STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UTILITIES MANAGEMENT & PROFESSIONAL ASSOCIATION OF PALO ALTO, Charging Party, v. CITY OF PALO ALTO, Respondent.	Case No. SF-CE-1413-M PERB Decision No. 2664-M August 21, 2019

Appearances: Davis & Reno by Alan C. Davis and Sylvia C. Courtney, Attorneys, for Utilities Management & Professional Association of Palo Alto; Sloan Sakai Yeung & Wong by Charles D. Sakai and Sherry Lin, Attorneys, for City of Palo Alto.

Before Banks, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Utilities Management & Professional Association of Palo Alto (UMPAPA) to the attached proposed decision issued by an administrative law judge (ALJ). The ALJ found that the City of Palo Alto (City) violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB Regulations[2] by failing to provide relevant and necessary information and otherwise engaging in bad faith bargaining. UMPAPA, the prevailing party, does not except to the ALJ's liability findings, but rather asks us to alter the ALJ's proposed remedial order in two respects. First, UMPAPA requests that we supplement the ALJ's direction to meet and confer in good faith, specifically urging us to clarify that the City must reinstate a

[1] The MMBA is codified at Government Code section 3500 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.

critical proposal that the City withdrew in bad faith. Second, UMPAPA asks that we amend the proposed order to include an attorney's fee award. The City filed no exceptions, and urges us to deny UMPAPA's exceptions.

We affirm those portions of the proposed decision to which no party excepted, namely, the ALJ's findings on liability and three undisputed aspects of the ALJ's proposed remedial order: directives to produce the information at issue, to post an official notice electronically and at employee worksites, and to cease and desist from interfering with or denying union and employee rights. Because those portions of the proposed decision were not before us on exceptions, they remain non-precedential; in other words, they are final and binding only on the parties to this case. (PERB Regs. 32215, 32300, subd. (c); *City of Torrance* (2009) PERB Decision No. 2004-M, p. 12.)

With respect to the attorney's fee issue, which is not addressed in the proposed decision, we find that UMPAPA has not proven it is entitled to an attorney's fee award. As to the proposed decision's directive to meet and confer in good faith, we supplement the proposed order with a more specific order, as described below.[3]

REMEDIES

The Legislature has delegated to PERB broad powers to remedy unfair practices or other violations of the MMBA and to take any action the Board deems necessary to effectuate the Act's purposes. (MMBA, §§ 3509, subd. (b), 3510; *City of San Diego* (2015) PERB Decision No. 2464-M, p. 42, affirmed *sub nom. Boling v. PERB* (2018) 5 Cal.5th 898, 920, *reh'g denied* (Oct. 10, 2018); *Mt. San Antonio Community College Dist. v. Public Employment*

[3] Absent good cause, the Board will not entertain initial exceptions by a prevailing party that would not change the outcome of the proposed decision. (*Oak Valley Hospital District* (2018) PERB Decision No. 2583-M, p. 5, quoting *Fremont Unified School District* (2003) PERB Decision No. 1528, p. 3.) In this case, each of the two issues UMPAPA has raised would impact the remedial order, which qualifies as a change in outcome.

Relations Bd. (1989) 210 Cal.App.3d 178, 189-190.) A "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) An appropriate remedy therefore should compensate affected employees and other injured parties, and should withhold from the wrongdoer the fruits of its violation. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13; *Mead Corp. v. NLRB* (11th Cir. 1983) 697 F.2d 1013, 1023 (*Mead Corp.*), enforcing *The Mead Corp.* (1981) 256 NLRB 686; *Carian v. Agricultural Labor Relations Bd.* (1984) 36 Cal.3d 654, 673-674.) In addition to these restorative and compensatory functions, a Board-ordered remedy should also serve as a deterrent to future misconduct, so long as the order is not a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. (*City of San Diego*, *supra*, PERB Decision No. 2464-M, pp. 40-42; *City of Pasadena*, *supra*, pp. 12-13.)

With these principles in mind, we examine the two primary issues raised in UMPAPA's exceptions. For context, we first summarize the ALJ's most relevant liability findings.

I. Summary of Relevant Liability Findings

From the outset of negotiations through April 20, 2016, when the City presented its last, best, and final economic proposals, the parties deferred negotiations on non-economic issues. The City's economic proposal of April 20, 2016 incorporated by reference its Management Compensation Plan for terms not otherwise specified. (Proposed Decision, pp. 28-30.) The City did not initially provide the language of the Management Compensation Plan. (*Id*., p. 28.) UMPAPA countered with a proposal for a one-year contract. In response, on April 20, 2016, and by e-mail dated April 27, 2016, the City proposed that the parties bifurcate economic issues from non-economic issues, which would allow pay increases to go into effect while the parties continued to negotiate non-economic terms. (*Id*., pp. 30, 32, 56.)

In reliance on the City's bifurcation proposal, UMPAPA took the City's economic proposal to its members, who ratified it. (Proposed Decision, p. 31.) UMPAPA reasonably expected the City to have its Council vote on implementing the economic terms on a bifurcated basis. However, what actually happened departed quite significantly from that expectation: The City made a non-economic proposal that the ALJ found to be predictably unacceptable, and when UMPAPA rejected that proposal, the City responded by withdrawing the bifurcation plan.[4] (*Id.*, pp. 33-34.) This conduct derailed negotiations, compounding other bad faith conduct by the City, such as sending a negotiating team with insufficient authority and delaying negotiations for unexplained or unjustified reasons. (*Id.*, pp. 56-63.)

II. UMPAPA's Request that PERB Clarify the City's Meet and Confer Obligation

The proposed decision directed the City, if requested by UMPAPA, to "meet and confer in good faith with representatives of UMPAPA regarding wages, hours, and other terms and conditions of employment, as that duty is defined in Government Code, section 3505." (Proposed Decision, p. 65.) Although UMPAPA does not request an order directing the City to withdraw its predictably unacceptable proposal, UMPAPA seeks clarification that in order to bargain in good faith as directed, the City must reinstate the bifurcation plan and related last, best, and final economic proposals that the City withdrew in bad faith.

[4] More specifically, on May 11, 2016, after UMPAPA ratified the City's bifurcation proposal and agreed to the City's economic terms, the City presented its first full written draft of the proposed MOU. This draft contained the actual language from the Management Rights Clause and Management Compensation Plan, including a declaration that certain management positions were at-will and employees hired into those positions would have no property or other interest in continued employment with the City. (Proposed Decision, pp. 31-32.) UMPAPA had previously objected to at-will status, and the union did so again on May 11, countering with a proposal that deleted the at-will language and included a provision for binding arbitration, among other changes. UMPAPA's counterproposal on these non-economic terms caused the City to change course and not schedule a Council vote on the economic terms and bifurcation. (Proposed Decision, pp. 32-34.)

If a party has withdrawn a contract proposal as part of an overall course of bad faith conduct, it may be properly ordered to reinstate the withdrawn offer. (*Mead Corp., supra,* 697 F.2d at pp. 1022–1023.) Because our task is to assure fair collective bargaining rather than to impose contractual terms on parties, we do not normally order a bargaining party to put forward a particular proposal that it has never before made in bargaining. (See, e.g., *City of Pasadena, supra,* PERB Order No. Ad-406-M, pp. 13-14 [discussing landmark decision interpreting federal law, *H. K Porter Co. v. NLRB* (1970) 397 U.S. 99, 106 (*H. K. Porter*), and related PERB precedent].) In contrast, it is appropriate to order a bargaining party to return to a prior bargaining position that it abandoned in bad faith, a remedy that is fundamentally different from ordering a party to make a proposal that it never previously offered. (*Mead Corp., supra,* 697 F.2d 1013, 1022–1023 [discussing propriety of such a remedy under *H.K. Porter* principles]; *Hyatt Management Corp. of New York, Inc. v. NLRB* (D.C. Cir. 1987) 817 F.2d 140, 143, fn. 3 [explaining why order—requiring that bargaining party return to position it abandoned as part of its bad faith conduct—comports with *Mead Corp.* and does not conflict with *H. K. Porter*]; *TNT USA, Inc. v. NLRB* (2nd Cir. 2000) 208 F.3d 362, 367 [citing *Mead Corp., supra,* 697 F.2d at p. 1023, and upholding National Labor Relations Board's (NLRB) order that employer "reinstate a proposal it previously voluntarily presented during negotiations and subsequently withdrew"].)

Based on the liability findings that both parties now accept, a *Mead Corp.* order is necessary to restore the situation as nearly as possible to that which would have existed but for the City's bad faith conduct. Such an order is also integral to requiring the City to cease and desist from its unlawful conduct. We therefore direct the City to put back on the table the

bifurcation and related last, best, and final economic terms that the City withdrew in bad faith, if UMPAPA so requests.[5]

III. UMPAPA's Request for Attorney's Fees

UMPAPA contends that attorney's fees should be awarded because the City violated its duty to bargain in good faith over an extended period of time, in multiple ways, and in a manner which was allegedly duplicitous. The City's conduct, UMPAPA contends, was intentionally designed to undermine the small union. The City argues that attorney's fees may only be awarded if a party engages in bad faith conduct in its litigation before the agency, and the underlying conduct which gave rise to the charge is of no import to an attorney's fees determination. Neither party's argument entirely comports with PERB precedent on awarding attorney's fees as a litigation sanction. We explain.

[5] Our decision does not prevent the City Council from voting on the bifurcation plan and the related last, best, and final economic terms that the City offered and UMPAPA ratified. Notably, the facts of this case unfolded shortly after the Legislature enacted AB 537 in 2013, amending MMBA section 3505.1, effective January 1, 2014. As amended, section 3505.1 explicitly allows a union to bring an unfair practice charge alleging that a governing body's rejection evidences bad faith. Thus, a governing body's rejection of certain terms, like a union membership vote to reject certain terms, does not excuse either party from the duty to refrain from vesting negotiators with insufficient authority and/or engaging in regressive bargaining—indicia of bad faith that can co-occur. (See, e.g., *Chino Valley Unified School District* (1999) PERB Decision No. 1326, pp. 5-6.) Rather, if an employer or union fails to obtain ratification, the requirements of good faith bargaining remain the same: A party's subsequent less favorable offer generally evidences regressive bargaining and/or a failure to vest negotiators with sufficient authority, unless accompanied by a credible, rationally supported explanation of changed economic circumstances sufficient to support the change in position. (*City of Arcadia* (2019) PERB Decision No. 2648-M, pp. 39-43; *Anaheim Union High School District* (2016) PERB Decision No. 2504, adopting proposed decision at p. 43; *The Mead Corp.*, *supra*, 256 NLRB at p. 696.) Alternatively, a party may withdraw concessions on some subjects, while offering more favorable terms on others, if done as part of a genuine attempt to reach an overall compromise. (See, e.g., *Charter Oak Unified School District* (1991) PERB Decision No. 873, pp. 17-18 [employer did not engage in regressive bargaining when it withdrew concessions on class size and discipline, but made offsetting improvements regarding salary and anniversary increments].)

To obtain reimbursement of attorney's fees or other litigation expenses incurred while litigating a matter in front of PERB, the moving party must demonstrate that the claim, defense, motion, or other action or tactic was "without arguable merit" and pursued in "bad faith." (*Lake Elsinore Unified School District* (2018) PERB Order No. Ad-446a, p. 5 (*Lake Elsinore*); *City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19 (*City of Alhambra I*); *City of Alhambra* (2009) PERB Decision No. 2037-M, p. 2.) To determine whether a claim, defense, motion, or other action is frivolous, we examine whether it is so manifestly erroneous that no prudent representative would have filed or maintained it. (*Lake Elsinore, supra*, PERB Order No. Ad-446a, p. 5 and cases cited therein). In *Lake Elsinore*, for instance, we found that the employer's request for reconsideration was without even arguable merit where it failed to comply with PERB regulations and decisional law directly on point, and it included no serious argument for extending, modifying, or reversing existing law or for establishing new law. (*Ibid*.)

Even if a party requesting attorney's fees can meet the "without arguable merit" prong, it must also show that the opposing party acted in bad faith. (Lake Elsinore, *supra*, PERB Order No. Ad-446a at p. 6.) For the purposes of this test, the term "bad faith" includes conduct that is dilatory, vexatious, or otherwise an abuse of process. (*Ibid*., citing *City of Alhambra I, supra*, PERB Decision No. 2036-M, p. 19.) Showing that an action or tactic was undertaken in "bad faith," does not require showing that the party and/or representative necessarily acted with an evil motive. (*Lake Elsinore*, *supra*, at p. 6, citing *West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702 (*West Coast Development*).) Prosecution of a frivolous action or defense may itself be evidence supporting a finding of subjective bad faith, as might other conduct which a party or representative knows or reasonably should know will unreasonably or unnecessarily cause delay or harass or injure an opposing party or representative, or impede the tribunal's own process. (*Ibid*.) However, we follow California Code of Civil Procedure section 128.5 in

requiring *some* showing of subjective bad faith, even if it must be inferred from circumstantial evidence. (*Lake Elsinore, supra*, PERB Order No. Ad-446a, p. 6, citing *West Coast Development, supra*, 2 Cal.App.4th at pp. 704-705 and *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635-636.)

Here, the positions taken by the City's representatives were unsuccessful but nonetheless were positions that a prudent representative might legitimately take in good faith. UMPAPA has established neither that such positions were without arguable merit, nor that they were taken in bad faith. Accordingly, we deny UMPAPA's request for attorney's fees.[6]

ORDER

Based upon the findings of fact and conclusions of law regarding liability in the proposed decision, to which neither party excepted, it is found that the City of Palo Alto (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., and PERB Regulations. The City violated the Act by failing to provide relevant and necessary information

[6] As respondent acknowledged in its pleadings, a charging party is free to request reimbursement of costs incurred as a result of a respondent's underlying conduct, and we analyze such a request under traditional make-whole principles. (See *Omnitrans* (2009) PERB Decision No. 2030-M, p. 30 (*Omnitrans*) [awarding attorney fees in ancillary case made necessary because of respondent's violation]; *Camelot Terrace, Inc. v. NLRB* (D.C. Cir. 2016) 824 F.3d 1085, 1092-1093 (*Camelot Terrace, Inc.*) [upholding NLRB's order that employer reimburse union for bargaining costs as a remedy for having engaged in bad faith bargaining, and reasoning that "[a]n award of bargaining expenses remedies an unfair labor practice by ensuring that, upon resolution of the [charge], the injured party can return to negotiations on the same footing it occupied before the violation."].) In contrast, the test described in *Lake Elsinore, supra*, PERB Order No. Ad-446a, pp. 5-6 applies to requests for litigation sanctions. The difference is best explained as follows: While a make-whole remedial order under *Omnitrans* and *Camelot Terrace, Inc.* may include, among other items, staff costs or attorney's fees reasonably incurred as a result of a respondent's unlawful conduct, any attorney's fees awarded pursuant to such make-whole principles normally may not include attorney's fees expended simply to litigate the unfair practice charge at issue—under the American Rule, such an attorney fee award is appropriate only as a litigation sanction, if the charging party satisfies the *Lake Elsinore* test. (*Camelot Terrace, Inc., supra*, 824 F.3d at pp. 1089-1095 [refusing to enforce NLRB's order of litigation costs in the underlying case under make-whole principles, and distinguishing such fee shifting from make-whole relief, including bargaining costs].)

in response to valid requests; and failing to meet and confer in good faith with the exclusive representative of an appropriate bargaining unit, pursuant to MMBA section 3505. By this conduct, the City also interfered with the right of unit employees to participate in the activities of an employee organization of their own choosing, in violation of MMBA section 3506 and PERB Regulation 32603, subdivision (a), and denied UMPAPA the right to represent employees in their employment relations with a public agency in violation of MMBA section 3503 and PERB Regulation 32603, subdivision (b).

Pursuant to section 3509 of the Government Code, it hereby is ORDERED that the City of Palo Alto, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing and/or failing to meet and confer in good faith with UMPAPA regarding matters within the scope of representation.

2. Interfering with the right of bargaining unit employees to be represented by an employee organization of their own choosing.

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

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

1. Within ten (10) workdays after this Decision is no longer subject to appeal, and upon a request from UMPAPA, provide to UMPAPA a copy of any report or document upon which the City bases or based its belief that the City could experience a recession beginning in 2016 or at a later date.

2. Within ten (10) workdays after this Decision is no longer subject to appeal, and upon a request from UMPAPA, provide to UMPAPA a copy of the City's bond rating.

3. Within ten (10) workdays after this Decision is no longer subject to appeal, and upon a request from UMPAPA, meet and confer in good faith with regard to matters within the scope of representation and return to the City's prior bargaining position by putting back on the table the bifurcation plan and related last, best, and final economic terms offered by the City on April 20, 2016 and by e-mail dated April 27, 2016.

4. Within ten (10) workdays after this Decision is no longer subject to appeal, post at all work locations where notices to employees in UMPAPA customarily are placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City of Palo Alto indicating that it will comply with the terms of this Order. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with employees represented by UMPAPA. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The City shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on UMPAPA.

Members Banks and Paulson joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-1413-M, *Utilities Management & Professional Association of Palo Alto v. City of Palo Alto*, in which all parties had the right to participate, it has been found that the City of Palo Alto (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., and Public Employment Relations Board (PERB) Regulations (Cal. Code Regs., tit. 8, § 3100 et seq.). The City failed to provide relevant and necessary information to Utilities Management & Professional Association of Palo Alto (UMPAPA), failed to meet and confer in good faith with UMPAPA, and interfered with protected rights of UMPAPA and the employees it represents.

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

A. CEASE AND DESIST FROM:

1. Refusing and/or failing to meet and confer in good faith with UMPAPA regarding matters within the scope of representation.

2. Interfering with the right of bargaining unit employees to be represented by an employee organization of their own choosing.

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

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

1. Within ten (10) workdays after this Decision is no longer subject to appeal, and upon a request from UMPAPA, provide to UMPAPA a copy of any report or document upon which the City bases or based its belief that the City could experience a recession beginning in 2016 or at a later date.

2. Within ten (10) workdays after this Decision is no longer subject to appeal, and upon a request from UMPAPA, provide to UMPAPA a copy of the City's bond rating.

3. Within ten (10) workdays after this Decision is no longer subject to appeal, and upon a request from UMPAPA, meet and confer in good faith with regard to matters within the scope of representation and return to the City's prior bargaining position by putting back on the table the bifurcation plan and related last, best, and final economic terms offered by the City on April 20, 2016 and by e-mail dated April 27, 2016.

Dated: _____ CITY OF PALO ALTO

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UTILITIES MANAGEMENT & PROFESSIONAL ASSOCIATION OF PALO ALTO, Charging Party, v. CITY OF PALO ALTO, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-1413-M PROPOSED DECISION (July 27, 2018)

Appearances: Davis & Reno by Alan C. Davis, Attorney, for Utilities Management & Professional Association of Palo Alto; Renne Sloan Holtzman Sakai by Erich Shiners, Attorney, for City of Palo Alto.

Before Alicia Clement, Administrative Law Judge.

PROCEDURAL HISTORY

On August 22, 2016, the Utilities Management & Professional Association of Palo Alto (Charging Party or UMPAPA) filed the above-referenced charge alleging that the City of Palo Alto (Respondent or City) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] arising from a course of conduct undertaken by the City during negotiations for an initial collective bargaining agreement. The City filed a position statement on September 29, 2016. On October 31, 2016, the Public Employment Relations Board's (PERB or Board) Office of the General Counsel granted a request by UMPAPA to expedite processing of the unfair practice charge and accordingly, on November 4, 2016, issued a Complaint charging the City with a failure to meet and confer in good faith, in violation of MMBA sections 3506 and 3506.5,

[1] The MMBA is codified at Government Code section 3500 et seq.

subdivision (a). The City filed a timely Answer to the Complaint on November 29, 2016. The parties participated in an Informal Settlement Conference on January 5, 2017, but the matter was not resolved. A Formal Hearing was held on May 8 and 9, 2017, and after the submission of closing briefs on June 20, 2017, this matter was submitted for determination.

FINDINGS OF FACT

The City's Utilities Department is "enterprise" funded—in other words, it is funded by the fees of its customers, and not through the City's general fund. Although this funding mechanism is not unusual among public utilities, the Utilities Department is unusual in that it provides a much wider range of services than most comparable public utilities, including electric, gas, water, wastewater, and dark fiber utilities, as well as storm and refuse services. Utilities Compliance Manager Debra Lloyd-Zanetti (Lloyd) was UMPAPA's Secretary during the events surrounding UMPAPA's initial recognition, and later became UMPAPA's lead negotiator.

UMPAPA filed its petition for recognition as the representative of the management and professional employees in 2010. The City disputed the appropriate composition of the bargaining unit and, in 2011, an arbitrator defined the bargaining unit to include everyone below the Director of Utilities on the "Utilities Department Managers" Organizational Chart.[2] Neither party has provided the PERB with a copy of the arbitrator's decision. After the

[2] The following positions are included in the bargaining unit: Administrative Assistant; Manager Communications; Senior Administrator; Senior Business Analyst; Assistant Director of Utilities – Customer Support Services; Manager Customer Services and Meter Reading; Manager Utility Marketing Services; Senior Resource Planner; Assistant Director – Utilities Operations; Manager Utilities Operations WGW; Supervisor Water Gas Wastewater; Supervisor Water Transmission Operations; Manager Electric Operations; Supervisor Electrical Systems; Assistant Director Utilities – Resource Management; Senior Resource Planner; Assistant Director of Utilities – Engineering; Engineering Manager – Electric; Senior Electric Project Engineer; Supervising Electric Project Engineer; Engineering Manager Water-Gas-Wastewater; Senior Project Engineer; and Supervising Project Engineer.

arbitrator's ruling on the proper composition of the bargaining unit, the parties met and conferred 27 times in an effort to reach agreement on an initial contract. Nevertheless, on April 30, 2013, UMPAPA declared that the parties were at impasse.

UMPAPA did not seek mediation or factfinding to resolve the impasse, and in June 2013, the City imposed its last, best, and final offer (LBFO). (Respondent Exhibit B.)[3] Both a management rights clause and a probation clause appear in the text of the imposed contract. The text of the imposed Management Rights clause contains the following language, with editorial markings:

> ARTICLE V – CITY RIGHT TO MANAGE
>
> The City retains and reserves, without limitation, all powers, rights, authority, duties , and responsibilities to manage the City including, but not limited, to:
>
> 1. Management and administrative control of the City, its operations, and its properties and facilities;
> 2. Evaluate, hire, promote, transfer, demote, discipline, and discharge employees;
> 3. Promulgate, enforce and periodically revise or rescind reasonable work rules, operational and administrative policies, qualitative and quantitative standards, and procedures;
> 4. Assign and distribute work;
> 5. Determine the methods, means, and personnel by which services are carried out including the right ~~to subcontract or contract out, contract in,~~ transfer duties between City employee whether or not they are in the bargaining unit, and to subcontract or contract out, subject to the provision of Article XIII, section 4 of this MOA;
> 6. Establish and revise reasonable standards of attendance, conduct, and performance and to enforce such standards;
> 7. Determine and implement technology and equipment used in the performance of work, and to determine work locations;
> 8. Determine work schedules including, but not limited to, the hours of work and rest;

[3] Given the large volume of exhibits presented at this hearing, I have included references to the exhibits in the text of this Proposed Decision, where it may be of assistance to the reader.

10. Determine payroll practices;
11. All rights conferred upon and vested in it by the law and the Constitutions of the State of California and the United States; and
12. Any other right traditionally and historically exercised by the City with respect to employees and operations within the scope of the bargaining unit.

Nothing in this Agreement is to be interpreted as constituting a waiver of the City's rights and responsibilities to manage the City and create and maintain programs and services that reflect its public's wishes. The intent of this MOA is to establish wages, working hours, and conditions of employment with the Association.

The text of imposed Article XII – PROBATION AND AT WILL STATUS, contains the following language:

Section 1 – Probation. Employees who are not At-Will shall serve an initial probationary period of twelve (12) months. During the probationary period the employee serves at the will of the City and may be terminated for no reason or for any lawful reason, and such termination is not subject to appeal.

Section 2 – At Will Status. Certain unit positions are designated as having "at-will" employment status. Employees who hold at-will positions shall have no constitutionally protected property or other interest in their employment with the City. Notwithstanding any provision in the Merit System Rules and Regulations or any other City rule, policy or procedure, at-will employees have no right or expectation to continued employment or pre-or post-disciplinary due process and work at the will and pleasure of the hiring authority. Work for an at-will employee may be eliminated and/or the employee may be terminated, or asked to resign, at any time, with or without cause, upon notice to that employee, and the employee may resign at any time upon written notice to the hiring authority.

Section 3 – At-will UMPAPA positions.

Effective on the date of adoption of this MOA, new employees hired or promoted to the following classifications shall be at-will employees:

Assistant director, engineering manager, communications manager, manager electric operations, manager customer

> service & meter reading, manager utilities marketing services, manager utilities operations WGW, utilities compliance manager.
>
> At-will employees will be eligible for, and shall receive, all regular benefits (i.e., health insurance, PERS contribution to the extent paid by City, etc.) and vacation, sick leave, and management leave as are generally provided to unit employees and described in this MOA, as amended from time to time.

The City has adopted a Merit System to govern its personnel matters, which is applicable to "all employees in the service of this City." All full-time and part-time regular positions are subject to a six-month probationary period. During the probationary period, the employee may be suspended, demoted, or terminated without cause and with no right to appeal the action. Causes for discipline are listed in Chapter 10, section 1002, and when cause is found, written notice of the disciplinary action must be provided to the employee prior to the effective date of the discipline. Discipline of a permanent employee for cause may be appealed.

Chapter 12 of the merit Rules contains provisions governing relations between the City and its employee organizations, as opposed to the rules described in Chapter 10 of the Merit System, which govern relations between the City and individual employees. Chapter 12, section 1203(e) defines "management employee" as "any City Council Member, or any employee having the authority to exercise independent judgment in the interests of the City to hire, transfer, suspend, promote, discharge, assign, reward or discipline other employees, or effectively to recommend such action." Section 1207(c), "Limitation; management and confidential employees," states:

> No management or confidential employee may be represented in their employment relations with the City by an employee organization which represents other types of employees. However, nothing in this chapter should be interpreted as

> prohibiting management and confidential employees from joining and holding office in an employee organization.

Section 1203 of the Merit Rules defines "professional" employees as "employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction…" Professional employees have the right under the Merit Rules to be represented separately from non-professional employees.

At a Special Meeting of the City Council on September 4, 2012, the City Council passed a motion to adopt the following two resolutions: 1) 9282 Adopting a New Compensation Plan for Management and Professional; and 2) 9283 Amending Chapter 9 of the Merit System Rules and Regulations to Revise Rules Related to Probationary Periods. (Charging Party Exhibit 76A.) Resolution 9283 amended the Merit System Rules to state:

> **901**. **Probationary period for new employees**. Original appointments to full-time or part-time regular municipal service positions that are not designated as "at-will" shall be tentative and subject to a probationary period of twelve months for management and confidential employees, and as set forth in Chapters 14-16 (memoranda of agreement for represented employees) for other employees.

Attachment B to the proposed Compensation Plan for Management and Professional Personnel is titled, At-Will Positions Management and Professional Unit. (Charging Party Exhibit 78.) The preamble to the list of positions states:

> The intent of this provision under the Management/Professional Compensation Plan is to designate classifications at the department head, assistant director, deputy director, and division manager levels as at-will. The applicable Council Appointed Officer may designate newly created positions at those levels not included on this list as at-will. Existing classifications that shall be at-will include but are not limited to:
>
> […]
>
> Utilities

Director, Utilities

*Assistant Director Utilities Engineering**
*Assistant Director Utilities Operations**
*Assistant Director Utilities Customer Support Services**
*Assistant Director Utilities/Resources Management**
*Communications Manager**
*Engineering Manager – Electric**
*Engineering Manager – WGW**
*Manager Customer Service & Meter Reading**
*Manager Electric Operations**
*Manager Utilities Mkt Services**
*Manager Utilities Operation WGW**
*Utilities Compliance Manager**

***Management positions up to and including Assistant Director in Utilities are represented by UMPAPA and currently under negotiations**

The Staff Report that accompanied the resolutions contains the following relevant background information:

> The Management and Professional group includes approximately 202 active, full-time employees who staff critical roles at the City by managing our services and finances. Demographically this group is transitioning into retirement, with nearly one-half of City employees eligible to retire within the coming five years. Connected with the changing face of City staff is our desire to enhance the drive, innovation, and effectiveness of City employees while providing a variety of benefits in a fiscally responsible manner. It is no longer a workable paradigm to provide steady employment with a generous pension and health benefits in return for narrowly focused jobs that are carried out with pleasant and courteous service. Dynamic times call for a workforce choosing to serve the City in order to better their community and to bring City services up to date with current good practices found in businesses and social institutions around the world. Palo Alto is the center of innovation and technology solutions to many of society's needs. Therefore, the City must serve as a beacon of innovative government, as well as leverage the incredible array of resources at our front door.
>
> Dynamic economic times also call for structural changes to City benefits, which have increased in cost substantially in recent years, and are projected to continue increasing. The ratio of

benefits to salary has risen from 50 percent of salary in 2010 to 62 percent in 2012. Employee commitment to take accountability for a portion of their own benefits costs is part of a fiscally responsible total compensation plan. This Plan creates such structural benefit changes that will serve the City in coming uncertain economic times and that also supports our culture shift to encourage engaged and innovative employees.

The Management and Professional employees are unrepresented and do not have a memorandum of agreement or other contract. The benefits for this group are covered in a compensation plan that is adopted by a resolution of the Council. In an effort to lead in addressing the City's financial challenges, the Management and Professional group has contributed over the past decade by implementing various cost-containing solutions including receiving no salary increases in several years, capping health insurance at the Blue Shield rate instead of the PERS Care rate, and changing eligibility requirements for retiree medical benefits. In 2008-2009, the group helped the City to address a significant budget gap by eliminating the Variable Management Compensation (VMC) benefit. In 2011, this group adopted an employee contribution to pay for health plan premiums for actives and future retirees. All these measures have been implemented in support of the City's goal to create structural solutions to curtail increasing employment costs while at the same time creating a supportive, accountable and creative work environment. Complementary to these plan changes are additional budgeted training funds that will be earmarked in department budgets for employee education and development. Further to the goal of creating an innovative, learning culture for employees at the City, the Human Resource Department is focused on leading culture change to support engaged management and professional staff.

The Staff Report also contains the following relevant discussion:

"At-Will" status for key positions

- All newly hired and newly promoted department heads, assistant directors, deputy directors, division managers and selected other positions will have "At-will" status. At-will employees may be terminated or asked to resign at any time, with or without cause. This status differs from the traditional "for cause" municipal employee who has due process rights in his or her employment. As a policy promoting effective operation and administration of City

business, staff believes that leadership of departments should be at will.

- This Plan provides that, upon involuntary termination, such employees are eligible for severance equal to one month (4 weeks) of salary and benefits upon hire, plus 1 week for each year of City of Palo Alto service, to a maximum of 12 weeks' severance after 8 years' service
- This provision does not retroactively change any current employee's status. It is applicable to employees newly hired and newly promoted into positions on the "At-will" list.

On June 24, 2013, the City Council met and adopted a "Resolution Implementing Terms for Utilities Managers and Professionals Association of Palo Alto Pursuant to California Government Code Section 3505." This resolution states, in part:

> **Background**
>
> UMPAPA petitioned to form a bargaining unit in November 2009, and following proceedings before the State Mediation and Conciliation Service, the City certified UMPAPA as a bargaining unit in 2011. This unit consists of 43 managers and administrative staff earning an average salary of $128,352 with an average total compensation of $194,450. The City and UMPAPA started meeting and conferring in good faith in July 2011. On April 30, 2013, UMPAPA declared impasse and requested that the City hold a public hearing to implement its Last, Best and Final offer.
>
> […]
>
> **Discussion**
>
> The parties have been bargaining for an initial MOA for two years and have held 29 formal meetings. During these negotiations the City has focused on negotiating three key concessions consistent with those established with other Management employee groups including the Management and Professional unit, and the Fire Chiefs' Association: (1) an employee cost share for medical premiums of 10 percent for active employees, (2) paying the full CalPERS employee retirement contribution and (3) decreasing the professional development benefit from $1500 to $500. SEIU and IAFF have

> also agreed to contracts with two of these three concessions not including this specific professional development change.
>
> In Dec. 17, 2012 [*sic*], the parties appeared to reach a tentative agreement on all issues, including the concessions outlined above. However, the agreement dissolved after the City proposed several minor clarifications throughout the contract and UMPAPA raised new concerns over the "Management Rights" provision. In particular, UMPAPA objected to language asserting the City's unilateral rights to: promulgate work rules; determine work schedules; determine job classifications and the allocation of positions; and determine the methods, means and personnel by which services are provided, including the right to contract out. Although the City attempted to address UMPAPA's concerns, it became clear that the parties would not be able to reach a final agreement. On April 30, 2013, UMPAPA declared impasse.
>
> Prior to UMPAPA's declaration of impasse, the parties were able to draft and sign tentative agreements on most subjects, and the City's Last, Best and Final Offer achieves many of the City's goals in negotiations, with the exception of the City's right to manage. Therefore staff recommends implementing the City's Last, Best and Final Offer, which is included with the attached resolution. The following provides a summary of the key terms for this unit, all of which were tentatively agreed to by both parties prior to UMPAPA's declaration of impasse:…
>
> **At-will status**
>
> - New Division Managers and Assistant Department Directors will be hired under "At-will" status with ability to separate or be asked to resign at any time with or without cause. Upon involuntary separation, UMPAPA employees will be eligible for severance up to 90 days.
>
> - Other employees in this bargaining group not considered "At-will" shall be subject to twelve (12) month probation (at-will employees do not have a probation period).

Lloyd contacted City Human Resources (HR) Manager, Melissa Tronquet (Tronquet) in January 2014 to resume negotiations just prior to the expiration of the one-year imposed contract. At that time, the City was in the process of completing a salary survey of its Utilities Department, and the parties agreed to begin negotiations in April 2014, at a time when it was

anticipated that the study would be complete. Although the parties discussed the possibility of meeting between January and April to discuss other matters, due to the importance that salary played in the prior negotiations, it was agreed that negotiations should focus on salary first, and that they should begin after completion of the salary survey.

During their preliminary discussions, Tronquet and Lloyd discussed the previous dispute over the salary study that had been completed during the first round of negotiations. In particular, UMPAPA disputed the City's "benchmarks" in that study and voiced its continued concerns with the accuracy of that study. (Charging Party Exhibit 5.) UMPAPA believed that the comparators used in the study did not adequately reflect the scope and complexity of the work performed by the positions in the Utilities Department bargaining unit, which resulted in the City's under-valuation of those positions. If the City intended to reuse the same comparators in the current study that were disputed previously, UMPAPA would continue to raise objections. Lloyd recollected that, after the City implemented the salaries in its LBFO, which were based on the disputed salary survey, there had been a "mass exodus" of employees to private industry and other agencies willing to pay higher salaries. (Charging Party Exhibit 6.) In February 2014, Lloyd included Director of Utilities, Valerie Fong, in these preliminary discussions. Fong corroborated Lloyd's concerns that salary would need to be addressed first before other issues like recruitment and retention could be resolved. (Charging Party Exhibit 7.) This served to solidify Lloyd's concern that negotiations would not be productive until the salary survey was complete.

In late May 2014, Lloyd and Fong had discussions with a representative of the consulting firm that was conducting the salary survey and expressed a number of concerns with that consultant's use of data. (Charging Party Exhibit 8.) In early June 2014, Tronquet sent

Lloyd an email with a copy of the most recent salary study (without revisions) and attempted to set a negotiating session for the following week. Lloyd was not available until the end of June, however, and the parties tentatively agreed to meet on July 1, 2014. However, when Lloyd learned that the revisions to the compensation study would not be available until July 13, she postponed the meeting for a couple of weeks in order to ensure that the meeting would be productive. The parties began to exchange meeting dates for the latter part of July. (Charging Party Exhibits 9 – 15.)

By early August, the City still had not received any revisions on the compensation study (Charging Party Exhibit 17), Tronquet began a maternity leave of absence, and Sandra Blanch was named as the City's negotiator in Tronquet's absence. (Charging Party Exhibit 18.) By mid-August, UMPAPA still had not received any revisions to the City's compensation study and became impatient with the lack of progress. Lloyd determined that the parties should meet, with or without the compensation study. The parties began looking at September meeting dates. The parties resolved to meet on September 4 at 2:00 p.m. (Charging Party Exhibit 19.)

UMPAPA's bargaining team was led by Lloyd, and she was at all of the bargaining sessions, accompanied by Attorney Alan Davis for most of them. Attorney Allyson Hauck negotiated on behalf of the City. Only Lloyd and Hauck testified.

The First Bargaining Session

The parties' first negotiation session was on September 4, 2014. At this session, UMPAPA gave a PowerPoint presentation, beginning with an introduction of the bargaining team members. (Charging Party Exhibit 21.) The presentation explained the different economic models that apply to the City on the one hand and the Utilities Department on the

other hand. Whereas the City is a non-profit entity, the Utility Department generates net revenue which is used to fund Utility operations as well as non-Utility City operations. UMPAPA's presentation also pointed to studies showing that Utilities work includes some of the most dangerous jobs in the country, more dangerous even than Fire and Police Services. The Utilities Department is also highly regulated by State and Federal authorities, and failure to comply with some of those regulations could result in civil and/or criminal sanctions of individuals and organizations. UMPAPA also noted that there was a high degree of Utilities Department positions that were filled with former Pacific Gas & Electric (PG&E) employees, but also that PG&E was a primary competitor for those same employees. PG&E set its salaries at 6 percent above the market with competitive benefits. Given all these concerns, UMPAPA proposed to work collaboratively with the City to ensure that the Department was able to recruit and retain qualified and talented employees, beginning with a revised Total Compensation Study for the purpose of increasing salaries of Utilities Department employees.

Hauck did not yet have authority from the City Council. Thus, while there was additional discussion about the relevant market comparisons at this first negotiation meeting, no proposals were exchanged. The parties agreed to meet again on October 14, 2014.

The Second Bargaining Session

On October 14, 2014, the City provided UMPAPA with its first bargaining proposal, which addressed only Health Benefits. (Charging Party Exhibit 22.) The existing City health benefits covered the first 90 percent of the cost for the second-most expensive health benefits plan available. The City's proposal would convert its health benefits costs to a flat-rate system in which it would contribute up to a set maximum for each City plan for eligible full time employees. In exchange for this concession (the City acknowledged that this proposal would

be a cost-savings to the City), the City would off-set with a 2 percent wage increase. Additionally, the City announced that it was steadfast in its resolve to continue using the same comparator agencies in its compensation study that had been used in the prior study, but that it had hired a different consultant to review it.

The parties agreed to meet again on November 18, 2014. On November 13, the City suggested a postponement of the scheduled negotiations because the market analysis was still incomplete. UMPAPA agreed that if the market study was not complete, the meeting would not be productive, and suggested a meeting in early December. (Charging Party Exhibit 23.) Meanwhile, UMPAPA informed the City that it had hired its own consultant to provide suggested job matches for the compensation study. After several e-mail exchanges, the parties set a meeting for January 20, 2015. (Charging Party Exhibit 26.)

The Third Bargaining Session

The January 20, 2015 meeting was unproductive. Neither party passed any additional proposals, and the City still had no completed compensation study to share. UMPAPA suggested that the City add a member to its bargaining team with some experience in Utilities, a suggestion that was not well received. Hauck suggested at this meeting that raising salaries for Utilities workers would put them at odds with the Police and Fire agencies, a premise that UMPAPA countered by pointing out that the Utilities Department employees' salaries were not funded through the City's general fund, and thus, raising the salaries of Utilities workers would not negatively impact the City's ability to pay the salaries of any other employees whose salaries were paid through the general fund, as police and fire employees' salaries were. The parties set a tentative date of February 18 for their next meeting. On February 17, the City requested a postponement of the February meeting because the new consultant was expected to

be finishing up the compensation study sometime that week. (Charging Party Exhibit 29.) After a number of e-mail exchanges, the parties tentatively agreed to hold March 2 and 4, 2015. Internally, the UMPAPA bargaining team expressed frustration at the additional delays to the completed compensation study, but these frustrations were not shared with the City's team. (Charging Party Exhibit 30.)

The Fourth Bargaining Session

On March 4, 2015, the parties met again. At this meeting, the City produced a completed compensation study, with spreadsheets. The parties discussed the study extensively, and UMPAPA raised several concerns with this study. First, the study used as one of its comparator agencies the City of Alameda, which has only an electric utility, where the employees work a 36-hour workweek. Comparing the salaries of 36-hour employees with Union employees who worked 40-hour weeks was objectionable to UMPAPA. Second, the study compared Union positions against the positions in Public Works Departments of other public agencies utilizing a 70 percent match of job duties. Dissatisfied with the City's approach, UMPAPA stated that it would provide its own study instead. The parties agreed to meet again on April 2.

The Fifth Bargaining Session

When the parties met again on April 2, 2015, UMPAPA made its first proposal. (Charging Party Exhibit 31.) UMPAPA's proposal incorporated its own compensation study. UMPAPA used different agencies as comparators, including several joint powers associations, special districts, water districts, and irrigation districts. UMPAPA included these agencies because many of them utilized the same positions that appeared in the City's Utility Department. UMPAPA's approach differed substantially from the City's approach.

Essentially, UMPAPA chose agencies based on the similarity of the duties performed by their employees, while the City utilized other cities as comparators, simply assigning position matches to those most closely resembling UMPAPA positions. UMPAPA then proposed that the City base salary increases on a competitive mid-point for the market, benchmarked against the median of the top three salaries (including benefits) for each position. UMPAPA presented a chart that showed the current salary for each position in Palo Alto compared against the same position in each comparator agency. (Charging Party Exhibit 32.) By UMPAPA's calculation, salaries for its positions lagged behind their comparators by double digit percentages, anywhere between 11 and 43 percent. UMPAPA justified its use of these comparators over the City's because by its estimation, the greatest competitor for Union positions was the private sector. UMPAPA believed based on anecdotal evidence[4] that Union employees were leaving the City for private sector jobs where they were paid 30-40 percent increases in salary. Actual data on private sector salaries was difficult to source, but UMPAPA believed that its use of a median from among the top three of its public sector comparators was a close enough approximation to private sector salaries to allow the City to make its positions competitive in the job market.

The City did not make a counter-offer at this meeting, but did ask a number of questions and appeared to be actively considering UMPAPA's presentation. The City requested and was provided an electronic copy of UMPAPA's study.

[4] According to UMPAPA, when Union employees received job offers from private entities, the City would counter these offers with retroactive salary increases. These negotiations were occurring on an individual basis, however.

The parties had a number of discussions in April and May 2015, but did not officially meet and confer during this time. After some confusion around scheduling, the parties set a meeting date of June 3, 2015. (Charging Party Exhibits 33 – 36.)

The Sixth Bargaining Session

The parties met again on June 3, 2015. The City negotiators had not gone to City Council for additional approval at this point, so they did not present any new proposals. Rather, the City spent this meeting discussing UMPAPA's proposal to reach a better understanding of its methodology for the salary study. In particular, the parties discussed a concern that UMPAPA had raised regarding the City's use of the mid-point of salaries as a control point. The City acknowledged that, structurally, UMPAPA's methodology was very different from its own. It was at this meeting that the City raised the issue of a management rights clause. It did not propose language at this time, but put UMPAPA on notice that it would do so in the future.

On August 19, 2015, Lloyd sent an e-mail to Hauck and Blanch seeking additional bargaining dates. (Charging Party Exhibit 37.) Lloyd's e-mail states, in part,

> Last time we met you presented some preliminary numbers for five positions that were potentially below market (under a mid to max benchmark) but you needed to complete the analysis and take back to the City Manager and Council for review/direction before giving us something more formal. I see that you are on the Council agenda for a closed session labor discussion on September 15. Can we expect to hear back from you shortly to set up the next negotiation meeting?"

The parties engaged in a rather lengthy e-mail conversation in an attempt to set a date for the next negotiation session. September 24 was proposed but cancelled after the City Council failed to consider UMPAPA's bargaining proposal during its September 15 closed

session meeting. Upon learning this news, Lloyd felt annoyed and made the following response:

> Allyson,
> Thank you for the update, I will cancel Thursday's meeting. We are disappointed at yet another delay and would like to get a realistic assessment of how and when negotiations can move forward. I am not seeing a closed session listed on the October 5 draft council agenda, is this still a possibility, or has it been moved again? Our suggestion is to set another meeting in October, following the expected Council meeting. If you are able to meet with Council next month we will hopefully have direction to move forward. However, if UMPAPA is dropped again from the agenda we would still like to meet in October, probably not as a formal negotiation meeting, but as an opportunity to share information and discuss the City's priorities for moving forward in finalizing an MOU for UMPAPA members. Once we hear back on the next possible council date, we can coordinate possible meeting dates.

Hauck responded to the e-mail with her apologies and an offer to meet again on October 20 after the next City Council meeting on October 19. (Charging Party Exhibit 37.)

The Seventh Bargaining Session

The parties met on October 20, 2015. At this meeting, the City's consultant, Doug Johnson, presented the City's latest compensation survey results by sharing with UMPAPA the same presentation he had made to the City Council the previous evening. (Charging Party Exhibit 39.) This nine-page study identifies twelve "core survey agencies" and four "supplemental survey agencies." All of the identified survey agencies are cities. The study also identifies 17 benchmark jobs that are unique to UMPAPA and acknowledged that even with its comparators, a significant number of the UMPAPA positions are below the median for salary. The City stated that it had set a goal of December 1, 2015, for its next bargaining proposal. UMPAPA again voiced its disagreement with the comparators being used by the City, as many of the comparators did not even have comparable positions to those in the

bargaining unit, whereas UMPAPA had continually argued that comparators should be restricted to utility positions. Lloyd recalls that all of this data had been provided in the last compensation survey—there was no new information being presented at this meeting—just the same data being provided in a new format by a new consultant.

Additional discussion at this meeting included the fact that the City Council had three new members who had begun voicing the concern that the City would be chasing the market by tying wages to market changes. Employees had recently received merit increases but no salary adjustments or COLA. The parties agreed to meet again on November 18, 2015, at which time, UMPAPA anticipated receiving a full proposal from the City. Unbeknownst to UMPAPA at this time, Hauck asked a consultant in her firm to go over the salary survey for quality control purposes, in part due to the concerns raised by UMPAPA that the survey contained inaccuracies.

The Eighth Bargaining Session

On November 18, 2015, the City presented what it titled its Proposal #2. (Charging Party Exhibit 41.) This two–page document makes economic proposals only for a 2 1/2 year agreement. During that time, employees would receive annual salary increases and market adjustments with the goal of bringing Utility Department employees to within 5 percent of the median. The City would also make a flat rate contribution to employees' health coverage plans, employees would pick up an additional contribution toward the employer's share of retirement benefits, and the City would include a reopener for the ACA[5] Cadillac tax clause and yet to be determined language for a management rights clause. Due to the clumsy wording

[5] The parties did not define this acronym. I presume it to be a reference to the Affordable Care Act.

of this last proposal, UMPAPA was given the impression that the City wanted a reopener on the management rights language, a position it found puzzling.

UMPAPA wanted to consider options that would make changes to CalPERS retirement pensions for new employees who would otherwise earn lesser retirement benefits than incumbent employees. UMPAPA wanted to consider using the "excess management benefit" to fund those efforts.

The Ninth Bargaining Session

The parties met again on November 23, 2015. There was no exchange of documents on this date, but the parties did meet for discussion. At this point, UMPAPA had reached the understanding that the City was not going to adopt UMPAPA's approach to job matches, but still had concerns and questions about the matches chosen by the City. For example, the City of Santa Clara used some job titles that UMPAPA found ambiguous and wanted to explore how and why the City chose these matches. Additionally, the City of Fremont did not have a utility department, but they did have a job titled, "Manager of Communications," which the City was comparing to the Utility Department's Manager of Communications. According to UMPAPA, the kind of work that is performed by the Manager of Communications in the Utility Department is very different from the work that might be performed by a Manager of Communications in a city that does not operate a utility. On this basis, UMPAPA argued that the City of Fremont should be removed as a comparator, and UMPAPA believed that they had reached an agreement to remove Fremont from the study. The City negotiators planned to go to the City Council on November 30 and December 9. Lloyd left the November 23 negotiation session with the impression that Hauck would support the idea of using management excess

benefits to sweeten pension benefits for new hires. There was no discussion of any non-economic proposals at this meeting.

The Tenth Bargaining Session

The parties met again on December 15, 2015. At this meeting, UMPAPA presented its proposal #2. This proposal only contained economic items. In it, UMPAPA proposed bringing wages up to the median, rather than below; they asked for a reopener for out-of-market conditions in order to fix the salary ranges as a means of addressing retention issues; and they asked for a discretionary retention or signing bonus to assist in recruitment. Lloyd recounted that it had recently taken over a year to recruit someone to fill a vacant Senior Resource Planner position and, when they found someone with the proper qualifications, they had difficulty with her salary negotiations. By Lloyd's estimation, having the ability to negotiate a signing bonus might relieve these problems in the future.

The Eleventh Bargaining Session

The parties met again on January 13, 2016, and the City presented its Proposal #3. (Charging Party Exhibit 45.) In this proposal, the City agrees to move to the median for salary adjustments in three increases of one-third each over the span of the agreement. The City also struck the language about the ACA Cadillac tax reopener, but maintained the reference to the management rights clause (though it still had not produced any language for the management rights clause). Employees would still pay 1 percent of the City's pension contribution, and the City's flat rate health benefits proposal was unchanged. For the first time in this proposal, the City added the following language: "All UMPAPA classifications that are a Management and Professional classification will receive an equivalent general salary increase as the Management and Professional classification." According to Lloyd, this language would

capture unrepresented management and professional positions, excluding police and fire. She characterized this as removing those positions from the unit for negotiations. The City's proposal states that both the hiring bonus and the management excess benefits proposals are "under consideration," but those matters had not been brought before City Council at this point. UMPAPA asked for a complete proposal from the City at this time.

The Twelfth Bargaining Session

The parties met again on January 26, 2016, and UMPAPA presented its Proposal #3. (Charging Party Exhibits 47 – 48.) In this proposal, UMPAPA sought wages at 2.5 percent above the median, and a COLA to offset the City's pension proposal. UMPAPA would agree to the flat rate health benefits proposal, provided it was offered with a me-too at the best medical plan agreed to by other bargaining units. It sought an increase in the management excess benefit to $5,000.00 per year, effective January 1, 2017. UMPAPA asked for the creation of a Labor Management Committee to discuss ongoing issues like reclassifications and benchmarking.

UMPAPA also sought another salary survey to be completed by July 2017. At this time, UMPAPA was still concerned about the benchmarks for three positions. Additionally, UMPAPA was concerned that there were positions in the unrepresented management group that had the same job titles as those positions in the bargaining unit, but the unrepresented positions had been receiving COLAs and other increases that were not given to bargaining unit positions. UMPAPA wanted its members' positions brought up to the same level so that all employees with the same job titles would be treated equally for pay, regardless of which bargaining unit they were assigned to. UMPAPA also raised the issue of retroactive pay increases to address the growing disparity since the beginning of negotiations. Hauck stated

that she had no authority to grant retroactivity. To address recruitment and retention issues, UMPAPA sought signing and retention bonuses as well as consideration of longevity pay.

There were no non-economic issues discussed at this meeting. Hauck stated at this meeting that while the parties were still far apart, she believed they were getting closer.

The Thirteenth Bargaining Session

The parties met again on February 10, 2016, and the City presented its Proposal #4. (Charging Party Exhibit 49.) In this proposal, the City announced that it would not go above the median for salary, and were approaching the top of their authority for salary but not quite at their last, best, and final offer. The City agreed to the proposed LMC and to continue merit increases. It was considering signing bonuses and the proposed increase to the management excess benefit. It would not agree to a reopener for at-risk positions, but concerns about at-risk positions could be raised at the LMC. The City also proposed the following management rights language, which appears to have copied from the 2013-2014 imposed contract:

> The City retains and reserves, without limitation, all powers, rights, authority, duties and responsibilities to manage the City including, but not limited to:
> 1. Management and administrative control of the City, its operations, and its properties and facilities;
> 2. Evaluate, hire, promote, transfer, demote, discipline, and discharge employees;
> 3. Promulgate, enforce and periodically revise or rescind reasonable work rules, operational and administrative policies, qualitative and quantitative standards, and procedures[;]
> 4. Assign and distribute work;
> 5. Determine the methods, means and personnel by which services are carried out including the right [to] transfer duties between City employees whether or not they are in the bargaining unit, and to subcontract or contract out, subject to the provisions of Article XIII, section 4 of this MOA;[6]

[6] Article XIII, section 4 of the imposed contract contains language regarding contracting out.

> 6. Establish and revise reasonable standards of attendance, conduct, and performance and to enforce such standards;
> 7. Determine and implement technology and equipment used in the performance of work, and to determine work locations;
> 8. Determine job classifications and the allocation of positions to those classifications;
> 9. Determine work schedules including, but not limited to, the hours of work and rest;
> 10. Determine payroll practices[;]
> 11. All rights conferred upon and vested in it by the law and the constitutions of the State of California and the United States, and
>
> Any other right traditionally and historically exercised by the City with respect to employees and operations within the scope of the bargaining unit.

Additionally, the parties discussed an on-going concern UMPAPA had with the benchmarks for the Senior Engineer on the water, gas and wastewater side of the Utilities Department when compared to the Electrical Engineers. Historically, the Senior Engineers were within five percent of the Electrical Engineers for pay. But because the City was benchmarking the Senior Engineers against Public Works employees at other agencies, the Senior Engineers were falling farther behind the Electrical Engineers. The City stated definitively that there would be no COLAs and no retroactive pay, as the City Council believed that retroactive pay disincentivized early negotiations and agreement.

At some point during this meeting, Hauck raised a concern that the City might be heading into another recession. Davis immediately sought evidence of this claim, but none was provided. When questioned about this exchange, Lloyd recalled the following:

> Yeah. She said they – it wasn't their last, best, final, but they were getting close to their authority. And she also made a claim that the economy was heading into a recession at this stage. I think there was some questions [*sic*] about this. Mr. Davis, I believe you asked for some report to support that claim on the recession just to back up that statement, but we never – we never received anything.

Hauck similarly recalled that the City had concerns about a three-year contract that offered a significant raise in the third year, due to market volatility. Hauck recalled that Davis challenged the notion that the economy was headed toward a recession and wanted her to identify the basis for her prediction.

The parties scheduled a meeting for February 23, 2016. However, at 9:20 a.m. on February 22, the City cancelled the meeting, stating, in part: "Due to the close proximity in time to the closed session today, we will not be ready to meet tomorrow morning." (Charging Party Exhibit 50.)

The Fourteenth Bargaining Session

The parties met again on March 2, 2016, at which time the City made its Proposal #5. (Charging Party Exhibit 52.) In it, the City agreed to increase its July 2016 and July 2017 COLAs to 2.5 percent, dropped the language about non-represented employees with the same title, and included a table of all positions showing their proposed increases and the justification for each.

During this meeting, the parties discussed the on-going concerns with the Senior Engineer position. The City announced that it was aligning that position with the City's Management and Professionals group. UMPAPA believed that the position had been moved out of that group and the matter resolved "long ago." The City continued to utilize the disputed Santa Clara benchmarks for some of its positions despite the fact that the Santa Clara positions had received increases since the start of these negotiations. When UMPAPA raised this concern, the City responded that it could not keep chasing the market. Davis asked the City for its bond ratings, but did not receive this information.

The Fifteenth Bargaining Session

The parties met again on March 14, 2016, and UMPAPA presented its Proposal #4. (Charging Party Exhibits 53 – 54.) UMPAPA agreed that it would move salaries to the median, but wanted them to be effective immediately. The disputed positions with overlap in the Management and Professional group should get retroactive pay tied to that received by the Management and Professionals group. They also sought some assurances that the next salary survey would be completed before the end of the current contract period.

UMPAPA still had an issue with some of the job matches for Electrical Engineers. The Electrical Engineers in the bargaining unit were aware that electrical engineers in Santa Clara were earning more than they were, and that the slow pace of the current negotiations was merely pushing them farther apart. (Charging Party Exhibit 55.)

The City did not raise any non-economic issues at this time, but Hauck stated that they were getting closer. After some confusion about scheduling, the parties agreed to meet again on March 31, 2016. (Charging Party Exhibit 56.)

The Sixteenth Bargaining Session

The parties met again on March 31, 2016. At this meeting, the City only wanted to discuss economic proposals. To that end, the City presented its Proposal #6. (Charging Party Exhibit 57 – 58.) In this proposal, instead of three market increases of one-third each, the city proposed to bring the bargaining unit to the market median in two increases—the first increase would be one-third, and the second increase would be two-thirds. The City appeared to take the management rights language off the table, but later stated that the omission of management rights language in this proposal was in error.

Hauck later explained that the City had a new HR manager at this time and they were still working on the language of the Management Rights clause. It was not the City's intention to eliminate the clause entirely, but they did not want Management Rights to hold up the entire agreement. When pressed further about the Management Rights and At-Will clauses, Hauck states that, in the two years she had been negotiating with UMPAPA, they had never brought it up or passed a proposal deleting the language of either proposal. She apparently deduced from these facts that there would be little opposition to the inclusion of the provisions going forward. There is no evidence that she discussed this understanding with UMPAPA at any point before the hearing, however.

The Seventeenth Negotiating Session

The parties met again on April 5, 2016. Hauck wanted to focus on the issues where the parties still differed, though there was no discussion of non-economic issues at this meeting. UMPAPA agreed to the City's proposed market adjustment in two allotments rather than three as well as the City's last COLA proposal, but it still wanted retroactive pay for the titles that overlapped with the unrepresented unit. (Charging Party Exhibit 59.) The parties then returned to their on-going discussion of the proper benchmarks, especially for the Electrical Engineer and Senior Resource Planner positions. UMPAPA was concerned that, as negotiations continued to lag, the benchmarked positions in other agencies continued to receive wage increases that were not reflected by the City's market study. It was at this time that UMPAPA raised the issue of a one-year contract rather than a multi-year contract. The City said it would take these concerns to the City Council on April 11, and proposed to meet again on April 20.

The Eighteenth Bargaining Session

The parties met as planned on April 20, 2016, and the City presented it Proposal #7, which it presented as a last, best, and final offer as to the economic proposals. (Charging Party Exhibit 60.) This proposal offered a 4.5 percent salary increase, one-third/two-thirds market adjustments, and increased pension contributions, contingent upon UMPAPA accepting the City's health benefits proposal. The offer also proposed to eliminate the current Excess Benefit and Individual Professional Development stipend in exchange for a Deferred Compensation match Benefit up to $4,000. Additionally, the City would agree to: continue merit increases; participate in LMC, including discussion of at-risk positions (not a reopener); and discretionary signing bonuses for key positions. Finally, the City would incorporate by reference the Management Compensation Plan MOA for any items not specifically negotiated by UMPAPA. According to Hauck, incorporating the Management Compensation Plan into the MOA was intended to address UMPAPA's concerns about aligning UMPAPA's positions with similarly-titled positions in the unrepresented unit. The City did not anticipate that this language would be a problem, since it had been present in the imposed terms. Again, there is no evidence that Hauck explained this rationale at the table.

After the City's presentation, UMPAPA took a caucus to retrieve the referenced Management Compensation Plan language that the City had made reference to but had not provided. (Charging Party Exhibit 61.) One of the terms in the Management Compensation Plan that had been an issue during UMPAPA's first round of negotiations in 2013 was the provision providing that employees of the management group were "at-will." When they returned from caucus, UMPAPA pointed out the "at-will" language would be illegal if applied to the bargaining unit employees. This language states, in part:

O. AT-WILL STATUS

Certain Management and Professional Positions are designated as having "at-will" employment status. Employees hired into "at-will" positions shall have no constitutionally protected property or other interest in their employment with the City. Notwithstanding any provision in the Merit System Rules and Regulations or any other City rule, policy or procedure, at-will employees have no right to continued employment or pre-or post-disciplinary due process and work at the will and pleasure of the hiring authority (City Council, City Manager or Council-Appointed Officer). Work for an at-will employee may be eliminated and/or the employee may be terminated, or asked to resign, at any time, with or without cause, upon notice to that employee, and the employee may resign at any time upon written notice to the hiring authority.

1. At-will Management & Professional positions.

Department heads hired after July 1, 2004 and prior to the date of adoption of this plan were hired as at-will employees whose terms of employment are specified by an employment contract that includes a severance package.

Effective on the date of adoption of this plan, new employees hired or promoted to department head, assistant department director, and all other positions listed on Attachment B shall be at-will employees.

At-will employees will be eligible for, and shall receive, all regular benefits (i.e., health insurance, PERS contribution to the extent paid by City, etc.) and vacation, sick leave, and management leave as are generally provided to management employees and described in this compensation plan, as amended from time to time. At-will employees who are terminated or asked to resign shall, upon execution of a release of all claims against the City, be eligible for a severance payment equivalent to four (4) weeks of salary and benefits, increasing after completion of the first full year of service by one (1) week for every completed year of service, up to a maximum of 12 weeks. For example, an at-will employee who has completed six (6) years of service would be eligible to receive ten (10) weeks of severance (4 weeks plus 1 week for each year of service). No severance shall be paid if the employee is terminated for serious misconduct, involving abuse of his or her office or position, including but not limited to waste, fraud, violation of the law

> under color of authority, misappropriation of public resources, violence, harassment or discrimination. If the employee is later convicted of a crime involving such abuse of his or her position the employee shall fully reimburse the City as set forth in Government code section 53243.3.

At this point in their negotiations, Hauck had reached the extent of her authority for economic proposals. UMPAPA had been pushing for a one-year contract out of concern for pay parity. Hauck knew the City Council would not approve a one-year contract, however. Because of this, she suggested that the parties consider bifurcating further negotiations. This would mean that the parties would agree to the economic proposals that had been reached, permitting the City to begin implementation of those economic proposals, while continuing to meet and confer over the non-economic proposals.

Seven days later, on April 27, 2016, Lloyd sent an e-mail message to Hauck asking whether there were any updates as to "bifurcation and compensation." (Charging Party Exhibit 62.) In response, Hauck states,

> The City management believes that we can proceed as we did with the Police Management, but final approval on this needs to come from Council. What the Council approved for Police Management was a letter agreement on the economic terms that included an agreement to resolve the economic terms within six months of approval of the letter agreement on economic terms. In the interim, the current terms and conditions that were imposed in 2013, in addition to the economic terms in the letter agreement, would continue until such time that the parties agree to MOA language. In addition, the final increase set for July 1, 2017 would be conditioned on the parties agreement on MOA terms.
>
> We think that we can proceed with the vote from UMPAPA and also start the process of the MOA review. We have an initial proposal on the MOA terms that we can distribute to you. There are very few changes in language from the current terms and conditions. Can we get a meeting on calendar to do this? My only open day next week is on the 4th. If that doesn't work, then maybe we can send it by e-mail and have a conference call to go over.

In reliance upon this understanding, UMPAPA took the City's LBFO to a vote of its members. The members approved the proposal and Lloyd reached out to Hauck and Blanch to move forward with the bifurcation. (Charging Party Exhibit 63.)

The Nineteenth Bargaining Session

The parties met again on May 5, 2016, at which time the City presented a written draft of the full MOA language with the City's proposed changes. (Charging Party Exhibit 66.) The parties spent the majority of their meeting going over the language in this proposal. Hauck stated that although the negotiating team had not gotten onto the agenda for the City Council's last closed-session meeting, the Council had expressed concerns with the At-Will language. The document provided to UMPAPA at this negotiating session includes the following At-Will language:

> ARTICLE XII – PROBATION AND AT WILL STATUS
>
> …
>
> Section 2 – At Will Status. Certain unit positions are designated as having "at-will" employment status. Employees who hold at-will positions shall have no constitutionally protected property or other interest in their employment with the City. Notwithstanding any provision in the Merit System Rules and Regulations or any other City rule, policy or procedure, at-will employees have no right or expectation to continued employment or pre-or post-disciplinary due process and work at the will and pleasure of the hiring authority. Work for an at-will employee may be eliminated and/or the employee may be terminated, or asked to resign, at any time, with or without cause, upon notice to that employee, and the employee may resign at any time upon written notice to the hiring authority.
>
> Section 3 – At-will UMPAPA positions. Effective on the date of adoption of this MOA, new employees hired or promoted to the following classifications shall be at-will employees:
>
> - Assistant Directors

- Engineering Manager
- Communications Manager
- Manager Electric Operations
- Manager Customer Service & Meter Reading
- Manager Utilities Marketing Services
- Manager Utilities Operations WGW
- Utilities Compliance Manager

[Alternatively: New employees hired or promoted into Assistant Directors and Manager in this Unit]

(Brackets in original.) Additional language in this article included the provision of various benefits to at-will employees and severance pay, similar to the version of the at-will language that was first proposed on April 20, 2016. UMPAPA requested and was provided an electronic copy of the proposed MOA edits.

The Twentieth (and Final) Bargaining Session

The parties met for their twentieth bargaining session on May 11, 2016, at which time UMPAPA provided the City with a printout of its proposed MOA language. (Charging Party Exhibit 68.) According to UMPAPA, most of its changes were non-controversial. Nevertheless, UMPAPA acknowledges that it proposed to strike the numbered paragraphs from the Management Rights clause, all of the At-Will language, and added a place-holder for binding grievance arbitration, though it did not provide proposed language at this time. Review of the document also establishes changes proposed to the provision calling for a Market Study, in which UMPAPA makes a notation that it is "trying to balance having relevant comparators with sufficient number of comparators." And that it may have different language to suggest. The City informed UMPAPA that it would recommend bifurcation to the City Council at its May 24 meeting. Hauck did not inform Lloyd that she believed UMPAPA's last proposal was regressive or that it was made in bad faith. The parties agreed to meet again on May 27.

On May 25, Hauck informed Lloyd that the City Council had been disturbed by the removal of the At-Will language in UMPAPA's latest proposal, and that it had discussed bifurcation during its closed session. Hauck informed Lloyd that written notice of the City Council's decision would be made in writing.

Hauck's letter to Lloyd, dated May 26, 2016 (Charging Party Exhibit 69), states, in part:

> On May 12, 2016, the parties met again and UMPAPA provided the City with a comprehensive counter proposal. Initially UMPAPA proposed major changes to the previously agreed upon economic items, including a demand that increases be retroactive to May 23, 2016, even though UMPAPA members had already voted for the increase to take effect the first pay period following Council approval of the terms in open session. Next, UMPAPA proposed that if any unit in the City receive any retroactive increase, UMPAPA's initial increase would be retroactive to July 1, 2015. Ultimately, the next day, UMPAPA removed these regressive proposals.
>
> UMPAPA did, however, propose other significant non-economic terms in this May 12, 2016 proposal. In addition to proposing to completely eliminate the current term on at-will status for new employees in certain high-level positions, UMPAPA proposed an entirely new section on binding grievance arbitration. Further, UMPAPA proposed that the market study, which the City had already agreed to conduct in the final year of the contract, be started no later than July 1, 2017, and include a mandate that "acceptable comparator classifications from other agencies will have at least the education requirements, licenses and the same exempt status as the Association classification being compared to."
>
> In light of these significant and very late proposals from UMPAPA, including major changes to the status quo terms, the City cannot agree to bifurcate discussions on economic terms from the non-economic terms. The City discussed bifurcation in good faith, as the City was very forthcoming with UMPAPA regarding any changes on non-economic terms. In contrast, it appears UMPAPA tried to sever bifurcation without disclosing the major changes to status quo terms that it now proposes. Accordingly, the City does not agree to bifurcate the negotiations

> on the MOA from the economic terms. The City will not move forward with obtaining Council adoption of the negotiated economic terms until the parties have agreed upon language for the entire MOA.
>
> At the next negotiations, the City will provide a response to UMPAPA's current proposal on the MOA terms.

Midday on May 27, Hauck emailed Lloyd to confirm whether the parties were going to meet that day or reschedule their meeting for another day. (Charging Party Exhibit 70.) At 7:36 that evening, Lloyd sent Hauck a lengthy e-mail message informing her, among other things, that UMPAPA believed the City had acted and was acting in bad faith, and that UMPAPA would not participate in any further negotiations until it had resolved the alleged unfair practices regarding bad faith bargaining. (Charging Party Exhibit 71.) As noted above, this charge was filed on August 22, 2016, approximately three months after the last bargaining session.

ISSUE

Did the City unlawfully fail to meet and confer in good faith?

CONCLUSIONS OF LAW

I. The Parties' Stipulation and PERB's Jurisdiction

The Charging Party's name, "Utilities Management and Professional Association of Palo Alto," gives an impression that the organization includes both "management" and "professional" employees. It is for this reason that I inquired of the parties whether some or all of the positions in the bargaining unit were beyond PERB's jurisdictional reach as "management" employees. During an off-the-record conversation that was later summarized on the record, the parties reached the following stipulation:

> Mr. Davis: …I think we have to make sure we have on the record something that we talked about off the record with respect to this being a professional group and the City is waiving any contention that PERB doesn't have jurisdiction.
>
> Mr. Shiners: We'll stipulate that PERB has jurisdiction over the unit because it includes professional employees.

Several of the statutes administered by PERB contain explicit exclusions. The Ralph C. Dills Act excludes managerial, confidential, and supervisory employees, among others, from its definition of "state employee." (Gov. Code, § 3513, subd. (c).) The Educational Employment Relations Act (EERA)[7] excludes elected officials as well as management and confidential employees from its definition of "public school employee." (Gov. Code, § 3540.1, subd. (j).) Higher Education Employer-Employee Relations Act (HEERA)[8] excludes, among others, managerial and confidential employees from its definition of "higher education employee." (Gov. Code, § 3562, subd. (e).) And, finally, the MMBA excludes elected officials, and officials appointed by the Governor from its definition of "public employee." (Gov. Code, §3501, subd. (d).) Notably, the MMBA does not exclude managers or confidential employees from the Act's coverage. It does, however, prohibit PERB from exercising its authority over employees designated as management.

MMBA section 3507.5 states:

> **3507.5. Designation of management and confidential employees of public agency**
>
> In addition to those rules and regulations a public agency may adopt pursuant to and in the same manner as in Section 3507, any such agency may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the public agency and restricting such employees from

[7] EERA is codified at Government Code section 3540 et seq.

[8] HEERA is codified at Government Code section 3560 et seq.

> representing any employee organization, which represents other employees of the public agency, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization.

MMBA section 3509 states, in relevant part:

> **3509. Board; powers and duties; unfair practices; rules; jurisdiction over employee organization actions**
>
> (a) The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter and shall include the authority as set forth in subdivisions (b) and (c). Included among the appropriate powers of the board are the power to order elections, to conduct any election the board orders, and to adopt rules to apply in areas where a public agency has no rule.
>
> (f) This section shall not apply to employees designated as management employees under Section 3507.5.

Thus, PERB does not have authority to investigate unfair practice charges which apply to employees designated as management employees under Section 3507.5. Nevertheless, under analogous circumstances, PERB has exercised jurisdiction over so-called "mixed bargaining units" that contained both peace officers and non-peace officer employees of a public agency employer, despite the fact that PERB may lack jurisdiction over some of the employees in the bargaining unit. (*County of Santa Clara* (2015) PERB Decision No. 2431-M.) MMBA section 3511 expressly excludes peace officers from PERB's jurisdiction. However, PERB held in *County of Santa Clara*, *supra*, PERB Decision No. 2431-M that the statutory exclusion in 3511 applies only to charges brought by individual peace officers—not to charges brought by employee organizations that represent both peace officers and non-peace officers. Thus, a statutory exclusion of a particular type of employee is not the same as a statutory exclusion of the exclusive representative of that employee. I can think of no rationale

why the facts of this case would compel a different conclusion than the one reached by the Board in *County of Santa Clara, supra*, PERB Decision No. 2431-M. Under this rationale, PERB may exercise jurisdiction to investigate a charge that is brought by the exclusive representative of an appropriate bargaining unit, even when that bargaining unit includes some employees who may be excluded from PERB's jurisdictional reach.[9]

II. The Duty to Meet and Confer In Good Faith

A public agency violates section 3505 of the Act if it fails or refuses to meet and confer in good faith with an exclusive representative on matters within the scope of representation. The mandatory scope of bargaining upon which the parties must meet and confer in good faith includes "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity or organization of any service or activity provided by law or executive order." (Gov. Code, § 3504.) Both parties have a duty to meet and confer promptly upon request by the other party about mandatory subjects. (Gov. Code, § 3505.)

In most cases of an alleged failure to bargain in good faith, the Respondent's conduct will be examined under a totality of circumstances test. (*Alhambra City and High School Districts* (1986) PERB Decision No. 560.)[10] In some cases, however, evidence of bad faith in

[9] My exercise of jurisdiction in this case is premised on the understanding that at least some of the employees in the bargaining unit are not excluded management employees—an understanding that is implicit in the parties' stipulation that the bargaining unit "includes professional employees."

[10] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act (NLRA) and other California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M.)

a surface bargaining charge will include conduct that gives rise to a per se violation of the duty to meet and confer. In such cases, the per se allegations should be analyzed both in their own right and as evidence in support of the surface bargaining allegation. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M.) Charging Party argues in its closing brief that "some" of Respondent's actions during the course of these negotiations constitute per se violations of the duty to meet and confer in good faith.

A. Per Se Violations of the Duty to Meet and Confer in Good Faith

PERB and the National Labor Relations Board (NLRB) recognize that there are some actions that are so damaging to the bargaining relationship that they constitute per se violations of the duty to meet and confer in good faith. The per se categories include: (1) an outright refusal to bargain; (2) refusal to provide information necessary and relevant to the employee organization's duty to represent bargaining unit employees; (3) insistence to impasse on a non-mandatory subject of bargaining; (4) bypassing the employee organization's negotiators; and (5) implementation of a unilateral change in working conditions without notice and an opportunity to bargain. Where a per se violation is alleged, the test does not include a determination of the employer's subjective intent. (*Regents of the University of California* (1996) PERB Decision No. 1157-H.)

The Complaint does not identify any per se violations. However, in its closing brief, UMPAPA asserts that the City failed on two occasions to provide information in response to a direct request, and in that manner, has violated its duty to meet and confer in good faith. PERB will consider an unalleged violation if the following requirements are met: (1) adequate notice and opportunity to defend has been provided to the respondent; (2) the conduct is intimately related to the subject matter of the complaint and part of the same course of

conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross examined on the issue. (*Fresno County Superior Court* (2008) PERB Decision No. 1942-C; *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668; *Eureka City School District* (1985) PERB Decision No. 481.) Absent any of these requirements, PERB will not consider the unalleged violation. (*Tahoe-Truckee Unified School District, supra*, PERB Decision No. 668.)

1. A Refusal to Provide Necessary and Relevant Information Is a Per Se Violation of the MMBA.

Davis made a request for information on February 10, 2016. Lloyd recalled that the parties were discussing the City's fourth proposal and UMPAPA was testing the City's claim that the economy might be heading into another recession. Hauck apparently raised this concern in response to UMPAPA's insistence that the City set salaries above the median range on the survey as well as that the City address the disparity between the senior electrical engineer on the one hand and the senior water, gas, and wastewater engineers on the other hand. In its closing brief, UMPAPA characterized this exchange as a request for a "financial report that would support the City's claim" that the City "was going to have financial problems." In reality, the request was more amorphous, boiling down to a demand to know the basis for the City's claim that it couldn't afford to pay higher salaries. Despite being a little fuzzy around the edges, Hauck acknowledged in her testimony that she understood that Davis wanted to know the factual basis for her assertions and that he sought additional information from her.

Davis made a second information request during the next bargaining session on March 2, 2016. During this bargaining session, the parties were focusing on the Senior

Resource Planner position. The City had chosen to use a benchmark from the city of Santa Clara, but during the interim, Santa Clara had increased the salary for its Senior Resource Planner, so the City was actually benchmarking against an outdated and undervalued position. When UMPAPA raised this concern, Hauck's response was that they couldn't keep chasing the market. At this point, Davis asked Hauck for the City's bond ratings. Hauck did not testify about this exchange between her and Davis, so it is impossible to determine with certainty whether she heard and understood the request at the time that it was made, and if so, why she did not respond to it.

With regard to the alleged failures to provide information in response to UMPAPA's asserted requests, I find that all the requirements of an unalleged violation have been met. UMPAPA asserted both of these alleged breaches in its unfair practice charge, but the allegations were not included in the complaint, and were not dismissed by the Office of the General Counsel. Thus, the allegations are timely, and the City was provided adequate notice of the allegations. (See *Fresno County Superior Court*, *supra*, PERB Decision No. 1942-C, and *Anaheim Union High School District* (2015) PERB Decision No. 2434.) Because the complaint alleges surface bargaining, all the parties' conduct during the course of negotiations is relevant and related to the subject matter of the complaint. And finally, Davis questioned both Lloyd and Hauck about the February 2016 request for verification of the City's recession concerns, and questioned Lloyd about the March 2016 request for the City's bond rating. I credit Lloyd's testimony that Davis sought the City's bond rating during the March 2, 2016 negotiation session. Lloyd testified that Hauck was present during both of these negotiation sessions, yet the City's attorney did not address either of these alleged requests for information in his questioning of Lloyd or Hauck, despite having had the opportunity to do so.

Once a good faith demand is made for relevant information, it must be made available promptly and in useful form. Unreasonable delay in providing requested information is tantamount to a failure to negotiate in good faith. (*Chula Vista City School District* (1990) PERB Decision No. 834.) Even if an employer questions the relevancy of material sought by the exclusive representative, the employer has a burden to make its challenge in a timely manner. An employer cannot simply refuse to provide information or ignore a request. (*Ibid*.)

Given the weight of the evidence in this case, I find that UMPAPA did make two requests for information—the first on February 10, 2016, for any reports on which the City based its belief that a recession was imminent, and the second on March 2, 2016, for the City's bond rating—and that the City failed to provide any response to these requests or a reason why it could not provide the information. Thus, the City breached its duty to meet and confer in good faith by failing to make timely responses to UMPAPA's requests for information.

2. Merely Proposing Terms that Might be Deemed Illegal is Not, Per Se, a Violation of the MMBA.

In a second, less concrete theory, UMPAPA appears to assert that the mere proposal of terms that it believes to be "illegal" is a per se violation of the statute. Notably, the parties acknowledge that there has been no declaration of impasse and, therefore, there has been no insistence to impasse on any of the proposals. UMPAPA argues that the City's "At-Will" proposal was illegal on its face and, had it agreed to the proposal, would have exposed UMPAPA to liability for bargaining away its members constitutional rights. UMPAPA's concerns are based on the following proposed language:

> Certain Management and Professional Positions are designated as having "at-will" employment status. Employees hired into "at-will" positions shall not have constitutionally protected property or other interest in their employment with the City.

> Notwithstanding any provision in the Merit System Rules and Regulation or any other City rule, policy or procedure, at-will employees have no right to continued employment or pre- or post-disciplinary due process and work at the will and pleasure of the hiring authority (City Council, City Manager or Council-Appointed Officer). Work for an at-will employee may be eliminated and/or the employee may be terminated, or asked to resign, at any time, with or without cause, upon notice to that employee, and the employee may resign at any time upon written notice to the hiring authority.

Discipline is a mandatory subject of bargaining. (*San Bernardino City Unified School District* (1982) PERB Decision No. 255.) Rules of conduct that expose employees to discipline are mandatory subjects of bargaining. (*Rio Hondo Community College District* (2013) PERB Decision No. 2313.) And, the inclusion of a probationary period and the conditions of probation are mandatory subjects of bargaining. (*Oliver Corp*. (1967) 162 NLRB 813.) Because the City's "At-Will" proposal relates to both discipline and probation, I find that it is a mandatory subject of bargaining.

The NLRB has reasoned that one party's attempt, through the negotiating process, to win unilateral discretion over a mandatory subject is not bad faith in itself. (*NLRB v. McClatchy Newspapers, Inc.* (D.C. Cir. 1992) 964 F.2d 1153, 1157 (*McClatchy*).) In the face of such a proposal, either party is entitled to agree or not agree, and the proposal need not be withdrawn prior to a finding of good faith impasse. (*Ibid*.) However, when a last, best, and final offer includes a proposal of this nature, it is treated as an exception to the impasse rule permitting the employer to impose terms and conditions reasonably included in its last, best, and final offer. Thus, while an employer need not withdraw this type of proposal prior to a declaration of impasse, it may not impose a proposal which gives it unilateral discretion over a mandatory subject. PERB adopted the *McClatchy* rule in *Los Angeles Unified School District* (2013) PERB Decision No. 2326. Through the At-Will proposal, the City seeks to exercise

complete and unfettered discretion over all disciplinary matters for employees in certain designated positions.

In *NLRB v. American Nat. Ins. Co*. (1952) 343 U.S. 395, the NLRB found that the employer's insistence upon the inclusion of a management functions clause in the collective bargaining agreement that gave the employer unfettered discretion over hiring, promotion, discharge, discipline, and scheduling, as well as excluding those matters from the grievance and arbitration provisions, was per se unlawful. The Court of Appeal disagreed with the NLRB, finding instead that, because the subject matter of the provision was not illegal, forbidden, or prohibited, the employer had a right to insist upon its inclusion in the agreement.

Focusing heavily on the fact that management functions clauses were within the scope of negotiations generally, the Supreme Court agreed with the Court of Appeal that no per se violation had occurred as a result of the employer's insistence upon the inclusion of this provision. The Court states,

> Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by respondent was, per se, an unfair labor practice. Any fears the Board may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to 'rates of pay, wages, hours and conditions of employment' do not justify condemning all bargaining for management functions clauses covering any 'condition of employment' as per se violations of the Act. The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.

(*NLRB v. American Nat. Ins. Co., supra,* 343 U.S. 395, 409.)

A decade later, the NLRB was faced with another allegation that an employer's proposal regarding a mandatory subject of bargaining was, per se, a violation of the Act. The

proposal in *Bethlehem Steel Co. (Boston, Mass.)* (1961) 133 NLRB 1400 (*Bethlehem Steel*), involved changes to the grievance procedure such that all grievances would be required to contain the signature of the individual employee on whose behalf the grievance was filed. In *Bethlehem Steel*, the NLRB held that a provision that would require an employee signature on every grievance was the equivalent of demanding proof of the union's authority to represent its employees every time it asserted their rights under the contract—a condition precedent that was "flatly inconsistent with recognition of the union as [their] bargaining representative." (*Bethlehem Steel, supra*, 133 NLRB 1400, 1410.)

In *Bethlehem Steel, supra*, 133 NLRB 1400, the parties had been meeting and conferring for some time before the grievance proposal became an issue, though there is some evidence that suggests the parties might have identified it as a sticking point in a prior round of negotiations. The Trial Examiner was unpersuaded that a per se violation had occurred because he could not know "whether [the union's] legal objection to the [proposals] was a serious attempt to avoid those clauses or instead a technical blind used indirectly to achieve elimination of other management prerogatives sought by the Company." In finding no violation on this basis, the Trial Examiner stated,

> The fact still remains that all that has happened thus far in this case is that the Respondent proposed these changes, heard Goldman's criticism, and adhered to its position. It went no further; it did not put its proposed conditions of employment into effect. There has therefore been no action taken by the Company which, in consequence of any unfair labor practice finding that might be made, it could be required to undo to restore the status quo. All it did was disagree with the union negotiators.

(*Bethlehem Steel, supra*, 133 NLRB 1400, 1414.)

The NLRB stressed that while a party was prohibited from insisting to impasse upon the inclusion of a permissive subject, absent a declaration of impasse, the point at which a

party's insistence became unlawful was "difficult to define precisely for all cases." Indeed, this was a matter of line-drawing, and the NLRB took into consideration factors like the stage at which the parties were in the bargaining process, and whether the proponent of the language made it clear that no agreement would be entered into unless the clause was included.

In an example from the public sector, the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America brought suit against the Transit Authority of the City of Sacramento, seeking a declaratory judgment that it was legal for the parties to include an impasse arbitration clause in their agreement. (*Wilson v. Transit Authority of City of Sacramento* (1962) 199 Cal.App.2d 716.)[11] At the time of the suit, the parties' collective bargaining agreement did not contain an interest arbitration clause because the City insisted that such clause would be illegal. The Superior Court upheld the city's demurrer and the union appealed. The appellate court found that there was no justiciable controversy because the parties had not included the disputed language in their contract. The court summarized the facts as follows:

> …it appears that plaintiffs, after bargaining collectively, have in successive previous years entered into written contracts with defendant Transit Authority as to hours, wages and working conditions, and that such a contract was in full force and effect at the time of the filing of said complaint. No allegation was made in the complaint that there was at the time of the filing of said action any unsettled grievance or other controversy pending under the existing contract, and relating to the rights and duties of the parties thereto. On the contrary, the alleged difficulty concerned a provision not in the contract, and about the legality of which there was a difference of opinion among counsel. We

[11] In this case, the parties were not under a statutory obligation to meet and confer and had voluntarily met and conferred over terms and conditions of employment for employees who were excluded from the city's civil service system.

> find the following language in *Conroy v. Civil Service Com.*, *supra*, page 454, [12] specifically applicable:
>
> "… What was really sought was an advisory opinion applying to all 1,300 members, generally, without regard to any acute, specific or pending controversy, so that there would be available and ready for use in any dispute arising in the future a judicial interpretation" –or, in other words, an advisory opinion on a question of law.

(*Wilson v. Transit Authority of City of Sacramento*, *supra*, 199 Cal.App.2d 716, 724-725.) The appellate court agreed with the superior court that "the declaratory judgment sought would be purely advisory on a question of law, and in no way would be obligatory upon the parties in future negotiations." (*Id*. at 726.)

Similarly, in *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, the union sought a ruling preventing the city from reducing or eliminating pension benefits unless comparable benefits were provided in their stead. At the time it sought the order, there had been no agreement either to eliminate or modify those benefits. The appellate court held that the issue was not ripe for review and that when the trial court decided the issue, it had issued an advisory opinion. (*Id*., at 1226-1227.)

I have not found any PERB case that would definitively resolve the question whether a per se violation of the statute may be found solely on the basis of the content of a proposal, when no declaration of impasse has been made and the proponent of the provision has not unilaterally implemented the provision. And, without foreclosing the possibility that circumstances could arise where a proposal is so offensive and patently illegal that its mere proposal could constitute a per se violation of the statute, I specifically and expressly decline

[12] *Conroy v. Civil Service Commission of City and County of San Francisco* (1946) 75 Cal.App.2d 450.

the invitation to find the At-Will proposal in this case amounts to a per se violation of the MMBA.

The parties have not reached impasse in their negotiations, and there is no evidence that the City has implemented the At-Will provision at this time. A declaration of impasse or imposition of terms would provide a bright line that is conspicuously absent from these facts. A declaration of impasse carries with it certain legal implications—after the declaration of impasse, an employer is free to implement its last, best, and final offer, subject to certain restrictions. Terms that are deemed illegal after impasse may not be implemented as part of an employer's LBFO, but legal terms may be implemented. By choosing not to declare impasse, yet pursue a claim that the At-Will proposal is per se unlawful, UMPAPA is hedging its bets by attempting to get its ruling while avoiding, or at least, delaying imposition of the proposal in the event that it is deemed lawful.

Notably, where the court found a contract provision was "illegal," it did so after agreement had been reached or impasse had been declared. (See, for example, *NLRB v. Amer. Nat. Ins. Co.*, *supra*, 343 U.S. 395, [parties agreed to a "management functions clause" that rendered discipline and work schedules non-arbitrable]; *NLRB v. Wooster Div. of Borg-Warner Corp*. (1958) 356 U.S. 342, [union agreed to a contract that contained an illegal ballot measure and an illegal recognition clause]; *NLRB v. National Maritime Union* (2d Cir. 1949) 175 F.2d 686, [employer agreed to a contract that contained a clause requiring the employer to discriminate in favor of union members]; and *Board of Education v. Round Valley Teachers Association* (1996) 13 Cal.4th 269, [the parties adopted a contract containing provisions that violated the California Education Code].)

What I glean from the cases cited above is that, prior to some outward conduct demonstrating that the parties understood the proposal to be fixed as to its terms, the issue is not yet ripe for consideration. "A controversy becomes 'ripe' once it reaches, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59, internal citation and punctuation omitted.) Courts will not consider an action that is not founded on an actual controversy that has been brought for the purpose of securing a determination on a point of law. (*Golden Gate Bridge Dist. v. Felt* (1931) 214 Cal. 308.)

It is an exercise in futility and a misuse of PERB's limited resources to rule on the legality of a single proposal before the parties have concluded their bargaining either in impasse or a signed agreement. As discussed in the cases above, to opine whether a particular proposal would be illegal if it were incorporated into a collective bargaining agreement amounts to a premature advisory opinion for the simple reason that the terms of a proposal are not yet fixed until some action has been taken thereon—either impasse, agreement or unilateral imposition.

Even assuming a violation were found, an attempt by PERB to fashion a remedy for one party's having made an illegal proposal would impermissibly interfere with the parties' negotiation process. The typical remedies for a failure to meet and confer are a cease and desist and order to bargain. (*Mt. Diablo Unified School District* (1984) PERB Decision No. 373b.) Presumably, the remedy for *proposing* something distasteful is to order the parties to resume bargaining. And, because discipline is a matter within scope, ordering the City to resume bargaining about discipline but not to include the particular At-Will proposal in dispute is essentially an order for the City to bargain against itself by retreating from its position

without any corresponding concession from UMPAPA. In pointing this out, I am not unmindful of the relative disparity in bargaining power between the parties, but I am highly conscious of the fact that PERB's role is merely to ensure that both parties come to the table in good faith. "[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (*NLRB v. American Nat. Ins. Co., supra,*343 U.S. 395, 404.)[13] Accordingly, I decline to find a per se violation of the duty to meet and confer in good faith on the basis that Respondent proposed terms that could, if adopted, be deemed illegal.

B. Surface Bargaining and the Totality of Circumstances

The indicia of surface bargaining are many. PERB has held it is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80.) Surface bargaining allegations must be determined from an examination of the "totality of circumstances" or "entire course of conduct" in which the negotiations took place. (*City of San Jose* (2013) PERB Decision No. 2341-M.) This test looks to the entire course of negotiations, including the parties' conduct at and away from the bargaining table, to determine whether a party has negotiated with the requisite subjective intention of reaching an agreement. (*Ibid.*; *Pajaro Valley Unified School District* (1978) PERB Decision No. 51.)

Various kinds of conduct may be evidence of bad faith. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to

[13] In *City of Santa Monica v. Stewart, supra,* 126 Cal.App.4th 43, at fn. 15, the court noted that, "[t]o a slightly lesser extent, the policy also recognizes that parties seeking advisory opinions often attempt to manipulate the legal process for their own purposes."

merely going through the motions of negotiations. (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (*Oakland Unified School District* (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (*Ibid.*) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be evidence of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (*Stockton Unified School District* (1980) PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134); and reneging on tentative agreements the parties already have made (*Charter Oak Unified School District* (1991) PERB Decision No. 873; *Stockton Unified School District*, *supra*; *Placerville Union School District* (1978) PERB Decision No. 69).

The ultimate question raised in every surface bargaining case is whether the respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations. (*City of San Jose*, *supra*, PERB Decision No. 2341-M.) Both PERB and the NLRB reject the application of rigid formulas or tests when reviewing the totality of a party's negotiating conduct to determine whether its intention was to frustrate those negotiations. (See *City of San Jose*, *supra*, PERB Decision No. 2341-M and *General Electric Co. (New York, NY)*, *supra*, 150 NLRB 192, respectively.) In most cases, however, more than one indicia of

bad faith is required before PERB will find a violation. (*City of San Jose*, *supra*, PERB Decision No. 2341-M.)

1. Predictably Unacceptable Offer

UMPAPA asserts that the At-Will language in the Management Compensation Plan was predictably unacceptable. An employer's rigid adherence to a proposal that is predictably unacceptable is indicia of surface bargaining where its purpose is simply to frustrate bargaining and undermine the statutory representative. (*Ampersand Publishing, LLC* (2012) 358 NLRB 1415 (*Ampersand Publishing*), and cases cited therein.) In labeling a proposal "predictably unacceptable," the NLRB looks not only to the language of the particular proposal, but will focus on the purpose behind the proposal and any defense to the proposal. And, if the employer's position may be deemed genuine and its beliefs sincerely held, no violation will be found. (*Ibid*. See also *Pease Co. v. NLRB* (9th Cir. 1981) 666 F.2d 1044.) The NLRB tests this theory by identifying the relevant proposal and considering its impact as a whole on employee rights. (*Ampersand Publishing*, *supra*, 358 NLRB 1415, 1498.) An inference of bad faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract, thus stripping the union of any meaningful representation of its members. (*Ibid*.)

In *Ampersand Publishing*, the employer made and rigidly adhered to a number of proposals that were designed to preserve the terms and conditions that the unit employees had before they were organized. Among the proposals made by the employer was a broad management rights proposal that included "such rights [as] existed prior to the time any Union became the statutory bargaining representative of the … employees…" The employer stated

that the purpose of the management rights clause was to set out subject matters on which management had the right to act unilaterally, without bargaining, during the term of the agreement. The employer's discipline and discharge proposal contained language affirming its at-will policy and reserving the right to discipline or discharge employees for "disloyalty," and "failure to meet the productivity standards of the employer." The parties engaged in a number of bargaining sessions, during which the union repeatedly objected to and challenged the employer's proposed language. After scrutinizing the parties' proposals and finding that "Respondent was wedded to regaining control over decision making by obtaining the Union's waiver through the quoted contract language of its representation rights for the life of the contract and beyond," the NLRB found that the totality of circumstances:

> … does not look like the conduct of an employer sincerely attempting to reach agreement, but rather is evidence that it is not seeking to bargain in good faith.

(*Ampersand Publishing, supra,* 358 NLRB 1415, 1500.)

PERB has generally adopted the concept that a predictably unacceptable proposal is evidence of surface bargaining. In *Oakland Unified School District*, *supra*, PERB Decision No. 326, PERB found that an offer that closely followed Education Code requirements was evidence of bad faith when viewed in the context of the negotiating process—the employer had made incremental concessions from the statutory minimum and insisted on a package proposal with a deadline for acceptance. In *San Bernardino City Unified School District* (1998) PERB Decision No. 1270, PERB adopted the ALJ's finding that a proposal to delete a union security clause, which was made without explanation or prelude, was predictably unacceptable. PERB found that the employer intended the proposal to be unacceptable, as evidenced by the employer's failure to provide any legitimate reason for making it in the first place.

Applying these standards here, I look first to whether the At-Will proposal was predictably unacceptable—that is, whether its purpose is to undermine the statutory representative. Next, I look to whether the proposal amounts to surface bargaining: a predictably unacceptable offer amounts to surface bargaining if it frustrated agreement and foreclosed future negotiations.

a. The At-Will Proposal Was Predictably Unacceptable

What little testimony there was about the negotiations that occurred in 2011-2013 came exclusively from UMPAPA's only witness. Nevertheless, both parties acknowledge that between the arbitrator's decision in 2011 and April 30, 2013, the parties met and conferred 27 times without reaching agreement. The same At-Will and Management Rights proposals that were made during the 2014-2016 negotiations were discussed during the first round of negotiations. On September 4, 2012, in the midst of the first round of negotiations, the City changed its merit rules by specifying that "classifications at the department head, assistant director, deputy director and division manager levels" were "at-will."

Although labeled a "Revision" to the "Rules Related to Probationary Periods," it is not clear from the text of the resolution what exactly was being revised. And, because it is unclear what, if anything, was "revised" by the resolutions adopted in September 2012, it is likewise unclear whether the At-Will proposal in November was an attempt by the City to maintain working conditions at pre-UMPAPA levels or to regress to fewer rights than employees had before they organized. In either case, the timing of these events tends to demonstrate that, since it was formed, the City has taken steps to prevent UMPAPA from bargaining and achieving any kind of job security for bargaining unit members. At best, the City's efforts were focused on maintaining pre-organizational terms and conditions of employment for

bargaining unit members. At worst, the City was attempting to ensure that it was all but impossible for UMPAPA to succeed in improving working conditions for its members, because it never intended to relinquish any control over issues like discipline, work rules, work assignments, attendance standards, and work schedules.

I do not reach these conclusions by conjecture alone. I reach them after reviewing all the facts of the case, including the City's own justification for the changes it made to its Merit Rules. As stated in the City's 2012 Staff Report, steady employment and generous pension and health benefits was no longer a price the City was willing to pay for what it perceived to be narrowly focused jobs carried out with pleasant and courteous service. The City also stated that the Management and Professional employees who were *unrepresented* were leading the way to assist the City in achieving cost savings by forgoing raises, capping their health benefits, and changing the eligibility requirements for retiree medical benefits. By negative implication, UMPAPA, which had just been recognized as the exclusive representative of the Utilities Management and Professional employees, was not leading the way to assist the City in achieving cost savings.

For its part, UMPAPA appeared less eager for its members to serve as an example of self-sacrifice for the greater good. And, as the exclusive representative of the bargaining unit, UMPAPA had a duty to advocate for the best working conditions possible for its members, not to agree to concessions simply to fit the City's narrative. The timing of these events also establishes that it was likely that the City was aware that some of its employees were not so enamored with its policy of self-sacrifice for the greater good. And, as UMPAPA attempted to point out to the City repeatedly, the problem with the City's approach was that the private sector actually paid employees much more than the City. So if the City was truly attempting to

model a private sector approach to services by modeling private sector employment practices, it was missing the mark.

In *Ampersand Publishing*, the NLRB ultimately found that an employer's position was not taken in good faith if the proposal, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract, thus stripping the union of any meaningful representation of its members. Even without a contract, a union has the right to demand to meet and confer over any changes to employees' working conditions. The At-Will and Management Rights clauses proposed by the City in this case would deny UMPAPA the right to protest most changes to working conditions and all employee discipline. Under the standard adopted by the NLRB, such proposals give rise to an inference of bad faith. Even assuming the City were to argue that there is nothing inherently unacceptable about an employer's attempt to severely limit the bargaining power of a newly-formed union before it reaches an initial bargaining agreement, under the circumstances presented here, I find a strong inference that the At-Will and Management Rights proposals were made with the intention of undermining UMPAPA's position as the exclusive representative of the Utilities Management and Professional employees. It is for all of these reasons that I find that the City knew or should have known that the at-will proposal and management rights proposals were predictably unacceptable when they were made.

b. <u>The At-Will Clause Frustrated Agreement</u>

The language proposed in the 2016 version of the at-will provision is identical to the language that was proposed and rejected in 2012. Though there is some debate over whether UMPAPA actually agreed to this language in 2012, it is clear that UMPAPA was at one time

willing to consider the proposal in exchange for severance pay for positions designated as at-will.[14] By 2016, however, UMPAPA's position had evolved and it was no longer willing to consider the At-Will language at any cost.

I also note that the City's reaction to UMPAPA's proposed removal of the At-Will language was exaggerated and seems calculated to foreclose additional discussion. When UMPAPA proposed that the At-Will language be removed entirely, the City reacted by taking bifurcation off the table. Bifurcation was proposed by the City in acknowledgment that, with the salary survey data locked in place, the longer it took the parties to reach agreement and actually implement salary increases, the more disparate UMPAPA's members' pay would become in comparison with the comparators from the study. Because the City was not interested in a one-year contract to address the parity concerns, and because the City refused to consider retroactive pay increases, bifurcation would allow the pay increases to go into effect while the parties continued to negotiate non-economic terms. When it gave its justification for refusing bifurcation, in essence, the City stated that because it was now apparent that non-economic negotiations would take longer than expected, it would not agree to bifurcation. In other words, the City would only agree to bifurcation if UMPAPA was going to make quick work agreeing on non-economic terms. If UMPAPA was going to put up a fight as to non-

[14] Charging Party's Exhibit 75 is a signed Tentative Agreement that contains the text of Article XIII- Probation and At Will Status. Though signed by Russell Kamiyama for UMPAPA and dated November 17, 2012, the copy provided contains a large "X" across the entire page and a handwritten notation at the bottom that states, "Note: Severance pay remains under negotiations notwithstanding this tentative agreement." The parties present different interpretations of this document. Lloyd-Zanetti testified that UMPAPA's agreement to at-will status was contingent upon an agreement to severance pay, and because no agreement was reached as to severance, this TA never went into effect. In its closing brief, the City argues that the parties agreed to at-will status, despite having never reached agreement on severance pay, though it failed to present any evidence of that interpretation beyond the language of the document itself.

economic terms, then bifurcation was off the table. Further negotiations over the At-Will and Management Rights proposals would come at a premium.

It is impossible to know what internal discussions took place between the City Council and its lead negotiator about the decision to remove bifurcation from the table because the discussions occurred during a closed session meeting of the City Council. What is clear is that the City did not offer a justification at the table for rescinding the bifurcation offer, and all outward appearances give the impression that its decision was retaliatory for UMPAPA's assertion of bargaining rights, giving rise to an inference of bad faith. In its closing brief, the City claims that its failure to recommend bifurcation to the City Council was justified by the fact that the circumstances under which bifurcation had been proposed, had changed. I have difficulty accepting this justification as genuine. The City's original justification for recommending bifurcation was as a compromise between the growing disparity in pay between UMPAPA employees and the City's comparator agencies. UMPAPA proposed to address the disparity by entering into a one-year agreement, and the City countered with bifurcation. These conditions had not changed between the first time the City's negotiator proposed bifurcation in lieu of a one-year agreement and the date of the City Council's meeting. Accordingly, based on the totality of circumstances, I find that the City used the predictably unacceptable At-Will proposal to frustrate future negotiations.

2. The City Caused Many Unexplained Delays in Bargaining

Neither the MMBA nor PERB case law establishes a timeline for negotiations. The pace of parties' efforts varies widely, and the pace of an individual set of negotiations is influenced by many factors. (*University of California, Lawrence Livermore National Laboratory* (1995) PERB Decision No. 1119-H.) However, one party's recalcitrance in

responding to bargaining demands, delays in scheduling meetings, cancelling meetings, arriving at meetings unprepared, or other "dilatory or evasive tactics," may be evidence of bad faith under a surface bargaining analysis. (*West Side Healthcare District* (2010) PERB Decision No. 2144-M.) Because reasonably expedient and efficient negotiations is an aspect of the bargaining obligation under all the statutes that PERB enforces, when deciding whether a party's delay tactics violate MMBA section 3505, the Board routinely relies upon cases decided under other statutes. (See, for example, *City of San Jose*, *supra*, PERB Decision No. 2341-M; and *City & County of San Francisco* (2007) PERB Decision No. 1890-M.)

The City argues that it only cancelled five bargaining sessions over the course of two years, and therefore, did not unnecessarily delay the negotiations process. The City also points out that UMPAPA cancelled two meetings—one because of a scheduling conflict and one in response to the City's rescission of its offer to bifurcate negotiations. As part of the totality of circumstances relevant to a surface bargaining charge, the Board may also consider the Charging Party's own conduct, regardless of whether the respondent has filed a counter-charge. (*Fresno County In-Home Supportive Services Public Authority*, *supra*, PERB Decision No. 2418-M.) Numerous authorities hold that a party may not be heard to complain about the pace or tenor of negotiations when the result may be attributed to its own conduct. (*Ibid*., and authorities cited therein.)

Bad faith delays and recalcitrance may be found in conduct other than cancelled bargaining sessions. I begin with the observation that negotiations have been ongoing for an inordinately long period of time in this case. Whether you calculate the duration of negotiations from 2011 when the parties first began negotiations, or from UMPAPA's January

2014 request to resume negotiations, the fact that the parties still have not reached an initial agreement is shocking.

UMPAPA sought to resume negotiations in January 2014, and the parties immediately agreed to postpone the start of those negotiations until April, when the City anticipated the completion of a salary survey. Both parties considered this salary study to be crucial to productive negotiations, and agreed that they could not begin to discuss salary until the study was completed. For reasons unknown, that study was not completed until March 2015, a year later. Although the parties met several times during the interim, these meetings were largely unproductive and no actual proposals were exchanged. For fifteen months, the parties had no productive negotiations because the City had no completed salary survey. And when, in early April 2015, UMPAPA made its first proposal, the City did not respond with a counterproposal until November 18, 2015, more than six months after the initial proposal. UMPAPA's second proposal was made on December 15, 2015, approximately one month after the City's counter proposal.

At this point, the pace of negotiations appeared to pick up a bit, as the parties began meeting more regularly and exchanging proposals at the rate of one or two a month. For example, the City's next proposal was made on January 13, 2016. UMPAPA presented its next proposal approximately two weeks later, on January 26, 2016. Then came another City proposal on February 10, 2016. After cancelling a meeting in late February, (one of the City's acknowledged cancellations), the City made another proposal on March 2, 2016. Then came a proposal from UMPAPA on March 14, followed by another City proposal on March 31. The parties met and exchanged proposals twice in April before negotiations came to a halt over the issue of the At-Will provision in early May 2016.

Despite the up-tempo pace, substantive movement during this period was incremental, however. The parties had a very slow start, then discussed only economics for months, appeared to gain some small momentum, then came to a screeching halt as soon as they began to discuss non-economic issues. Throughout that slow start, the City provided no real explanation for the delay in the salary survey: there was no explanation why in January 2014, the survey was expected to take another three months to complete; no explanation why it wasn't actually completed in April 2014 as anticipated; no detail provided as to what revisions were needed in May 2014 and why; and no explanation why, in October 2014, the City hired a new consultant to review the salary study, resulting in another five-month wait. Had any of these delays been outside of the City's ability to control, it would presumably have an explanation at the ready. While the City's silence on this issue is not absolutely damning, it is suspicious given the high level of importance that both parties placed on the results of the salary survey. Given its acknowledged importance, it is reasonable to expect that the City would take any necessary steps to ensure the survey's timely completion. Yet there were multiple, unexplained delays in the City's production of this critical report, and the City appears to have been utterly nonchalant about producing a completed document for use in these negotiations.

The City acknowledges having cancelled five bargaining sessions but argues that five meetings over the course of "over two years" is not excessive, and that UMPAPA offered no evidence that the reasons for the cancellations were pretextual. First, I note that the acknowledged cancellations all occurred on top of the City's initial eight month delay between UMPAPA's January 2014 demand to begin bargaining and the first bargaining session on September 4, 2014—a fact that the City simply ignores.

The City's delays are troubling not for their number, necessarily, but for their rationale. The City states that the April 21 delay was because the City wanted to be "fully prepared" for the next meeting, and therefore, was not evidence of bad faith. The May 26 delay was for a scheduling conflict, and the excuse for the February 2016 cancellation was again because the City's bargaining team didn't have sufficient time to prepare. The City argues that these cancellations were not made with any intent to delay or frustrate negotiations. Hauck explained at the hearing that the City was busy during this time with negotiations with all its bargaining units. But the duty to meet and confer in good faith requires more than the mere absence of bad faith. A lack of preparedness and a failure by one party to take the bargaining obligation seriously is evidence of bad faith. (See *Oakland Unified School District, supra*, PERB Decision No. 326; *Anaheim Union High School District, supra*, PERB Decision No. 2434.)

The City may not have acted affirmatively to kill negotiations with UMPAPA, but they certainly neglected those negotiations severely. In this case, I do not view each of these cancellations and delays in isolation, but as part of a pattern. What emerges is a picture in which the City assigned little or no priority to negotiations with UMPAPA, and apparently feared no serious consequence for its failure to meet and confer in a timely fashion. At best, the City's conduct and attitude toward negotiations with UMPAPA demonstrate that the City placed a low level of importance on these negotiations – prioritizing other tasks over preparation for negotiations and bumping negotiations when conflicts arose. That the parties have been in negotiations since 2011 with no agreement is outrageous. That the City continued to approach negotiations with UMPAPA with no sense of urgency after several years of painfully slow progress gives rise to a strong inference of bad faith.

3. The City Negotiator's Lack of Authority

Although UMPAPA did not assert a lack of authority as an indication of surface bargaining, I note that Hauck's lack of authority on several occasions caused delays or limited the efficacy of the parties' bargaining session. For example, negotiations began in earnest in September 2014. At that time, UMPAPA made an extensive presentation at this first negotiating session, but no proposals were exchanged. Almost nine months after UMPAPA's demand to bargain, Hauck acknowledged that she had not yet received any authority from the City Council.

I also note the following delays resulting from Hauck's lack of authority: on June 3, 2015, the meeting was unproductive because City negotiators had failed to get additional approval from the City Council; a September 24 meeting (not one of the acknowledged five cancellations) was cancelled because the City Council failed to consider UMPAPA's most recent proposal during its closed session meeting; in January 2016, the City's negotiator again failed to get approval from City Council on the issue of a hiring bonus and the management excess benefits proposals; and again in January 2016, the City negotiator was unable to discuss retroactivity because she lacked authority to do so.

In *Atlas Mills, Inc*. (1937) 3 NLRB 10, 21, the NLRB set an enduring standard for good faith negotiations, stating,

> There is no doubt that the respondent negotiated with the representatives of Local 2269, meeting with them, receiving proposals, and putting forward counter-proposals of its own. But there is equally little doubt that if the obligation of the Act is to produce more than a series of empty discussions, bargaining must mean more than mere negotiation. It must mean negotiation with a bona fide intent to reach an agreement if agreement is possible. Negotiations with an intent only to delay and postpone a settlement until a strike can be broken is not collective bargaining within the meaning of Section 8, subdivision (5) of the Act.

Essentially, merely "going through the motions" of negotiations with no true effort to reach agreement is the essence of bad faith. The duty to meet and confer promptly demands that the Respondent take the obligation seriously, giving it priority by ensuring that meeting dates are kept free from conflict, City Council agendas are populated with necessary bargaining matters, and the negotiation team completes the necessary homework so that meetings are productive. Based on a totality of circumstances, including predictably unacceptable proposals, unexplained or unjustified delays in bargaining and a lack of authority of its negotiator, I find that the City breached its duty to meet and confer in good faith.

REMEDIES

A properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice. (*Modesto City Schools* (1983) PERB Decision No. 291.)

In cases where there has been a finding of a violation of the duty to supply requested information, the appropriate remedy is to order the offending party to cease and desist from refusing to supply the information and to order it to produce such information upon request. (*Trustees of the California State University* (1987) PERB Decision No. 613-H.)

The appropriate remedy for a violation of the duty to meet and confer in good faith is a cease and desist order, coupled with affirmative relief consisting of an order to consult in good faith upon request. (*City of Palo Alto* (2017) PERB Decision No. 2388a-M.)

Finally, it is the ordinary remedy in unfair practice cases that the party found to have committed a violation of the law is ordered to post a notice incorporating the terms of the order at all work locations where notices to unit employees are customarily posted. Thus, the City is ordered to do so in this case. Posting of such a notice, signed by an authorized agent of the

City provides employees with notice that the City acted in an unlawful manner, must cease and desist from its illegal action, and will comply with the order. It effectuates the purposes of the MMBA to inform employees of the resolution of the case. (*Omnitrans* (2010) PERB Decision No. 2143-M.) In addition to physically posting a notice, to ensure the continued viability of notice-posting as a tool for remedying unfair practices, where the offending party in unfair practice proceedings communicates with public employees by e-mail, intranet, websites, or other electronic means, it shall be required to use those same media to post notice of the Board's decision and remedial order. Any posting of electronic means shall be in addition to the Board's traditional physical posting requirement. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the City of Palo Alto violated the Meyers-Milias-Brown Act (Act), Government Code section 3500 et seq. The City of Palo Alto violated the Act by failing to provide relevant and necessary information in response to valid requests; and failing to meet and confer in good faith with the exclusive representative of an appropriate bargaining unit, pursuant to MMBA section 3505. By this conduct, the City also interfered with the right of unit employees to participate in the activities of an employee organization of their own choosing, in violation of Government code section 3506 and PERB Regulation 32603, subdivision (a), and denied UMPAPA the right to represent employees in their employment relations with a public agency in violation of Government Code section 3503 and PERB Regulation 32603, subdivision (b).

Pursuant to section 3509 of the Government Code, it hereby is ORDERED that the City of Palo Alto, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with Charging Party.

2. Interfering with the right of bargaining unit employees to be represented by an employee organization of their own choosing.

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

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

1. Within ten (10) workdays of the service of a final decision in this matter, and upon request from Charging Party, provide to Charging Party a copy of any report or document upon which the City bases or based its belief that the City could experience a recession during the three-year period that would have been covered by the parties' Memorandum of Agreement;

2. Within ten (10) workdays of the service of a final decision in this matter, and upon request from Charging Party, provide to Charging Party a copy of the City's bond rating;

3. Upon request, meet and confer in good faith with representatives of UMPAPA regarding wages, hours, and other terms and conditions of employment, as that duty is defined in Government Code, section 3505.

4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in UMPAPA customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an

authorized agent of the City of Palo Alto indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on UMPAPA.

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).)