a bona fide impasse, through good-faith negotiations, by itself, does not authorize imposition of proposals that waive or limit statutory rights." (*Id.*, p. 23.)

The gravamen of Local 39's claim is that, absent a mutual agreement, PERL section 20516.5 gives employees a statutory right to receive the EPMC until January 1, 2018. Local 39 asserts that the Court committed a per se violation of the Trial Court Act when it unilaterally eliminated the EPMC before January 1, 2018. On May 18, 2013, the Court implemented its LBFO to eliminate half, or 3.5%, of the EPMC on June 7, and eliminated the full 7% EPMC on July 19.

To determine if the Court unlawfully waived employee statutory rights, a review of the relevant provisions of PEPRA and PERL is required. Under the rules of statutory construction, where the language of a statute is clear and unambiguous, the legislative intent is reflected in its plain meaning. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M; *County of Imperial* (2007) PERB Decision No. 1916-M.) A statute should be construed in reference to the entire legislative scheme, giving effect to every section, to achieve the legislative purpose. (*Board of Trustees of the California State University v. PERB* (2007) 155 Cal.App.4th 866, 876; *Grossmont-Cuyamaca Community College District* (2008) PERB Decision No. 1958.) "The contemporaneous administrative construction of an enactment by

those charged with its enforcement . . . is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." (*Marzec v. California Public Employees Retirement System* (2015) 236 Cal.App.4th 889, 907; *Board of Trustees of the California State University v. PERB, supra*, 155 Cal.App.4th 866, 876.)

PEPRA is largely intended to change pension benefits for new employees, but amendments to other state and local retirement system laws may result in changes for classic employees. PEPRA requires new employees to pay at least 50% of the normal cost of retirement benefits, and prohibits employers from paying any of the required employee contribution for new employees.[14] The statutes demonstrate there is a distinction between the total "normal cost" of pension benefits and the employee "member contribution," which is set by statute. CalPERS annually determines the total normal cost of pension benefits for each contracting agency.[15] For fiscal year 2013-2014, CalPERS determined that the Court's total normal cost was 15.737%. Thus, under PEPRA section 7522.30, the Court's new employees are required to pay at least 50% of the total normal costs, or approximately 7.86% of their reportable compensation. The employee member contribution, which is set by statute for Court employees represented by Local 39, remains 7%.

---

[14] PEPRA section 7522.30. If an MOU with different pension benefits is in effect on PEPRA's operative date, January 1, 2013, new employees will be covered by the terms of the MOU until it expires. (PEPRA § 7522.30, subd. (f).)

[15] PEPRA section 7522.04, subdivision (g), defines "normal cost," stating in part:

> The portion of the present value of projected benefits under the defined benefit that is attributable to the current year of service, as determined by the public retirement system's actuary according to the most recently completed valuation.

Local 39 relies solely on PERL section 20516.5 to assert that bargaining unit employees have a statutory right to continue receiving the EPMC because unilaterally changing it before January 1, 2018, is prohibited. PERL section 20516.5, applicable to classic employees, states:

> (a) Equal sharing of normal costs between a contracting agency or school employer and their employees shall be the standard. It shall be the standard that employees pay at least 50 percent of normal costs and that employers not pay any of the required employee contribution.
>
> (b) Notwithstanding any other provision of this part, a contracting agency or a school district *may* require that members *pay 50 percent of the normal cost* of benefits. However, that contribution shall be not more than 8 percent of pay for local miscellaneous or school members, not more than 12 percent of pay for local police officers, local firefighters, and county peace officers, and no more than 11 percent of pay for all local safety members other than police officers, firefighters, and county peace officers.
>
> (c) Before implementing any change pursuant to subdivision (b), for any represented employees, the employer shall complete the good faith bargaining process as required by law, including any impasse procedures requiring mediation and factfinding. *Subdivision (b) shall become operative on January 1, 2018*. Subdivision (b) shall not apply to any bargaining unit when the members of that contracting agency or school district are paying for at least 50 percent of the normal cost of their pension benefit or the contribution rates specified in subdivision (b) under an agreement reached pursuant to Section 20516.

[Emphasis added.]

PERL section 20516.5, subdivision (a), shows that the Legislature set the same "standard" for new and classic employees, that employees pay at least 50% of the normal cost of pension benefits, and that employers not pay any of the required employee contribution. In subdivisions (b) and (c), however, classic employees are treated differently than new employees. It is not mandatory that classic employees pay 50% of the normal cost. The provision states that an employer "may" require classic employees to pay 50% of normal cost,

subject to certain compensation caps.[16] Subdivision (b) addresses only the "normal cost" of benefits. There is no reference to an employee's statutory member contribution in subdivisions (b) or (c).

Subdivision (c) provides that an employer's authority to unilaterally implement the requirement that classic employees pay 50% of normal costs is not effective until January 1, 2018. Before an employer can implement this requirement, subdivision (c) requires the employer to complete the bargaining process through impasse in good faith.

The plain meaning of PERL section 20516.5 demonstrates that before January 1, 2018, an employer may not unilaterally implement the requirement that classic employees pay at least 50% of the normal cost of pension benefits. This section must be considered, however, in the context of the entire legislative scheme. (*Board of Trustees of the California State University v. PERB*, *supra*, 155 Cal.App.4th 866, 876; *Grossmont-Cuyamaca Community College District*, *supra*, PERB Decision No. 1958.) Other provisions of PERL establish that an employer's authority to continue to pay the EPMC, or require classic employees to pay the employee statutory member contribution, has not changed.[17]

---

[16] If required to pay 50% of the normal cost, subdivision (b) caps classic employee contributions at 8%, 11%, or 12%, depending upon the employee classification.

[17] Commentators acknowledge differing views of the applicable statutory provisions. See Steele, *CPER Pocket Guide to Public Employee's Pension Reform Act* (2nd ed. 2015) p. 21-22.

> There is ambiguity in the law regarding whether the employer can unilaterally implement any changes at all in cost-sharing for "classic members" prior to 2018. One perspective is that an employer cannot unilaterally implement any cost-sharing changes on "classic members" between January 1, 2013, and December 31, 2017, even to reduce or eliminate EPMC. Some employers disagree, citing Government Code sections 20691 and 20516(h). Such employers argue that Government Code section 20691 authorizes an employer to eliminate EPMC, and

PERL section 20691 authorizes an employer to continue paying, or to modify or cease paying, classic employees' statutory member contribution, stating, in part:

> (a)(1) Except as provided in subdivision (b), notwithstanding any other law, a contracting agency or school employer may pay all or a portion of the normal contributions required to be paid by a member. . . .
>
> *(2) Nothing in this subdivision shall be construed to limit the authority of a contracting agency or school employer to periodically increase, reduce, or eliminate the payment by the contracting agency or school employer of all or a portion of the normal contributions required to be paid by members, as authorized by this section.*
>
> (b) Notwithstanding subdivision (a), employers shall not pay a portion of the normal contributions for members who are subject to subdivision (c) of Section 7522.30, except where authorized pursuant to subdivision (f) of Section 7522.30.

[Emphasis added.]

PERL section 20691 has long authorized employers to modify or eliminate the EPMC after meeting and conferring in good faith. Subdivision (a)(1) permits an employer to pay all or part of the employees' statutory member contribution. Subdivision (a)(2) authorizes an employer to increase, reduce, or eliminate the EPMC without the limitations in PERL section 20516.5, subdivision (c).

The Legislature was well aware of an employer's authority to modify or eliminate the EPMC, because it amended this section as part of the PEPRA clean-up legislation.[18] In 2013,

---

> that Government Code section 20516 allows employers to impose changes that were previously authorized under the Public Employees Retirement Law. CalPERS may agree with that perspective.
>
> [Footnotes omitted.]

[18] SB 220 (Ch. 526, Stats. 2013.)

the Legislature added subdivision (b) to PERL section 20691 to clarify that employers are prohibited from paying any portion of new employees' contributions. In amending this section after PEPRA was enacted, the Legislature did not change the employer's authority to modify or eliminate the EPMC for classic employees. If the Legislature had intended that employers be prohibited from changing the EPMC before January 1, 2018, it had the opportunity to do so when it amended this section. But the Legislature did not include any limitation on an employer's existing authority to modify or eliminate the EPMC, nor did it prohibit an employer from imposing a change in employee contributions after impasse, as was included in PERL section 20516, subdivision (b).

This interpretation is reinforced by PERL section 20516, which permits employers and employees to agree that employees will pay all or part of the employer's pension contribution. This section authorizes employees to pay the employer's contribution only by agreement, prohibiting an employer from unilaterally imposing payment of the employer contribution. However, PERL section 20516, subdivision (h), also states:

> Nothing in this section shall require a contracting agency to enter into a memorandum of understanding or collective bargaining agreement with a bargaining representative in order to increase the amount of *member contributions* when such a member contribution increase is authorized by other provisions under this part.

[Emphasis added.]

While PERL section 20516 expressly requires mutual agreement to require employees to pay part of the employer's contribution, subdivision (h) authorizes an employer to unilaterally implement an increase in the "amount of member contributions." PERL section 20691, authorizing an employer to eliminate the EPMC, is included in the same part as PERL section 20516, subdivision (h). PERL section 20516, subdivision (h), does not contain

any limiting language to prohibit an employer from increasing the amount of member contributions before January 1, 2018. Thus, PERL section 20516, subdivision (h), bolsters the interpretation that PERL section 20691 authorizes employers to unilaterally eliminate the EPMC, subject to good faith negotiations.

Local 39 contends that these three provisions, PERL sections 20516.5, 20691, and 20516, must be harmonized to eliminate any conflict. Local 39 asserts that when read together, the January 1, 2018 limiting date in PERL section 20516.5, subdivision (c), must be applied to all three provisions. Local 39 contends, therefore, that an employer is prohibited from making a unilateral change in employee payment of retirement contributions from January 1, 2013, PEPRA's effective date, until January 1, 2018.

Local 39's interpretation would prohibit employers from unilaterally reducing or eliminating the EPMC for five years. This view is contrary to the interpretation announced by CalPERS, the administrative body authorized to administer PEPRA and PERL.[19] After PEPRA was enacted, CalPERS advised that:

> Employers who wish to eliminate or reduce EPMC for classic members are able to do so under existing law through collective bargaining and contract amendments.[20] Existing PERL statutes allow employers to periodically increase, reduce or eliminate employer paid member contributions.

CalPERS' interpretation uses the same language as PERL section 20691, authorizing employers to "periodically increase, reduce or eliminate" the EPMC. In fact, CalPERS posted on its website, under "Frequently Asked Questions," that PERL section 20691 allowed employers to "reduce or eliminate" the EPMC. CalPERS' "contemporaneous administrative

[19] PERL section 20004.

[20] "Contract amendments" refers to a member agency's contract with CalPERS.

construction" of the pension statutes it administers "is entitled to great weight." (*Marzec v. California Public Employees Retirement System, supra*, 236 Cal.App.4th 889, 907; *Board of Trustees of the California State University v. PERB, supra*, 155 Cal.App.4th 866, 876.) CalPERS confirmed that other provisions of PERL continue to authorize employers to "increase, reduce, or eliminate" the EPMC. There is no statutory right, therefore, to continue to receive the EPMC until January 1, 2018. The Court implemented, as part of its LBFO, the elimination of the employer paid statutory employee member contribution of 7%. By this action, the Court did not require employees to pay 50% of the "normal cost" of pension benefits under PERL section 20516.5. Since there is no statutory right to continue to receive the EPMC until January 1, 2018, the Court did not violate its duty to bargain in good faith when it implemented its LBFO to eliminate the EPMC.

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE-22-C, *Stationary Engineers Local 39 v. El Dorado County Superior Court*, are hereby DISMISSED.

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

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

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a), and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c), and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091, and 32130.)

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